

2014 IL App (2d) 131093-U & 2014 IL App (2d) 131204-U
Nos. 2-13-1093 & 2-13-1204
Order filed June 27, 2014

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

STEVE MCKEEVER,)	Appeal from the Circuit Court
)	of Winnebago County.
Plaintiff-Appellant,)	
)	
v.)	No. 10-CH-2195
)	
PEPPERIDGE FARM, INC., JULIE)	
JENKINS-TOKH and RONALD WOOLSEY,)	Honorable
)	Eugene G. Doherty,
Defendants-Appellees.)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Jorgensen and Hudson concurred in the judgment.

ORDER

¶ 1 *Held:* Whether plaintiff's business was substantially associated with Pepperidge's trademark under section 3(1)(b) of the Illinois Franchise Disclosure Act of 1987 (the Franchise Act) (815 ILCS 705/19 (West 2010)) presented a genuine issue of material fact. Therefore, the trial court erred in granting summary judgment in defendants' favor and in dissolving the preliminary injunction. We reversed and remanded.

¶ 2 In 2010, plaintiff brought suit against defendants, Pepperidge Farm, Inc. (Pepperidge), Julie Jenkins-Tokh, and Ronald Woolsey. The lawsuit stemmed from defendants terminating "without cause" its agreement with plaintiff that permitted plaintiff to distribute bread products as a franchise distributor. Plaintiff's eight-count complaint alleged that the termination of the

franchise agreement violated the Illinois Franchise Disclosure Act of 1987 (the Franchise Act) (815 ILCS 705/19 (West 2010)), discrimination under the Franchise Act, declaratory and injunctive relief, and breach of contract. Defendants filed counterclaims that are not at issue in this appeal.

¶ 3 Thereafter, the trial court granted summary judgment in defendants' favor with respect to most of plaintiff's allegations. The trial court also dissolved a preliminary injunction. Plaintiff now appeals pursuant to Supreme Court Rule 304(a) (eff. Feb. 26, 2010), contending that the trial court erred in finding that no general issue of material fact existed regarding his claim under the Franchise Act and in dissolving the preliminary injunction. We reverse and remand.

¶ 4 I. BACKGROUND

¶ 5 The record reflects that, on February 24, 1992, Pepperidge entered into a "consignment agreement" (agreement) with plaintiff, which provided that Pepperidge would grant an "exclusive franchise" to plaintiff. Defendant Woolsey was an employee of Pepperidge. Defendant Jenkins-Tokh was the district sales manager for the territory at issue in the agreement.

¶ 6 Paragraph 1 of the agreement provided that plaintiff would have the "exclusive right to distribute [certain Pepperidge] products to retail stores within [a specified territory], and [Pepperidge] would not sell or deliver or authorize any others to sell or deliver the same products to retail stores within the same territory ***."

¶ 7 Paragraph 12 under the agreement further provided:

"[Plaintiff] may use the [Pepperidge's] trade name, trade-mark, and distinguishing colors on his trucks and other equipment and supplies; provided, however, that (a) [Pepperidge] trade name may not be used as a part of any business name or trade name of the

[plaintiff] without the written consent of [Pepperidge] or in any other way which will tend to confuse the separate identities of [Pepperidge] and [plaintiff] *** .”

¶ 8 Plaintiff is also the third-generation owner of Piemonte Bakery, Inc., a bakery founded in 1918 in Rockford. Piemonte bakes bread that it sells to grocery stores and restaurants.

¶ 9 Pursuant to the agreement, Pepperidge would ship products to plaintiff and plaintiff would deliver that product within his territory. Plaintiff would also check rack space at the various stores to ensure that the products were not stale or out of stock; and also complete tickets at each store for products that were removed or deposited. Pepperidge provided plaintiff with delivery equipment and marketing guidelines, which included promotions. Pepperidge set product prices and shelf life, and fixed promotions and discounts. Plaintiff’s drivers used trays and dollies with Pepperidge’s trademark to deliver its product. Pepperidge provided these trays for purposes of continuity.

