

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FOURTH DISTRICT

Case No.: 4D23-2847

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LEGACY GROUP, LLC,

Appellant,

vs.

5335 NORTH MILITARY, LLC,

Appellee.

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ON APPEAL FROM THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR  
PALM BEACH COUNTY, FLORIDA

L.T. Case No.:50-2023-CA-013060-XXXX-MB

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**APPELLANT'S INITIAL BRIEF**

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Respectfully submitted,

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## **PRELIMINARY STATEMENT**

All references to the Hearing Transcript are designated as “Hearing” followed by the page(s) and line numbers [Hearing, P. \_\_ Ln. \_\_]. The Hearing Transcript can be found in the Appendix being filed by the Appellant with its Initial Brief.

## **NATURE OF THE CASE**

This appeals an Order denying a preliminary injunction enjoining the owner and landlord, 5335 NORTH MILITARY LLC (“Landlord”), from constructing and renovating the South Wind Plaza shopping center (“Plaza”), in which the tenant, LEGACY GROUP, LLC (“Tenant”), is the Plaza’s major tenant.

At issue are two paragraphs in the operative Lease agreement. Paragraph 3 of the operative Lease says “[T]he arrangement and location of all store buildings and common areas (including parking area) within the shopping center shall at all times during the term of this lease, or any extensions thereof, be maintained as shown on Exhibit "A" and shall not be changed without the written consent of the Tenant.” Paragraph 8 of the Lease states “[L]andlord hereby dedicates and grants to Tenant, its employees, agents, suppliers, customers and invitees, a non-exclusive right at all times to use, free of charge, during the term of this lease, or any extensions thereof, all the common areas, as defined in Article 3 hereof, and as shown on Exhibit "A", which areas are acknowledged to be for use by such persons, along with others similarly entitled, for parking and for ingress and egress between the demised premises and all other portions of the shopping center and the adjoining streets, alleys and sidewalks.

Landlord shall at all times during the term of this lease, and any extensions thereof, provide and maintain a surfaced parking area substantially as shown on Exhibit "A"..."

The trial court's ruling is based upon the court being unconvinced that the Tenant has a clear legal right to the injunctive relief it seeks. First, the trial court found that the granting of the Tenant's temporary injunction would be contrary, as opposed to serving the public interest. Second, the trial court concluded that the Tenant had an existing remedy at law as expressed in the Lease. Finally, the trial court denied the Tenant's injunctive relief as it stated that there no reliable evidence presented on bond valuation in order to determine a bond amount.

The trial court abused its discretion by failing to grant the Tenant's request for injunctive relief.

## **STATEMENT OF FACTS AND COURT PROCEEDINGS**

### **1. Undisputed Evidence**

5335 NORTH MILITARY LLC, the Landlord, and LEGACY GROUP, LLC, the Tenant, are bound by the terms and conditions of a written Lease Agreement dated February 26, 1987, and Supplemental Lease Agreement dated December 10, 1987, entered into between the previous owner, Sabra/SCA Properties, and the previous tenant, Winn-

Dixie Stores, Inc. On May 23, 2006, Winn-Dixie Stores, Inc., entered into a Lease Assignment with the Tenant. On November 21, 2011, the Landlord acquired the Plaza assuming the leases for the Plaza.

The Tenant is the anchor tenant in the Plaza and is in possession of a certain store and related improvements with an address of 5335 North Military Trail, Suite 60, West Palm Beach, Florida 33407 (the “Premises”).

The Lease expressly incorporates restrictive covenants requiring the Landlord to obtain the Tenant’s written consent for changes to the arrangement and location of all store buildings and common areas (including parking area) in the Plaza.

On March 9, 2021, the Landlord applied for a commercial building permit to renovate the Plaza. The Landlord incorporated changes to the arrangement and location of store buildings and commons areas (including parking area), without the knowledge, and more importantly, without the written consent of the Tenant. On December 8, 2022, nearly two years after the Landlord’s initial application, the Landlord told the Tenant of its planned renovations and its submittal of the commercial building permit application with overall site plans.

On January 13, 2023, the Tenant mailed its notice of default letter to the Landlord advising the Landlord that it was in violation of the Lease for

its failure to comply with the restrictive covenant terms and conditions related to changes to the arrangement and location of all store buildings and common areas (including parking area) in the Plaza. The Landlord failed to cure the alleged defaults within the January 13, 2023, notice of default letter and continues to be in breach.

