INDIANA COMMERCIAL COURT

STATE OF INDIANA	)	IN THE MARION SUPERIOR COURT
	) SS:	
COUNTY OF MARION	)	CAUSE NO. 49D01-2006-PL-020195

SIMON PROPERTY GROUP, L.P. on behalf of itself and its affiliated landlord entities,	)
Plaintiff,	)
v.	)
PACIFIC SUNWEAR STORES LLC.,	)
Defendant.	)

ORDER GRANTING PACIFIC SUNWEAR STORES LLC'S MOTION FOR TEMPORARY RESTRAINING ORDER

This matter came before the Court on Defendant's, Pacific Sunwear Stores LLC ("PacSun"), Motion for Temporary Restraining Order and Preliminary Injunction ("Motion for TRO"), to enjoin Plaintiff, Simon Property Group, L.P., on behalf of itself and its affiliated landlord entities, ("Simon").

PacSun filed its Motion for TRO with exhibits on June 23, 2020. On June 24, 2020, Simon filed its Brief in Opposition of PacSun's Motion for TRO with exhibits. A hearing on the matter was held on June 24, 2020 at 10:30 A.M. All parties appeared by agreement telephonically to provide argument.

The Court, being duly advised, hereby GRANTS Defendant's Motion for TRO. Pursuant Ind. Trial Rules 52 & 65(D), the Court has included the following specific findings:

I. RELEVANT FACTS UNDER MOTION FOR TRO

1. Simon is a Delaware limited partnership with its principal place of business in Indianapolis, Indiana that operates shopping centers across the United States.

2. PacSun is a retail company that sells lifestyle apparel, along with footwear and accessories. (Aff. Russell Bowers, ¶ 5).

3. PacSun leases approximately 103 retail locations from Simon.

4. PacSun operates sixteen (16) of these stores in Texas. (Thomas Aff., ¶ 4).

5. Prompted by the COVID-19 public health crises, the government of Texas imposed restrictions on the operation of non-essential retail businesses on March 13, 2020. (Bowers Aff., Ex. B).

6. PacSun temporarily closed its Texas stores on March 18, 2020. (Thomas Aff., ¶ 4).

7. Simon closed its Texas retail properties on March 19, 2020. Thomas Aff., ¶ 4).

8. By April 30, the restrictions imposed by the government of Texas were lifted. (Thomas Aff., ¶ 6).

9. On May 1, 2020, Simon opened all of its Texas retail centers. (Thomas Aff., ¶ 6).

10. By the end of May, PacSun had reopened all of its Texas stores for all business. (Thomas Aff., ¶ 6).

11. On June 19, 2020, Simon initiated a lawsuit against PacSun seeking over $7.3 million in damages related to unpaid rent to Simon since April 2020 under the 103 leases. (Compl.)

12. Simon alleges that PacSun has failed to pay the complete rent amount owed for its Texas stores for the entire period of March, April, May, and June, with unpaid amounts totaling over $1 million. (Bailey Aff., ¶ 5).

13. On June 20, 2020, Simon switched the locks of the sixteen (16) PacSun stores located in Simon malls in Texas, (Thomas Aff., ¶ 6), but did not provided notice to PacSun prior to changing the locks.

14. PacSun now seeks an injunction to compel Simon to allow PacSun to reenter its Texas properties on the basis that the restrictions put in place by government authorities to address the COVID-19 public health crisis absolved PacSun from paying the rent claimed by Simon.

15. This order on the Motion for TRO concerns the narrow issue of whether Simon must permit PacSun to be able to reenter its Texas stores from which it has been locked out under Tex. Prop. Code § 93.002.

II. DISCUSSION

A. Standards on a Motion for TRO

10. The grant or denial of a request for a preliminary injunction rests within the sound discretion of the trial court. *Robert's Hair Designers, Inc. v. Pearson*, 780 N.E.2d 858, 863 (Ind. Ct. App. 2002).

