

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GMAC REAL ESTATE, LLC,)
)
Plaintiff,)
)
v.) CIVIL ACTION FILE
)
METRO BROKERS, INC., KEVIN R.) NO. 1:09-CV-02838-JEC
LEVENT and CLYDE W. CARVER,)
)
Defendants.)
)

**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR
TEMPORARY RESTRAINING ORDER AND
PRELIMINARY INJUNCTION**

COMES NOW Plaintiff GMAC Real Estate, LLC ("GRE"), and submits this Memorandum of Law in Support of its Motion for Temporary Restraining Order and Preliminary Injunction against Defendant Metro Brokers, Inc. ("Metro") and shows the Court as follows:

INTRODUCTION

On October 1, 2004, GRE entered into a franchise agreement (the "Agreement") with Metro. Among other things, the Agreement granted to Metro the exclusive right to operate a GRE franchise and to use certain service marks and trademarks of GRE (the "Exclusive Franchise") in a defined territory in Northern Georgia (the "Licensed Territory"). On October 1, 2009, Metro sent notice to GRE

of Metro's attempted termination of the Agreement. Although GRE vigorously disputes that Metro's termination of the Agreement was effective, pursuant to the Agreement, Metro's notice of termination irrevocably waived Metro's Exclusive Franchise in the Licensed Territory. Accordingly, Metro's notice of termination permitted GRE to immediately enter into franchise agreements with third parties, and to license third parties to use GRE's marks, in the Licensed Territory. In the alternative, GRE properly terminated the Agreement on October 13, 2009, likewise terminating Metro's Exclusive Franchise in the Licensed Territory and permitting GRE to immediately enter into franchise agreement with third parties, and to license third parties to use GRE's marks, in the Licensed Territory. Out of an abundance of caution, however, on October 14, 2009, GRE sent a letter to Metro asking whether Metro planned to object to GRE undertaking such actions in the formerly exclusive Licensed Territory. Metro failed to timely respond to the letter, indicating their apparent objection to GRE's proposed actions. Accordingly, GRE seeks an Order from the Court restraining Metro from preventing or attempting to prevent GRE from entering into franchise agreements with third parties, and licensing third parties to use GRE's marks, in the Licensed Territory.

RELEVANT FACTS

1. The Parties Enter An Exclusive Franchise Agreement.

On or about October 1, 2004, GRE entered into a written real estate franchise agreement with Metro (the "Agreement"). *See* First Amended Verified Complaint for Damages, Injunctive Relief and Declaratory Judgment ("Compl.") at ¶ 11, Ex. 1. The Agreement was scheduled to expire on January 31, 2014. Compl., Ex. 1 at Section 28. During its term, the Agreement granted to Metro the exclusive right to operate a GRE franchise and to use certain service marks and trademarks of GRE (the "Exclusive Franchise") in a defined territory in Northern Georgia (the "Licensed Territory"). Compl. at ¶¶ 12 and 16, Ex. 1 at Section 6. Among other things, in exchange for the Exclusive Franchise in the Licensed Territory, Metro was obligated to pay to GRE certain franchise fees, referral office fees, referral fees, new office fees and advertising fees, as well as submit to GRE certain reports. Compl. at ¶ 13, Ex. 1 at Section 10 and Section 11.

2. The Parties Agree That A Termination Of The Agreement By Either Party Will Terminate Metro's Exclusive Franchise In The Licensed Territory.

Pursuant to the Agreement, "[t]he service of [Metro's] Termination Notice by [Metro] shall: (1) be deemed to be an irrevocable waiver by [Metro] of the exclusivity of the Licensed Territory and Sites and [GRE] shall be free to license other parties to use the Marks in the Licensed Territory and at the Licensed Sites." Compl., Ex. 1 at Section 18(a)(i). Likewise, GRE's termination of the Agreement

terminated Metro's Exclusive Franchise in the Licensed Territory. Compl., Ex. 1 at Section 18(d).

3. Metro Attempts To Terminate The Agreement, Irrevocably Waiving And Terminating Metro's Exclusive Franchise In The Licensed Territory.