## **2. Course of Proceedings**

The trial court heard testimony from four witnesses and received documentary evidence, in addition to the exhibits attached to Tenant's motion. The Landlord did not file any opposition to Tenant's motion nor did the Landlord disclose its witnesses and its exhibits prior to the evidentiary hearing in front of the trial court. Prior to the witnesses' testimony, the parties stipulated to the Lease attached to the Tenant's motion. [Hearing, P. 26 Ln. 4-12].

The first witness, Mr. Dhawan from the Tenant, testified that he was unaware of the Landlord's planned renovation nor its submittal of the commercial permit to the City of West Palm Beach prior to the December 2022 meeting between the parties. [Hearing, P. 35 Ln. 2-16]. Mr. Dhawan further testified that the Landlord breached the Lease by failing to abide by the Lease's terms and conditions and by failing to obtain the Tenant's written consent for deviations from the original site plan attached to the

Lease as Exhibit "A." [Hearing, P. 100 Ln. 20-21].

The second witness, Mr. Costoya, a registered architect, testified on behalf of the Tenant. Mr. Costoya testified that he reviewed the Lease, the Supplemental Lease, Exhibit "A" to the Lease and the overall site plan included within the commercial permit application package submitted by the Landlord to the City of West Palm Beach. [Hearing, P. 86 Ln. 2-11]. Mr. Costoya further testified that the Landlord was in violation of the Lease and its restrictive covenants based upon the clear differences between the site plan attached to the Lease as Exhibit "A" and the overall site plan attached to the Landlord's permit application. [Hearing, P. 99 Ln. 14-20].

The third witness, Mr. Litterick, a landscape architect, appeared on behalf of the Landlord. The Tenant objected to Mr. Litterick's being called as a witness as the Landlord failed to disclose its witnesses prior to the hearing. The trial court overruled the Tenant's objection. Mr. Litterick testified that he prepared the site plan attached to the Landlord's permit application that was submitted to the City of West Palm Beach and in evidence as Defendant's Exhibit 2. [Hearing, P. 108 Ln. 3-13]. Next, Mr. Litterick was shown a different site plan by the Landlord's counsel. Landlord's counsel referred to this site plan as the current site plan. When asked if the current site plan was pending for consideration by the City of

West Palm Beach, Mr. Litterick testified that he had no idea whether amended site plans were submitted or approved by the City of West Palm Beach. [Hearing, P. 112 Ln. 9-21].

The final witness, Mr. Morrison, appeared on behalf of the Landlord. The Tenant objected to Mr. Morrison's being called as a witness as the Landlord failed to disclose its witnesses prior to the hearing. The trial court overruled the Tenant's objection. Mr. Morrison began his testimony about certain code violations issued by the City of West Palm Beach. The Landlord's counsel then proceeded to show Mr. Morrison a printout from the City of West Palm Beach. Upon the Tenant's objection to the printout, the trial court sustained the objection and precluded the printout from being admitted into evidence. Mr. Morrison testified that the violation issued by the City of West Palm Beach in 2019, solely based upon the condition of the Plaza's parking lot, was still open and incurring daily fines totaling approximately \$112,000. [Hearing, P. 121 Ln. 9-11]. Mr. Morrison further testified that the entry of a temporary injunction would prevent the Landlord from performing the parking lot improvements allegedly cited in the 2019 violation. [Hearing, P. 121 Ln. 12-15]

On cross-examination, Mr. Morrison testified that the Landlord did not seek nor obtain the Tenant's written consent prior to submitting the

commercial permit application to the City of West Palm Beach. Mr. Morrison testified that the permit application included proposed renovations and site plans that violated the terms and conditions of the Lease. Mr. Morrison further testified that the commercial permit application package sought approval for multiple renovations which were above and beyond the repair of the Plaza's parking lot. [Hearing, P. 137 Ln. 1-8]

### **SUMMARY OF THE ARGUMENT**

The trial court abused its discretion in denying the Tenant's request for injunctive relief. The trial court's ruling mistakenly concluded that the Tenant did not have clear legal right to injunctive relief, that the granting of the Tenant's motion would be contrary to, as opposed to serving, the public interest, that the Tenant has an existing remedy at law set forth in the Lease and that there was no reliable evidence on bond valuation.