11. Pursuant to Ind. Trial Rule 65(B), a temporary restraining order may be granted upon a showing that immediate or irreparable harm or loss that will result unless the Court orders the TRO.

12. To obtain temporary restraining order, a party must make a showing of four elements: (1) there exists a reasonable likelihood of success at trial; (2) the

remedies at law are inadequate, thus causing irreparable harm pending resolution of the substantive action; (3) the threatened injury to the moving party outweighs the potential harm to the nonmoving party from the granting of an injunction; and (4) the public interest would not be disserved by granting the requested injunction. *State v. Econ. Freedom Fund*, 959 N.E.2d 794, 803 (Ind. 2011).

13. Furthermore, a court may not issue a TRO unless the movant tenders a bond or security in an amount deemed proper "for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." T.R. 65(C).

B. Preliminary objections to PacSun's Motion for TRO

14. A party seeking a preliminary injunction "is not required to show that he is entitled to relief as a matter of law, nor is he required to prove and plead a case which would entitle him to relief upon the merits." *Norlund v. Faust*, 675 N.E.2d 1142, 1149 (Ind. Ct. App. 1997), *clarified on denial of reh'g*, 678 N.E.2d 421 (Ind. Ct. App. 1997). The likelihood of success element is met if the party seeking injunctive relief shows that it has a "better than negligible" chance of succeeding on the merits. *IHSAA v. Martin*, 731 N.E.2d 1, 7 (Ind. Ct. App. 2000). "Better than negligible" has been understood to mean the party can satisfy this factor "by establishing a prima facie case." *Coates v. Heat Wagons, Inc.*, 942 N.E.2d 905, 911 (Ind. Ct. App. 2011).

i.Whether PacSun needs to first file a cause of action before seeking TRO

15. Simon argues that PacSun's Motion for TRO is improper because PacSun has not filed a formal claim (a counterclaim) against Simon and thus cannot seek injunctive relief. PacSun maintains that its request for injunctive relief arises from

Simon's conduct in this matter, which permits PacSun to seek injunctive relief. Additionally, PacSun intends to file formal claims (a counterclaim) in this action.

16. Under Indiana statute, a party may seek a preliminary injunction:

> "when, during the litigation, it appears that the defendant is: (A) doing; (B) threatening; (C) about to do; or (D) procuring or suffering to be done; some act in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual;

Burns Ind. Code Ann. § 34-26-1-5(a)(2).

17. In support, Simon directs the Court to the Texas case, *Brittingham v. Ayala*, where a claimant obtained an injunction from a Texas trial court freezing the defendant's assets based on an *ex parte* garnishment the claimant had obtained against the defendant in Mexico. 995 S.W.2d 199, 200 (Tex. App. 1999). The Texas Court of Appeals found that grant of an injunction to be an error because it was based on a foreign garnishment order that the claimant had not first domesticated into the United States. *Id.* at 201. Because the underlying claim was not actionable in Texas, an injunction based on that claim could not issue. *Id.*

18. Simon similarly argues that since PacSun has brought no underlying claim, PacSun cannot not seek injunctive relief.

19. The Court disagrees with Simon's position.

20. By unilaterally changing the locks to the stores, Simon has "done" some action that may violate PacSun's rights under Ind. Code § 34-26-1-5 since PacSun has the right to seek damages for an improper lockout Under Tex. Prop. Code § 93.002(g).

21. The Court thereby finds that PacSun can proceed seeking injunctive relief under its Motion for TRO.

ii. Whether PacSun is precluded from seeking injunctive relief under the "clean hands" doctrine

22. Simon also argues that PacSun cannot obtain injunctive relief due to having "unclean hands" for failing to pay outstanding rent owed.