On October 1, 2009, Metro attempted to terminate the Agreement, effective January 16, 2010, pursuant to Section 3(a), Section 18(a)(i) and Section 18 (a)(ii) of the Agreement. Compl. at ¶ 64, Ex. 7. Pursuant to the Agreement, Metro was permitted to terminate the Agreement prior to its expiration only if certain conditions existed. Compl. at ¶ 65.

Pursuant to Section 3(a), Metro could terminate the Agreement twelve months after GRE provided written notice to Metro of a change to GRE's relevant Marks. Compl. at ¶ 66, Ex. 1. at Section 3(a). Metro's attempted termination of the Agreement pursuant to Section 3(a) was ineffective because GRE had not – and has not - provided twelve months' written notice to Metro of a change to GRE's relevant Marks. Compl. at ¶ 67.

Pursuant to Section 18(a)(i) of the Agreement, Metro could terminate the Agreement if GRE was in default under the Agreement and failed to cure that default within 30 days after written notice of the default from Metro. Compl. at ¶ 68, Ex. 1 at Section 18(a)(i). On October 1, 2009, Metro sent a letter to GRE, alleging that an August 18, 2009 letter from GRE – concerning outstanding fees *owed by Metro to GRE* – constituted an event of default *by GRE* under the

Agreement. Compl. at ¶ 69, Ex. 8. Notably, Metro's letter describing GRE's purported default was sent after Metro attempted to terminate the Agreement. Compl. at ¶ 70. The October 1, 2009 default notice letter from Metro is time-stamped at 3:48 p.m., ten minutes *after* Metro's October 1, 2009 termination letter, which is time-stamped at 3:38 p.m. Compl. at ¶ 70. Regardless, Metro's attempted termination of the Agreement pursuant to Section 18(a)(i) was ineffective because GRE was not then, and is not now, in default under the Agreement. Compl. at ¶ 71.

Finally, pursuant to Section 18(a)(ii) of the Agreement, Metro could terminate the Agreement at Metro's option, effective 180 days after service upon GRE of notice of termination. Compl. at ¶ 72, Ex. 1 at Section 18(a)(ii). Metro's attempted termination of the Agreement pursuant to Section 18(a)(ii) was ineffective because Metro did not provide notice of its attempted termination at least 180 days before the effective date of the attempted termination. Compl. at ¶ 73. To date, Metro has not properly terminated the Agreement. Compl. at ¶ 74.

4. GRE Terminates The Agreement Based On Metro's Default, Terminating GRE's Exclusive Franchise In The Licensed Territory.

Beginning in late 2008, Metro ceased paying to GRE the fees that it was required to make under the Agreement. Compl. At the request of Metro, in or about March 2009, GRE and Metro discussed amending the Agreement. Compl. at ¶ 33. Among other things, the parties discussed implementing a fee waiver,

sometimes referred to as a "fee holiday" whereby *certain* delinquent fees – but not all fees – owed by Metro to GRE could be deferred and paid at a later date. Compl. at ¶ 34. GRE and Metro exchanged drafts of a Franchise Agreement, Amendment 14 (the "Amendment") to the Agreement, which modified certain terms of the Agreement, including a proposed fee waiver to occur from January 1, 2009 through September 30, 2009. Compl. at ¶ 35. Among other things, the proposed fee waiver would have deferred to a later date Metro's obligations to pay franchise fees and advertising fees. Compl. at ¶ 36.

In or about early to mid-April 2009, Metro orally accepted the basic terms of the Amendment, subject to approval and acceptance by GRE. Compl. at ¶ 37. Between March 2009 and August 2009, GRE officials and Defendant Kevin R. Levent ("Levent") engaged in several phone calls and multiple in-person meetings to discuss, among other things, the terms of the Amendment, including the proposed waiver of certain fees. Compl. at ¶ 38.

Unable to agree on terms amending the Agreement, on August 18, 2009, GRE provided notice to Metro of its default under the Agreement based on Metro's failure to pay all amounts owed to GRE and based on Metro's failure to submit to GRE certain required reports. Compl. at ¶ 39, Ex. 2. Metro failed to cure these defaults within 30 days after receiving notice from GRE. Compl. at ¶ 40.