¶ 10 Plaintiff had a total of five trucks, including one back-up truck, that he used to distribute both Piemonte and Pepperidge products. The trucks did not use the Pepperidge logo. Four of plaintiff’s drivers distributed both Piemonte and Pepperidge products, with one driver distributing Piemonte products only. Piemonte drivers carried Piemonte identification cards and did not have to wear Pepperidge clothing. Plaintiff paid his drivers from the Piemonte bank account. Plaintiff filed individual and Piemonte tax returns.

¶ 11 On October 22, 2010, Pepperidge terminated its relationship with plaintiff without cause. Pepperidge offered plaintiff 125% of the fair market value of the distributorship.

¶ 12 On November 14, 2010, plaintiff filed his complaint. As amended, plaintiff’s complaint alleged eight counts. Count 1 alleged that plaintiff had a franchise with Pepperidge and that Pepperidge violated the Franchise Act by terminating the agreement without cause. Count 2

alleged that defendant Woolsey, acting as an agent for Pepperidge, “materially aided” Pepperidge in violating the Franchise Act. Count 3 alleged that Pepperidge violated the Franchise Act by requiring plaintiff to pay “significant stale charge-backs to [Pepperidge] from his own profits while other franchisees were not held to the same standards.” Count 4 alleged that Jenkins-Tokh violated the Franchise Act because, as district manager, she was aware that plaintiff’s “stale percentage allowance was significantly lower than all other franchises competing in [plaintiff’s] territory.” Count 5 sought a declaration that Pepperidge’s termination of the agreement was invalid and unenforceable. Count 6 sought a permanent injunction that Pepperidge reinstate the agreement. Count 7 alleged that Pepperidge committed a breach of contract pursuant to the Illinois Sales Representative Act (Representative Act) (820 ILCS 120/1 *et seq.* (West 2010)). Count 8 alleged that Pepperidge breached the agreement.

¶ 13 On November 8, 2012, defendants filed a motion for summary judgment. Defendants argued, in part, that they were entitled to summary judgment on plaintiff’s claims pursuant to the Franchise Act and the Representative Act because plaintiff’s business was not substantially associated with Pepperidge’s trademark. On April 13, plaintiff filed a cross-motion for partial summary judgment. Plaintiff argued that there was no genuine issue of material fact and that he was entitled to judgment with respect to counts 1 through 4, 7 and 8, and also sought a permanent injunction and declaratory relief.

¶ 14 On August 20, 2013, the trial court issued a memorandum opinion. With respect to counts 1 through 6, the trial court concluded that “[t]here is no basis for a finder of fact to conclude that [p]laintiff ‘identified its business to its customers’ under [Pepperidge’s] trademark, or that [p]laintiff used the mark or was permitted to use it ‘in a manner likely to convey to the public that it is an outlet of the franchisor.’ ” Therefore, the trial court granted summary

judgment in defendants' favor on those counts. However, the trial court found that a genuine issue of material fact existed in counts 7 and 8, and denied plaintiff's and defendants' respective motions for summary judgment on those counts. The trial court also dissolved a preliminary injunction, which had prevented defendants from terminating the agreement.

¶ 15 On November 14, 2013, the trial court added language pursuant to Supreme Court Rule 304(a) (eff. Feb. 26, 2010), finding that there was no just reason for delaying enforcement or appeal with respect to its finding on counts 1 through 6. Thereafter, plaintiff timely appealed.

¶ 16 II. ANALYSIS

¶ 17 On appeal, plaintiff contends that the trial court erred in finding that no genuine issue of material fact existed regarding whether he had a "substantial association" with Pepperidge in order to satisfy section 3(b) of the Franchise Act. In support of this contention, plaintiff argues that he used Pepperidge's trade name and trademark to identify its business to customers and to convey to the public that he was an outlet authorized by Pepperidge Farm. Plaintiff further argues that the trial court erred in dissolving the preliminary injunction.