23. Under the "clean hands" doctrine, one who seeks equity must be free of wrongdoing before the court. *Kobold v. Kobold*, 121 N.E.3d 564, 575 (Ind. Ct. App. 2019)

24. Whether PacSun has unclean hands remains to be determined. PacSun has provided a meritorious defense to the rent claims, (see *infra*), so the Court must still determine PacSun's liability before finding that PacSun has unclean hands for the purposes of disposing of injunctive relief. In dismissing a claim for equitable relief, the *Kobold* Court based its decision on an earlier trial court ruling that the party seeking relief was in default of an agreement. 121 N.E.3d at 569. Since no similar determination has yet been made in this case, the Court declines to find PacSun to be in breach of its rental obligations and thus unable to seek injunctive relief under the "clean hands" doctrine.

C. Four factors to obtain injunctive relief under the Motion for TRO

i. Likelihood of success on the merits

25. A party seeking a preliminary injunction "is not required to show that he is entitled to relief as a matter of law, nor is he required to prove and plead a case which would entitle him to relief upon the merits." *Norlund v. Faust*, 675 N.E.2d 1142, 1149 (Ind. Ct. App. 1997), *clarified on denial of reh'g*, 678 N.E.2d 421 (Ind. Ct. App. 1997).

26. The likelihood of success element is met if the party seeking injunctive relief shows that it has a "better than negligible" chance of succeeding on the merits. *IHSAA v. Martin*, 731 N.E.2d 1, 7 (Ind. Ct. App. 2000).

27. "Better than negligible" has been understood to mean the party can satisfy this factor "by establishing a prima facie case." *Coates v. Heat Wagons, Inc.*, 942 N.E.2d 905, 911 (Ind. Ct. App. 2011).

28. PacSun argues that it is has shown a likelihood of success on the merits on the lockout issue by arguing both that Simon could not change the locks without notice due to the terms of the leases and that PacSun cannot be considered delinquent on rent for the purposes of Tex. Prop. Code § 92.002.

a. General standards for lockouts under Tex. Prop. Code § 92.002.

29. "The Texas Property Code generally forbids a landlord from excluding or locking-out a tenant from property which is the subject of a valid lease agreement. *Ashford.Com, Inc. v. Crescent Real Estate Funding III, L.P.*, No. 14-04-00605-CV, 2005 WL 2787014, at *3 (Tex. App. Oct. 27, 2005) (citing Tex. Prop. Code Ann. § 93.002).

30. Under certain delineated circumstances, however, a landlord can exclude a tenant from a leased premises without going through judicial processes, *Saltworks Ventures, Inc. v. Residences at Spoke, LLC*, No. 03-16-00711-CV, 2018 WL 2248274, at *8 (Tex. App. May 17, 2018). Among those delineated circumstances, a landlord is permitted to "chang[e] the door locks of a tenant who is delinquent in paying at least part of the rent." Tex. Prop. Code § 93.002(c)(3).

31. While Tex. Prop. Code § 93.002 provides the landlord this right, any language of the lease that conflicts with the statute will supersede the statute. Tex. Prop. Code § 93.002(h).

32. PacSun contends that Simon's lockout procedure fails for two reasons 1) PacSun is not delinquent in rent, and 2) that twelve (12) of PacSun's leases with Simon conflict and thus supersede the self-help remedy under Tex. Prop. Code § 93.002(c)(3).

b. Whether the leases conflict with Tex. Prop. Code § 93.002

33. PacSun maintains that under most of the leases of the Texas stores, Simon was required to provide notice and engage in a legal process before changing the locks of the premises, which would conflict with Tex. Prop. Code § 93.002(c).

34. The relevant provided portions of the leases state:

> In any such event (including failure to Tenant to pay rent for more than ten (10) days after written notice of such failure). without grace period or notice, **Landlord, in addition to all other rights or remedies it may have**, shall have the right thereupon or at any time thereafter to terminate this Lease by giving notice to Tenant stating the date upon which such termination shall be effective, and **shall have the right**, either before or after any such termination, **to re-enter and take possession of the Premises**, remove all persons and property from the Premises, store property at Tenant's expense, and sell such property if necessary to satisfy any deficiency in payments by Tenant as required hereunder, **all with notice and resort to legal process.**

(Bowers Aff., Ex. D, PDF pp. 4, 7, 10, 14, 17, 23, 27, 31, 37; incomplete versions on PDF pp. 20, 34, 40) (emphasis added).