The Lease's terms and conditions expressly contain restrictive covenants affecting real property. These restrictive covenants have created bargained for rights in favor of the Tenant. The Landlord is required to obtain written consent from the Tenant for renovations that violate the restrictive covenants in the Lease. The terms and conditions of the Lease provide the Tenant with a clear legal right to injunctive relief.

The trial court's denial of the Tenant's motion has precluded the Tenant's ability from enforcing its rights under the Lease. The trial court's ruling overlooks the public interest in enforcing contracts between the parties. The trial court has the ability to serve the public's interest by narrowing the scope of the renovations to address the Plaza's parking lot violation cited by the City of West Palm Beach and enforcing the terms and conditions of the Lease. The trial court's sole concern was the open violation issued by the City of West Palm Beach.

The trial court further relied upon an existing remedy at law expressed in Paragraph 8 of the Lease between the parties. The existing remedy in Paragraph 8 provided the Tenant with the option to terminate the Lease solely based upon the Landlord's failure to provide the agreed upon parking area in Paragraph 8. Although the trial court indicated that the option to terminate the Lease under Paragraph 8 would result in greater harm to the Tenant, it nevertheless concluded that the Tenant's option to terminate under Paragraph 8 provided an overall legal remedy available to the Tenant justifying the denial of the Defendant's request for injunctive relief.

The trial court's ruling also found that the Defendant failed to present reliable evidence on bond valuation. However, the trial court abused its

discretion by failing to initially set the amount of the injunction bond based in part upon the good faith representations of the parties.

### **STANDARD OF REVIEW**

“A trial court is afforded broad discretion in granting, denying, dissolving or modifying injunctions, and unless a clear abuse of discretion is demonstrated, an appellate court must not disturb the trial court's decision.” Sacred Family Investments, Inc. v. Doral Supermarket, Inc., 20 So.3d 412, 415 (Fla. 3<sup>rd</sup> DCA 2009).

### **ARGUMENT**

#### **I. THE TRIAL COURT ABUSED ITS DISCRETION BY IMPROPERLY FINDING THAT THE TENANT DID NOT HAVE A CLEAR LEGAL RIGHT TO INJUNCTIVE RELIEF**

“Injunctive relief is normally available to redress violations of ... restrictive covenants [affecting real property] without proof of irreparable injury or a showing that a judgment for damages would be inadequate. The value of a restrictive covenant ... is often difficult to quantify and may be impossible to replace.” Autozone Stores, Inc. v. Northeast Plaza Ventures, LLC., 934 So. 2d 670, 673 (Fla. 2<sup>nd</sup> DCA 2006) citing to Restatement (Third) of Prop.: Servitudes § 8.3 cmt. b (2000); Blue Reef Holdings Corp., Inc. v. Coyne, 645 So. 2d 1053, 1055 (Fla. 4<sup>th</sup> DCA 1994); Jack Eckerd

Corp. v. 17070 Collins Ave. Shopping Center, Ltd., 563 So. 2d 103, 105 (Fla. 3<sup>rd</sup> DCA 1990).

The terms and conditions in the stipulated Lease between the parties leave no doubt that the Lease incorporated restrictive covenants affecting real property. These restrictive covenants provide the Tenant with a clear legal right for injunctive relief. These restrictive covenants within the Lease provided the Tenant with valuable rights. Any deviation from the agreed upon restrictive covenants by the Landlord required the written consent of the Tenant. The testimony of the witnesses and the documentary evidence admitted by the trial court clearly indicate that the Landlord breached the restrictive covenants in the Lease and that the Landlord failed to obtain the Tenant's written consent. Furthermore, the Landlord's approved commercial permit application undoubtedly included multiple renovations that required the Tenant's written consent.

II. **THE TRIAL COURT ABUSED ITS DISCRETION BY CONCLUDING THAT THE GRANTING OF THE TENANT'S MOTION WOULD BE CONTRARY, AS OPPOSED TO SERVING, THE PUBLIC INTEREST**

The Trial Court's abused its discretion by concluding that the granting of the Tenant's Motion would be contrary, as opposed to serving, the public interest. The trial court relied on uncorroborated testimony from the Landlord's witness, Mr. Morrison, of a violation issued by the City of West

Palm Beach relating to the Plaza's parking lot. The trial court further reasoned that the granting of the Tenant's request for injunctive relief would result in the trial court interfering with the City's enforcement of its laws, and the Landlord's efforts to comply with same.