¶ 18 The sole function of a trial court in acting upon a motion for summary judgment is to determine whether a material question of fact exists. *Fritzsche v. LaPlante*, 399 Ill. App. 3d 507, 516 (2010). Summary judgment is proper when the pleadings, depositions, and affidavits on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Nelson v. Aurora Equipment Co.*, 391 Ill. App. 3d 1036, 1038 (2009). In reviewing a grant of summary judgment, we must construe the pleadings, depositions, admissions, and affidavits strictly against the moving party and liberally in favor of the nonmoving party. *Mills v. McDuffa*, 393 Ill. App. 3d 940, 948 (2009). Summary judgment is a drastic means of disposing of a case and should not be granted unless the movant's right to

judgment is clear and free from doubt. *Id.* at 948. We review *de novo* an order granting summary judgment. *Nelson*, 391 Ill. App. 3d at 1038.

¶ 19 The Franchise Act is a statutory scheme designed to provide a prospective franchisee with “information necessary to make an intelligent decision regarding franchises being offered for sale,” and to protect both franchisor and franchisee by providing a better understanding of the business and legal relationship between the two. 815 ILCS 705/2(2)(a), (b) (West 2010). A franchise is an agreement between two or more persons which:

- (a) a franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services, under a marketing plan or system prescribed or suggested in substantial part by a franchisor; and
- (b) the operation of the franchisee’s business pursuant to such a plan or system is substantially associated with the franchisor’s trademark, service mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate; and
- (c) the person granted the right to engage in such a business is required to pay to the franchisor or an affiliate of the franchisor *** a franchise fee of \$500 or more.” 815 ILCS 705/3(1)(a), (b), (c) (West 2010).

Therefore, when an agreement satisfies the three objective criteria, the statutory definition of a “franchise” is met. *Salkeld v. V.R. Business Brokers*, 192 Ill. App. 3d 663, 670 (1989).

¶ 20 Because the parties do not dispute subsections (a) and (c) of section 3(1), the gravamen of this appeal is whether the trial court erred in concluding as a matter of law that plaintiff was not “substantially associated” with Pepperidge’s trademark. Section 200.103 of the Illinois

Administrative Code (Administrative Code) further defines “substantially associated” under section 3(1)(b) of the Franchise Act:

“A franchisee’s business is substantially associated with the franchisor’s trademark, service mark, trade name, logotype, advertising or other commercial symbol designating the franchisor or its affiliate *** if the franchise [agreement], the nature of the franchise business[,] or other circumstances permit or require the franchisee to identify its business to its customers primarily under such trademark, service mark, trade mark, logotype, advertising, or other commercial symbol *** or to otherwise use the franchisor’s mark in a manner likely to convey to the public that it is an outlet of the franchisor. Mere absence in the franchise agreement of permission to use the franchisor’s name or mark will not alone negate ‘substantial association.’ A contractual prohibition on the use of the franchisor’s name or mark must be policed and enforced to insure that the name or the mark is not being substantially used without the franchisor’s knowledge.” 14 Ill. Code 200.103 (West 2010).

¶ 21 In *P&W Supply Co., Inc. v. E.I. Dupont de Nemours & Co., Inc.*, No. 89 C 20293, 1991 WL 352614 (N.D. Ill. Sept. 17, 1991), the plaintiff alleged that the defendant wrongfully terminated an existing agreement in violation of the Franchise Act. *Id.* at *1. The defendant moved for summary judgment, claiming that there was not a genuine issue of material fact regarding the lack of a franchise relationship. *Id.*

¶ 22 The court in *P&W Supply* denied the motion. In doing so, the court noted:

“A reading of the relevant statute, [the Franchise Act], reveals that whether a franchise relationship exists is a factual determination. The statute sets forth no hard-and-fast rules for this determination. Rather, it describes three characteristics of a franchise which are

present in a written or oral, express or implied contract or agreement.” *Id.*

Regarding whether the plaintiff’s business was substantially associated with the defendant’s trademark, the court referenced section 200.103 of the Administrative Code and noted:

“Among these regulations is one which describes this requirement as a situation where the franchise agreement *** *permit or require* the franchisee to identify its business primarily under the franchisor’s mark, or to otherwise use the franchisor’s mark in a manner likely to convey to the public that it is an outlet of the franchisor.” (Emphasis in original.) *Id.* at *2.