35. PacSun maintains that by changing the locks without notice or legal process, Simon has taken possession of the Texas premises through a procedure superseded by the leases. Because Simon is bound to the terms of the leases when they conflict with Tex. Prop. Code § 93.002(c)(3), PacSun argues that, at the very least,

it has shown a likelihood of success on showing that Simon violated Tex. Prop. Code § 93.002.

36. In response, Simon disagrees with PacSun's characterization of changing the locks on the Texas stores as "taking possession" of the premises such that the action would be governed by the lease. Simon has not entered any of the premises nor removed any property from the stores; Simon has only changed the locks and provided the required written notice on the store fronts. (Thomas Aff. ¶ 7). Simon argues that the leases do not specifically preclude Simon from taking these actions pursuant to Tex. Prop. Code § 93.002(c)(3); therefore, the lockout remedies are part of the rights and remedies reserved by Simon in the beginning of the referenced portions of the leases.

37. Whether the statute controls or the lease controls turns on whether changing the locks pursuant to Tex. Prop. Code § 93.002(c)(3) constitutes the kind of action to take possession contemplated under the terms of the twelve leases.

38. Based only on the designations provided, the language of the leases does not provide a clear answer in either direction. The Court will then look to other sources for guidance.

39. In their briefings on this matter, both parties referenced to Tex. Prop. Code § 93.003, the statute governing the tenant's right of reentry following a lockout under Tex. Prop. Code § 93.002.

40. The opening language of Tex. Prop. Code § 93.003 states, "If a landlord **has locked a tenant out of leased premises** in violation of Section 93.002, the tenant **may recover possession of the premises** as provided by this section." (emphasis added).

41. The remedy for the tenant under Tex. Prop. Code § 93.003 is to then retake possession back from the landlord once the landlord has exercised a right under Tex. Prop. Code § 93.002. By specifically using the phrase "recover[ing] possession" when describing the tenant's remedy under the statute, the Texas Legislature appears to suggest that the landlord must have taken possession of the premises from the tenant when changing the locks pursuant to Tex. Prop. Code § 93.002.

42. Reading the statutes together, the Court finds there is a reasonable interpretation of Simon's act of changing the locks on the PacSun stores as taking possession of all of the premises.

43. Because the leases of at least twelve of the Texas stores require Simon to provide notice and engage in a legal process before taking possession of those stores governed by the leases, the Court finds that PacSun has shown a prima facie case of Simon electing to use a remedy under Tex. Prop. Code § 93.002 despite it being superseded by agreement.

44. Because PacSun has shown a prima facie case for an impermissible seizing of possession of the twelve properties, the Court finds that PacSun has established a likelihood of success on the merits for at least those twelve stores.

c. Whether PacSun has shown a likelihood of success on the delinquent rent issue

45. Because the leases potentially precluded lockouts for only twelve of the sixteen stores at issue, the Court will address Defendant's other argument regarding whether the rent is delinquent.

46. PacSun maintains that the alleged rent owed to Simon is not delinquent because PacSun was not required to pay that rent under the leases due to the impossibility of performance defense to contract performance.

47. "Supervening impracticability excuses contract performance when, 'after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.'" *Samson Expl., LLC v. T.S. Reed Props., Inc.*, 521 S.W.3d 766, 775 (Tex. 2017).

48. PacSun argues that both the government-mandated shutdowns and Simon's own decision to close its malls prevented PacSun from being able to operate its retail stores, which is PacSun's primary obligation under the leases with Simon.

49. In response, Simon argues that the periods where the Simon malls were closed does not account for the entire period which PacSun owes rent. The Texas government-enforced closures ended on April 30, 2020. Simon reopened its retail centers on May 1.