The trial court's determination that it would interfere with the City's enforcement of its laws is misplaced and has resulted in the complete denial of the Tenant's Motion. The alleged violation issued by the City of West Palm Beach to the Landlord occurred in 2019. The violation only concerned the Plaza's parking lot. The Landlord took no action to cure the violation for approximately 4 years. The City took no action against the Landlord to enforce the alleged 4 year old violation. The trial court completely disregarded the public policy consideration to encourage parties to abide by the terms, conditions and covenants contained within the Lease. The Tenant has over nine and half years remaining on its Lease. Furthermore, it is in the public's interest to encourage competition between Tenant's store and nearby supermarkets. Public policy considerations and this Court weighing the balance of the equities should have resulted in the entry of injunctive relief in favor of the Tenant with the narrow exclusion relating to the Plaza's parking lot. Sacred Family Investments, Inc. at 417; Jack Eckerd Corp. at 105.

III. **THE TRIAL COURT ABUSED ITS DISCRETION BY CONCLUDING THE TENANT HAS A BARGAINED FOR, ADEQUATE REMEDY AT LAW EXPRESSED IN THE LEASE**

The Trial Court abused its discretion by concluding that the Lease included a bargained for, adequate remedy at law. The trial court understood that the option to terminate, which gave the Tenant a specific right to terminate the Lease based upon the Landlord's failure to comply with the parking area as agreed by the parties in Paragraph 8 of the Lease, did not make monetary sense. The trial court further indicated, based upon the case law presented at the hearing, that injunctive relief is the appropriate remedy to redress violations of restrictive covenants affecting real property without the need to consider irreparable injury or a showing that a judgment for damages would be inadequate. Autozone Stores, Inc. at 673; Velickovich v. Ricci, 391 So.2d 258, 259 (Fla. 4th DCA 1980); Coffman v. James, 177 So. 2d 25, 31 (Fla. 1<sup>st</sup> DCA 1965); Daniel v. May, 143 So. 2d 536, 538 (Fla. 1<sup>st</sup> DCA 1962). The trial court's deliberations should have concluded in granting the Tenant's request for injunctive relief based upon enforcement of restrictive covenants affecting real property and upon the balance of the equities.

IV. **THE TRIAL COURT ABUSED ITS DISCRETION BY CONCLUDING THAT THERE WAS NO RELIABLE EVIDENCE PRESENTED ON BOND VALUATION**

The trial court abused its discretion by finding that there was no reliable evidence presented on bond valuation. The Tenant provided good faith representations for the trial court to determine an initial amount of the injunction bond based upon testimony given by the Landlord's witness, Mr. Morrison. In Parker Tampa Two, Inc. v Somerset Development Corp., 544 So. 2d 1018, 1021 (Fla. 1989), the Florida Supreme Court stated "[W]hen a court initially sets an injunction bond, this constitutes the court's determination of foreseeable damages based on the good faith representations that are before it. Fla.R.Civ.P. 1.610(b). Should this amount prove insufficient or excessive, an affected party is free to move for modification." The trial court should have set an initial bond amount based upon the testimony provided by the Landlord's undisclosed witness, Mr. Morrison, as to the approximate total accrued balance of the violation. The trial court relied on the same witness to arrive at its determination that a temporary injunction would not serve the public interest, and in this case would be contrary to public interest.

## **CONCLUSION**

This Honorable Court should reverse the trial court's order denying the Tenant's Motion for Temporary Injunction. The trial court abused its discretion by failing to enforce the Tenant's bargained for rights concerning restrictive covenants affecting real property in the Lease. Injunctive relief is an equitable remedy in which the trial court can balance the equities by ensuring the Tenant's rights under the Lease are enforced while also ensuring that it does not interfere with the City's enforcement of its laws, and the Landlord's efforts to comply with same. The Tenant has a substantial likelihood of success on the merits based upon its alleged affirmative defenses and counterclaims.

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## **CERTIFICATE OF SERVICE**

I hereby certify that a true copy of this Initial Brief has been furnished to all on the attached Service List by electronic mail through the Florida Court's eFiling Portal or by U.S. Mail on this 23<sup>rd</sup> day of January 2024.

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## **CERTIFICATE OF COMPLIANCE**

Counsel for Appellant, Legacy Group, LLC, certifies that this pleading has been prepared in Arial 14-point font, in compliance with the requirements set forth in Florida Rule of Appellate Procedure 9.045(b).

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