The court further noted that deposition testimony reflected that the plaintiff sold the defendant’s product in containers clearly marked with the defendant’s trademark, that the plaintiff’s customers asked for the defendant’s product by name, and that 80% of the plaintiff’s automotive paint sales were from the defendant’s product. *Id.* at *3. After viewing the evidence in the light most favorable to the plaintiff, the court concluded that the plaintiff had demonstrated that a genuine issue of material fact existed as to whether the plaintiff was substantially associated with the defendant’s trademark or commercial symbol. *Id.*

¶ 23 The reasoning in *P&W Supply* is instructive here. We agree with the court’s conclusion that whether a franchise relationship exists under the Franchise Act is a factual determination. We further conclude that, after viewing the evidence in the light most favorable to plaintiff, there is a genuine issue of material fact as to whether such a relationship existed.

¶ 24 Initially, we disagree with the trial court’s conclusion that the agreement does not permit plaintiff to use Pepperidge’s trade name. While paragraph 12 limited plaintiff’s use of Pepperidge’s trademark by providing that it could not be used “as a part of any business name” of plaintiff or “in any *** way which will tend to confuse” plaintiff’s and defendants’ separate

identities, the prohibition was not absolute. On the contrary, the first part of paragraph 12 expressly *permits* plaintiff to use Pepperidge's trademark on plaintiff's trucks and equipment. We believe that having permission to use Pepperidge's trademark on trucks and equipment had the possibility to "convey to the public that plaintiff was an outlet" of Pepperidge. See *id.* Whether plaintiff's use of Pepperidge's trademark in such a manner actually did convey to the public that plaintiff was an outlet of Pepperidge should be determined by a fact finder, not by the trial court as a matter of law on summary judgment.

¶ 25 Moreover, both plaintiff and defendants point to conflicting evidence. On the one hand, defendants note that plaintiff did not use Pepperidge's logo on any of his five trucks, plaintiff did not tell his drivers how to dress, and that plaintiff's drivers carried Piemonte identification cards. On the other hand, the deposition testimony reflects that plaintiff's drivers delivered Pepperidge products on trays and dollies that contained Pepperridge's trademark, which Pepperidge had trained plaintiff to use for continuity purposes. Plaintiff also directs us to deposition testimony that his employees filled Pepperidge product on shelves; and also arranged, organized, and participated in promotional displays.

¶ 26 As in *P&W Supply*, we conclude that these circumstances present a genuine issue of material fact regarding whether plaintiff was substantially associated with Pepperidge's trademark, rendering summary judgment inappropriate. See *id.* Therefore, we reverse the trial court's decision to grant summary judgment in defendants' favor on counts 1, 2, 3, 4, and 5.

¶ 27 Finally, because we reverse the trial court's determination to grant summary judgment in defendants' favor on counts 1, 2, 3, 4, and 5, we also reverse the trial court's determination to dissolve the preliminary injunction that it had entered on December 6, 2010. The preliminary injunction prevented defendants from terminating plaintiff as a Pepperidge distributor. While a

trial court has the discretion to dissolve a preliminary injunction absent a change of facts or law from the time of issuance to the time of dissolution, there must be a sufficient basis in the record to support such action. *Kraft v. Solon*, 32 Ill. App. 3d 557, 561 (1976). In this case, the trial court's rationale for dissolving the preliminary injunction was that, due to its finding that plaintiff's allegations do not come within the ambit of the Franchise Act, "[p]laintiff has no basis to contest [d]efendants' termination of the parties' contract." Because we conclude that whether plaintiff was a franchisee under the Franchise Act involves a factual inquiry to be resolved at trial, there is no basis in the record dissolving the preliminary injunction; otherwise, even if plaintiff prevails at trial, the agreement would already be terminated. See *id.* (holding that the trial court erred in dissolving a preliminary injunction because, even if the plaintiffs were successful at trial, they would be unable to recoup the loss of money and pension benefits absent a preliminary injunction).

¶ 28

III. CONCLUSION

¶ 29 For the foregoing reasons, the judgment of the circuit court of Winnebago County is reversed and remanded.

¶ 30 Reversed and remanded.