

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

LEGACY VILLAGE INVESTORS LLC)	CASE NO: CV 09 686055
)	
Plaintiff)	JUDGE JOHN P. O'DONNELL
)	
vs)	
)	
Z GALLERIE)	<u>JOURNAL ENTRY</u>
)	
Defendant)	

John P. O'Donnell, J.:

Plaintiff Legacy Village Investors LLC operates a shopping center in Lyndhurst known as Legacy Village. Defendant Z Gallerie is a tenant of the plaintiff at the shopping center. The lease between the parties provides, in pertinent part, as follows:

SECTION 1

* * *

Permitted Use: The retail sale of furniture, kitchenware, housewares, home furnishings, home accessory gift items, various other gift items, travel and office accessories, posters, graphic art and picture framing.

* * *

SECTION 10

USE

(a) The Premises shall be occupied and used for the purpose set forth in Section 1.1 hereof and for no other purpose. . . .

(b) Tenant shall keep the Premises fully-stocked and open for business and shall operate one hundred percent (100%) of the Premises during the entire term of this Lease. Tenant shall conduct its business in the Premises on all business days during all regular and customary business hours established for Legacy Village by Landlord. Tenant will conduct such business in a lawful manner in good faith, and in such manner that Landlord will at all times receive the maximum amount of rental for the operation of such business in and upon the Premises. Minimum hours of operation shall be from 10:00 a.m. to 6:00

p.m., on Monday through Sunday. Tenant agrees to conduct its business at all times in a first class and reputable manner, maintaining at all times a full staff of employees and a full and complete stock of merchandise. Tenant shall keep all windows well lighted during all Legacy Village business hours and at least one (1) hour thereafter and during such other hours after dusk as may be designated by Landlord . . . No auction, liquidation, going out of business, fire or bankruptcy sales may be conducted in the Premises . . .¹

The complaint was filed on February 27, 2009, after it became apparent to the plaintiff that the defendant was conducting a liquidation sale. The complaint alleges that the defendant is in breach of the lease by having a liquidation sale and by not continuously operating. The complaint does not seek money damages for breach of contract. Instead, the plaintiff asks that the defendant be enjoined from conducting a liquidation sale and that the continuous operation requirement of Section 10 of the lease be enforced, *i.e.* that the court order the defendant to continue to operate its store at Legacy Village.

The complaint included a motion for a temporary restraining order. That motion was granted *ex parte* on February 27 and prohibited the defendant from, among other things: operating less than 100% of the area of the store; maintaining less than a full and complete stock of merchandise; conducting a going out of business sale; and closing the store. The temporary restraining order remained in effect until the date of the hearing on the motion for a preliminary injunction, March 16. The defendant did not appear at the preliminary injunction hearing. That hearing went forward, on the record, in the defendant's absence.

Testimony at the hearing established that Section 10 of the lease is known as a continuous operation clause. This clause was specifically negotiated with defendant Z Gallerie because it was considered an anchor tenant. An anchor tenant is a store that is expected to draw many potential customers, or traffic, to a shopping center. Although Z Gallerie does not have the

¹ See Exhibit 1 to complaint, Lease at pages 1, 9-10.

amount of square footage typically associated with an anchor tenant, its unique collection of merchandise makes it an anchor by virtue of its ability to draw interested customers to the shopping center.

In exchange for Z Gallerie agreeing to the continuous operation clause, the plaintiff agreed to a lower rent compared to other home furnishings stores at the center and paid a higher tenant improvement allowance (money the owner pays to “build out” a tenant’s space). The plaintiff made these concessions, and insisted upon the continuous operation clause, because the plaintiff considered the defendant’s presence as essential to the vitality of the entire shopping center and, in fact, used Z Gallerie as an “inducement tenant” to persuade other stores to open at the center.

The plaintiff also presented evidence that Z Gallerie is still profitable, or at least not losing money, at Legacy Village. Recent profit and loss statements that Z Gallerie sent to the landlord show a profit exclusive of an unexplained “corporate allocation.”

In deciding whether to grant a preliminary injunction, a court must look at 4 factors:

- 1) Whether there is a substantial likelihood that the plaintiff will prevail on the merits;
- 2) Whether the plaintiff will suffer irreparable injury if the injunction is not granted;
- 3) Whether third parties will be unjustifiably harmed if the injunction is granted; and
- 4) Whether the public interest will be served by the injunction.²

² *KLN Logistics Corp. v. Norton* (2008), 174 Ohio App. 3d 712, at 713.