50. PacSun had started reopening stores during May. By the end of May, all of the PacSun stores had reopened.

51. Simon argues that PacSun was required to pay its full May rent on May 1, which PacSun did not do. Despite not paying rent, PacSun opened and operated its stores in Simon retail centers.

52. Simon, therefore, maintains that PacSun is delinquent on at least some of the May rent because PacSun was operating despite not having paid the rent owned.

This presents a sufficient basis for Simon to justifiably to change the locks under Tex. Prop. Code § 93.002. Simon maintains that PacSun owes the full amount of the rents during the relevant period, but argues that even taking PacSun's impossibility argument based on government-enforced enclosures into account, PacSun would still owe at least some portion of the May rent after having reopened its stores during that month.

53. Additionally, Simon argues that all leases required PacSun to continue paying rent even through the government restrictions and other COVID-19 closures. In its Rule 1006 Summary of the leases at issue, Simon directs the Court to language of the Houston Premium Outlets lease by way of example, which states: "The Fixed Rent and Additional Rent shall be paid promptly when due, in lawful money of the United States, without notice or demand and without deduction, abatement, counterclaim or setoff of any amount or for any reason whatsoever…." (Rule 1006 Summary, Wigar, ¶ 6).

54. Simon additionally directs the Court to similar clauses that purport to obligate PacSun to continue paying rent regardless of any "other reason of a like nature not the fault of the party delayed in performing work or doing the acts required under this Lease," (Rule 1006 Summary, Wigar, ¶ 9), or despite "action by any government entity." (*Id.* ¶ 10). Regardless of any COVID-19 related restrictions imposed by the Texas government, Simon argues that the leases PacSun was still required to pay its minimum rent even when the stores were closed. By failing to do so, PacSun is delinquent.

55. Upon review of the designations, the Court finds that PacSun has shown a likelihood of success on the merits of their impossibility defense of the delinquent rent claim.

56. The COVID-19 pandemic has had unprecedented effects on nearly every facet of the public and private lives of Americans. The effects of both the COVID-19 disease and the public health responses to it on the national economy have sent profound shockwaves throughout all facets of the commercial sector. Courts around the country are grappling with how the monumental impacts of the COVID-19 crises are affecting arrangements between businesses and other service providers who entered into deals without ever entertaining the possibility that the performance would be interrupted by a global pandemic.

57. Due to the unprecedented nature of the disruption, the Court provisionally finds that PacSun's impossibility defense satisfies the likelihood of success factor by providing a prima facie case where performance under the leases was impossible, discharging PacSun from the obligation of paying rent to Simon during the relevant period.

58. The Court understands Simon's argument that the enforced closures of the mall did not last for the entire period for which Simon claims PacSun owes rent. The Court is willing to hear further evidence on this point at the preliminary injunction hearing and reconsider its position should PacSun be shown to be delinquent on its rent and subject to a lockout under Tex. Prop. Code § 93.002(c).

59. With respect to the argument that Simon shifted the costs of the risk of any government-enforced closure onto PacSun through the terms of the leases, the

Court still finds PacSun has met its burden for the purposes of the Motion for TRO. The Court will also revisit this issue at the preliminary injunction stage to determine if PacSun's defense can overcome the language of the leases.

60. In sum, the Court finds that PacSun has shown a prima facie case that the terms of at least twelve leases at issue could conflict with the lockout procedure under Tex. Prop. Code. § 92.002, and thus Simon should not have changed the locks on these stores without notice or legal process.

61. With respect to the remaining leases, the Court finds that PacSun has shown a prima facie defense that it is not delinquent on any rent amounts allegedly owed Simon under a theory of impossibility of performance.

62. Based on the designations before the Court, the Court finds that PacSun has shown a likelihood of success on the merits for the purposes of this Motion for TRO.