Instead, on September 14, 2009, Metro sent a letter to GRE contending that Metro was somehow not in default. Compl. at ¶ 41, Ex. 3. Specifically, Metro contended that it was granted a "franchise fee holiday period" for "all of 2009" based on a February 26, 2009 letter from John B. Bearden, the former President of GRE, sent to Fidelity Bank, a third party. Compl. at ¶ 42, Ex. 4.

The February 26, 2009 letter from GRE to a third party did not grant Metro a "franchise fee holiday" or otherwise relieve Metro of any of its obligations owed to GRE under the Agreement. Compl. at ¶ 43. Rather, the letter indicated GRE's willingness to consider an amendment to the Agreement that might include a deferral of franchise fees only. Compl. at ¶ 43. Such an amendment would require agreement on a variety of other terms, as well as a formal writing. Compl. at ¶ 43. Falling far short of a binding agreement under Georgia law, the February 26, 2009 letter lacked nearly all the elements required to form a valid contract, including the lack of several critical material terms. Compl. at ¶ 44. Indeed, GRE and Metro continued to negotiate these critical material terms for several months after February 26, 2009, without reaching agreement. Compl. at ¶ 45.

Instead, the February 26, 2009 letter merely communicated GRE's "*willingness* to provide [Metro] a franchise fee holiday for the foreseeable future." Compl. at ¶ 46, Ex. 4 (emphasis added). The February 26, 2009 letter did not define the fee or fees to be included in the "franchise fee holiday." Compl. at ¶ 47.

The February 26, 2009 letter did not provide a time period during which the "franchise fee holiday" would apply. Compl. at ¶ 48. The February 26, 2009 letter did not specify when Metro would be required to repay the fees otherwise deferred during the "franchise fee holiday." Compl. at ¶ 49. The February 26, 2009 letter was silent on the issue of whether the fees were being completely forgiven, or whether the fees were being deferred, to be repaid by Metro to GRE at a later date. Compl. at ¶ 50. The February 26, 2009 letter failed to describe treatment of the outstanding fees already accrued by Metro and owed by Metro to GRE on or before February 26, 2009. Compl. at ¶ 51. Metro provided no consideration to GRE in exchange for the February 26, 2009 letter. Compl. at ¶ 52.

Moreover, the Agreement contains a merger clause, requiring any modification to the Agreement be in writing and *signed by all parties*. Compl. at ¶ 53, Ex. 1 at Section 24 (emphasis added). The February 26, 2009 letter was not signed by all parties. Compl. at ¶ 54. The February 26, 2009 letter from GRE was addressed and sent to an unrelated third party - not to Metro. Compl. at ¶ 55. In addition, Metro's negotiation with GRE from March 2009 through August 2009 concerning a proposed fee waiver, flies in the face of Metro's contention that a "fee holiday" for "all of 2009" was already in place as of February 26, 2009. Compl. at ¶ 56.

In short, the February 26, 2009 letter had no impact on Metro's obligations to GRE under the Agreement, and did not absolve Metro of its default. On September 24, 2009, GRE sent a letter to Metro's counsel, reiterating that Metro remained in default under the Agreement and had failed to timely cure its default. Compl. at ¶ 57, Ex. 5. To date, Metro has failed to cure its default. Compl. at ¶ 58. As of October 13, 2009, Metro is required to pay to GRE, among other amounts, all fees, charges and other amounts due to GRE, totaling \$206,660.45. Compl. at ¶ 60, Ex. 1 at Section 19(a)(2). Based on Metro's uncured default, on October 13, 2009, GRE terminated the Agreement pursuant to Section 18(d) of the Agreement. Compl. at ¶ 59, Ex. 6.

5. Metro Refuses To Agree That Its Exclusive Franchise In The Licensed Territory Has Been Terminated.

At 10:11 a.m. on October 14, 2009, out of an abundance of caution and in an effort to avoid the Court's involvement in this limited issue, the undersigned counsel for GRE electronically mailed to Metro's counsel a letter asking Metro whether they planned to object to GRE's immediate "license of other parties to use the Marks in the Licensed Territory and at the Licensed Sites" in light of Metro's attempted October 1, 2009 termination. *See* the Affidavit of Richard K. Hines, V. (the "Hines Aff.") at ¶ 3, Exhibit A. The letter went on to state:

Please respond to this letter on or before Wednesday, October 14, 2009 at 5 p.m. EDT and state whether Metro will contend that GRE does not have the right to immediately "license other parties to use the

Marks in the Licensed Territory and at the Licensed Sites" as those terms are defined in the Agreement. If we do not receive a response from you on or before Wednesday, October 14, 2009 at 5 p.m. EDT, we will deem your failure to respond as an objection to GRE's right to immediately undertake such action and GRE will seek available legal remedies to enforce its rights under the Agreement, including but not limited to requesting from the Court a temporary restraining order concerning the subjects of this letter.