No one factor is dispositive. When there is a strong likelihood of success on the merits, preliminary injunctive relief may be justified even though the plaintiff's case of irreparable injury may be weak.³ Finally, the party seeking the preliminary injunction must establish a right to the preliminary injunction by showing clear and convincing evidence of each element of the claim.⁴

Because the evidence of a breach by the defendant is uncontradicted – a liquidation sale went forward and the store is now abandoned – the plaintiff's likelihood of success on the merits depends entirely upon whether the court can order specific performance of the continuous operation clause of the lease. Although there may be practical impediments to ordering the defendant to operate a store against its will, there are no legal impediments to such an order. There is ample authority to support the proposition that a court may enforce by injunction a clear and unambiguous continuous operation clause.

For example, in *Fodor v. First National Supermarkets, Inc.*, 1990 Ohio LEXIS 2779, Cuyahoga Cty. App. No. 58587, the appeals court, while rejecting the plaintiff's claim that the lease in question contained an implied covenant of continuous use, recognized by its citation to other authorities the enforceability of an express continuous use clause. The court noted that “the easiest way to have accomplished a continuous use and occupancy . . . would have been to insert such a covenant in the lease. That knowledgeable, experienced parties of the commercial world did not is some indication that such was not contemplated by the parties.” If that observation is correct, then the opposite is also true: if, as in this case, knowledgeable, experienced parties did include a continuous operation clause, that indicates it was contemplated

³ *Cleveland v. Cleveland Elec. Illum. Co.* (1996), 115 Ohio App. 3d 1, at 14.

⁴ *VanGuard Transp. Sys., Inc. v. Edwards Transfer and Storage Co., Gen. Commodies Div.* (1996), 109 Ohio App. 3d 786, at 790.

and agreed to by the parties. The evidence supports the existence of a breach and the law supports the availability under the circumstances of the equitable remedy of specific performance, therefore the plaintiff appears likely to succeed on the merits.

The plaintiff may also suffer irreparable injury if an injunction is not granted. The importance of this anchor tenant to the economic well-being of the entire center is difficult to deny even if it can't be quantified. Z Gallerie was sought as a tenant that would bring customers to the shopping center. If the store closes, the shopping center loses the customers attracted by the store and other tenants lose business, ultimately to the detriment of the whole shopping center. Additionally, the defendant was given a prime location within the center that exposed it to shoppers from several vantages. A conspicuous empty storefront will be a further deterrent to shoppers. Keeping the store open also serves the public interest by helping ensure the viability of the center, thereby maintaining income and property tax revenues. Finally, no evidence was produced to suggest that a third party will be unjustifiably harmed if Z Gallerie stays in business. As for harm to the defendant itself, it appears that continuing to operate the store – even at a slight net loss – will cost it less than breaching a contract that runs for several more years.

Therefore, the motion for a preliminary injunction is granted and the defendant is ordered to do the following:

1. Defendant shall forthwith reopen its Z Gallerie store in Legacy Village;
2. Defendant shall forthwith restock the store with a complete stock of merchandise;
3. Upon reopening, defendant shall operate 100% of the area of the store; and
4. To the extent that defendant terminated the employment of employees to close the store, defendant shall either re-hire those employees or hire replacement employees so that it can maintain a full staff of employees at its Legacy Village store.

Until further order of this court, defendant is hereby enjoined from:

1. Closing its Z Gallerie store in Legacy Village;
2. Engaging in any actions in connection with the announced closing of its Z Gallerie store at Legacy Village including, but not limited to, any of the following:
 - (a) Operating less than 100% of the area of the store;
 - (b) Reducing business hours to less than required by the lease, to-wit: 10:00 a.m. to 6:00 p.m., Monday through Sunday;
 - (c) Conducting its business in anything less than a first class and reputable manner;
 - (d) Maintaining less than a full staff of employees;
 - (e) Maintaining less than a full and complete stock of merchandise; or
 - (f) Conducting any auction, liquidation, or going out of business sales; and
3. Engaging in any other violation of Section 10 of the lease.

Plaintiff is not ordered to post a bond.

IT IS SO ORDERED:

Judge John P. O'Donnell

Date: _____

SERVICE

A copy of this Journal Entry was sent by regular U.S. mail, this ____ day of March, 2009,
to the following:

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Judge John P. O'Donnell