63. Because the Court resolved this dispute on other arguments, the Court declines to weigh whether Simon complied with the notice requirements under Tex. Prop. Code § 92.002.

ii. Irreparable harm

64. "Irreparable harm is that harm which cannot be compensated for through damages upon resolution of the underlying action." *Coates v. Heat Wagons, Inc.*, 942 N.E.2d 905, 912 (Ind. Ct. App 2011). "The trial court should only award injunctive relief where a legal remedy will be inadequate because it provides incomplete relief or relief that is inefficient 'to the ends of justice and its prompt administration.'" *Id.*

65. One purpose of a preliminary injunction is to prevent harm to the moving party that could not be corrected by a final judgment." *Crossman Communities, Inc. v. Dean*, 767 N.E.2d 1035, 1042 (Ind. Ct. App. 2002).

66. PacSun argues that being locked out of its Texas locations causes irreparable harm to its goodwill and relationships with customers, which is sufficient to support a finding of irreparable harm. *See Gleeson v. Preferred Sourcing, LLC,* 883 N.E.2d 164, 173 (Ind. Ct. App. 2008).

67. The Court agrees with PacSun that being locked out its stores without a notice of unpaid rent could irreparably harm its goodwill and relationships with customers.

68. The Court finds that PacSun has satisfied the irreparable harm factor for the purposes of the Motion for TRO.

iii. Balance of the harms

69. The Court must also determine whether the balance of the harms between the PacSun and Simon parties favors granting the Motion for TRO.

70. PacSun argues that the balance of harms weighs in favor of granting injunctive relief because PacSun will not be able to generate any revenue from its stores on top of the irreparable harm to its good will and customer relationships previously discussed.

71. In comparison, PacSun argues that Simon will not suffer from PacSun operating its Texas locations while this case is pending. In fact, PacSun argues that operating its Texas stores benefits Simon because Simon would receive a larger amount of percentage rent.

72. The Court agrees with PacSun and finds the balance of harms favors granting the Motion for TRO.

iv. Whether a TRO would violate the public interest

73. "Whether a particular covenant is against public policy is a question of law for the court to determine from all the circumstances." *Bowling v. Nicholson*, 51 N.E.3d 439, 445 (Ind. Ct. App. 2016). "[P]ersons should not be unnecessarily restricted in their freedom to contract."

74. PacSun argues that granting the Motion for TRO would not go against public policy. PacSun maintains that opening its stores allows PacSun to participate in the recovery of retail sales being experienced as COVID-19 restrictions are being lifted. By being allowed to operate, PacSun can bring its workforce back from furlough and generating taxable revenue for the communities.

75. Simon maintains granting the Motion for TRO would violate public policy because it would deprive Simon's rights under Texas law.

76. Based on the designations presented, the Court finds that granting PacSun's Motion for TRO would not violate the public interest.

D. Bond Amount

77. Under T.R. 65(C), no TRO may issue without adequate security.

78. PacSun has asked for no bond because Simon cannot point to any damages that would arise from PacSun operating its Texas locations.

79. The Court finds that Simon incurred costs in changing the locks. (Plf. Ex. 1, Thomas Aff.) If the Motion for TRO were erroneously granted, Simon would have had the right to change the locks and should be able to recover those costs.

80. The Court hereby sets the bond amount at $6,025.00

ORDER

Based on the foregoing analysis, the Court hereby GRANTS PacSun's Motion for TRO against Simon. Simon is thereby ordered to make the new keys to the sixteen PacSun stores in Texas available to PacSun by no later than midnight on June 26, 2020.

The Court hereby sets a telephonic pre-trial conference to discuss scheduling a hearing date on the preliminary injunction and discussing discovery matters on July 7, 2020 at 1:30 pm for 30 minutes.

SO ORDERED, ADJUDGED, AND DECREED this 26th day June 2020.

Heather A. Welch

Hon. Heather A. Welch, Judge
Marion Superior Court 1
Indiana Commercial Court

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