Hines Aff. at ¶ 4, Ex. A. Undersigned counsel also left two voicemails for counsel for Metro, and sent another follow-up E-Mail, but counsel for Metro failed to respond in any manner until October 16, 2009. Hines Aff. at ¶ 5. Since that time, counsel for GRE and counsel for Metro have communicated, but were unable to reach a resolution on the subject matter of this Motion.

ARGUMENT

Pursuant to FED. R. CIV. P. 65, a party seeking a temporary restraining order must establish:

- (1) a substantial likelihood that the movant will ultimately prevail on the merits;
- (2) it will suffer irreparable harm if the injunction is not issued;
- (3) the irreparable harm it will suffer if the injunction is not granted is greater than the irreparable harm the defendant will suffer if the injunction is granted; and
- (4) an injunction will not harm the public interest.

Haitian Refugee Center, Inc. v. Nelson, 872 F.2d 1555, 1561-62 (11th Cir. 1989), *aff'd* 498 U.S. 479 (1991). Pursuant to its terms and Georgia law, the Agreement

is to be construed in accordance with Georgia law. Compl. at ¶ 16, Ex. 1 at Section 23. Pursuant to the Agreement, GRE "may seek to enforce, through litigation, its rights that require the entry of injunctive or similar relief, as determined by the court to which an application for such relief is made." Compl. at ¶ 17, Ex. 1 at Section 23 (b).

1. There Is A Substantial Likelihood That GRE Will Succeed On The Merits Of Its Claims.

A temporary restraining order ("TRO") should be granted if there is a substantial likelihood that the plaintiff will succeed on the merits of its case. *Schiavo v. Schiavo*, 403 F.3d 1223, 1225-1226 (11th Cir. 2005). When seeking a TRO, however, a plaintiff need not prove that it will ultimately prevail. *Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir. 1985). Here, there is a substantial likelihood that GRE will succeed on the merits of its claims.

It is undisputed that on October 1, 2009, Metro served a termination notice to GRE attempting to terminate the Agreement. Compl. at ¶ 64, Ex. 7. Although GRE vigorously disputes that Metro's termination was effective, pursuant to the Agreement, "[t]he service of [Metro's] Termination Notice by [Metro] shall: (1) be deemed to be an irrevocable waiver by [Metro] of the exclusivity of the Licensed Territory and Sites and [GRE] shall be free to license other parties to use the Marks in the Licensed Territory and at the Licensed Sites." Compl. at Ex. 1.

In the alternative, GRE properly terminated the Agreement on October 13, 2009, likewise terminating Metro's Exclusive Franchise in the Licensed Territory. The Agreement is a valid and binding agreement under Georgia law and is fully enforceable in this Court. Accordingly, GRE is entitled to enter into franchise agreements with third parties, and to license third parties to use GRE's marks, in the Licensed Territory.

2. GRE Will Suffer Irreparable Harm In The Absence Of A Temporary Restraining Order.

A TRO should be granted if, absent the TRO, a plaintiff will suffer irreparable injury. FED. R. CIV. P. 65(b)(1)(A). An irreparable injury must be actual and imminent. FED. R. CIV. P. 65(b)(1)(A); *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007). Further, an irreparable injury is one that cannot be prevented or fully rectified by a final judgment following a trial. *Roland Mach. Co. v. Dresser Indus.*, 749 F.2d 380, 386 (7th Cir. 1984). An injury is irreparable if it is not accurately measurable, if the plaintiff cannot be adequately compensated in damages, or if the defendant would be unable to pay. *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 19 (1st Cir. 1996).

Here, absent a TRO, GRE will suffer actual and imminent irreparable injury because such injury cannot be accurately measured and because GRE cannot be adequately compensated in damages. GRE's loss of its presence in the market will not be susceptible to quantification as money damages; at stake is not just the

replacement of the lost revenue stream formerly attributable to Metro, rather, the ability to replace (or even increase) that revenue stream depends entirely on the continuity of the GRE brand in the eyes of the public and among the real estate professional community.

GRE's business is supported solely by franchisees. GRE conducts its business exclusively through franchisees and GRE establishes its presence in the market – and the value of its brand name in the given market – in conjunction with the efforts of its franchisees. Here, GRE invested and assisted Metro for the past 15 years to establish and build the GRE brand name in the Northern Georgia market. Once the name is withdrawn from the market by virtue of Metro's actions, the value of the GRE name, and its recognition by the public and professionals, becomes a quickly vanishing asset. Thus, the passage of time renders the task of finding a replacement franchisee increasingly difficult.

Indeed, if replacement of the market is not achieved in the short term, it is more likely that GRE will be frozen out of the market for many years. Accordingly, it is necessary to immediately replace Metro with another brokerage company in the Licensed Territory for various reasons, including the need to continue the GRE presence in the market in order to sustain GRE as a viable entity in the Licensed Territory. Moreover, a limited number of prospective franchisees exist in the Licensed Territory, comprised of a finite population of licensed real

estate agents and brokers. The existing agents and brokers in the market, who would otherwise want to join or remain part of the GRE network, will be making decisions in the next few days and weeks as to the given real estate company with which they seek to affiliate. GRE will forfeit the opportunity to capture these potentially interested agents and brokers if GRE does not act quickly to seize a foothold in the market. Finally, if Metro is permitted to continue to use the GRE Marks and otherwise continue the franchise relationship until it expires under the terms of the Agreement - even though Metro has expressly stated its desire to terminate the relationship and GRE is aware that Metro is searching for a new franchise relationship - GRE will suffer immeasurable detriment to its brand. The damage done to GRE in the Licensed Territory absent the requested TRO will likely span to other territories. Such irreparable injuries cannot be adequately measured and GRE cannot be adequately compensated in damages.

3. The Balance Of Hardships On The Respective Parties Favors Issuance Of Injunctive Relief.

A TRO should be granted if the injury faced by the plaintiff outweighs the injury that would be sustained by the defendant as a result of the injunctive relief. *Yakus v. U.S.*, 321 U.S. 414, 440, 64 S. Ct. 660, 675 (1944). Here, the balance of hardships favors the issuance of a TRO. Indeed, as of October 1, 2009, Metro at least attempted to terminate the Agreement, evidencing Metro's desire to end its franchise relationship with GRE. As a necessary result, Metro will need to affiliate

itself with another franchisor or otherwise continue operating without a franchise agreement. To that end, Metro will suffer little to no harm if GRE enters into franchise agreements with third parties, and licenses to third parties the use of GRE's marks, in the Licensed Territory.

4. The Public Interest Will Be Served By An Injunction.

Finally, a TRO should be granted if the relief requested would not adversely affect public policy or the public interest. *Davidoff & CIE, S.A. v. PLD Int'l*, 263 F.3d 1297, 1304 (11th Cir. 2001). Here, the issuance of a TRO as requested by GRE would not adversely affect public policy or the public interest.

Pursuant to FED. R. CIV. P. 65(b)(1)(B) and LR 7.5(B), counsel for GRE certifies that it has given notice of this pleading to counsel for Metro contemporaneous with this filing, via E-Mail and via facsimile.

Pursuant to FED. R. CIV. P. 65(b)(1)(A), GRE's Motion is supported by, among other things, a verified complaint.

Pursuant to FED. R. CIV. P. 65(c), GRE stands willing to post a bond in an amount deemed reasonable and necessary by the Court.

For the foregoing reasons, GRE respectfully requests the Court grant its Motion for Temporary Restraining Order and Preliminary Injunction.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the within and foregoing

**MOTION FOR TEMPORARY RESTRAINING ORDER AND
PRELIMINARY INJUNCTION MEMORANDUM OF LAW IN SUPPORT**

via electronic communications and fax to:

Counsel for Defendants
Gary S. Freed, Esq.
191 Peachtree Street, N.E.
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This 19th day of October, 2009.

/s/ Richard K. Hines, V

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