COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2004-02614

JOHN R. ALLEN,
SUBLESSEE OF SUBWAY REAL ESTATE CORP.,
- Plaintiff

vs.

R.K. ASSOCIATES, INC.
- Defendant

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Plaintiff John R. Allen ("plaintiff"), sublessee of Subway Real Estate Corp. ("Subway"), moves for a preliminary injunction against defendant R.K. Associates, Inc. ("defendant"). Plaintiff seeks to enjoin defendant from leasing certain commercial property to a developer of a Panera Bread Bakery Café ("Panera"), as such a lease would allegedly violate the terms of a lease plaintiff and defendant agreed to in 1995. Defendant argues that its proposed lease to Panera does not violate the terms of its lease with plaintiff. For the following reasons, plaintiff's motion is **ALLOWED**.

FACTUAL BACKGROUND

In November, 1994, defendant executed a lease with Subway for commercial property defendant owned in Marlborough. In June,1995, Subway executed and delivered a sub-lease of the premises to plaintiff, who had previously reached a franchise agreement with Subway. Plaintiff's wife, Lucy Lu Allen, currently operates plaintiff's Subway sandwich shop franchise at

that Marlborough location, as she has done since 1995. Mrs. Allen's operation of the Marlborough Subway franchise is her full-time job and only source of income.

The lease that Subway and defendant agreed to in 1995 states that

> Landlord agrees not to . . . lease, let, use or permit to be used, any property owned or controlled by it within one mile of the leased premises now or at any time during the period of this lease or any extension *to any tenant or subtenant whose main principle* [sic] *business is the sale of submarine sandwiches or Deli-type sandwiches*, such as Miami Sub, DeAngelo's, Blimpies, Kelly's Roast Beef, Schlotzky . . . . [Notwithstanding] the above, Landlord shall have the right to lease space to a pizza restaurant and/or Bruegger's Bagel or to any other restaurant whose main principle [sic] business is not the sale of submarine or deli-type sandwiches.

(emphasis added). The lease contains no definition of "main principle[1] business" or "Deli-type sandwiches."

Sometime in the spring of 2004, defendant began negotiations with Panera to rent commercial space located in the same commercial shopping center as plaintiff's Subway franchise.[2] In response, plaintiff hired an investigator to observe Panera stores to determine whether Panera's proposed use of defendant's commercial space would violate the terms of the Subway lease. After deciding that a lease with Panera would violate the terms of the Subway lease, plaintiff filed its verified complaint for equitable relief on June 29, 2004.[3]

According to defendant, the Panera store is not scheduled to open until September, 2004.

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[1] This word is misspelled in the lease language; the court will use its proper spelling throughout the remainder of this decision.

[2] At that time the space was occupied by a Dress Barn retail clothing store.

[3] The verified complaint contains four counts: (I) action for injunction; (II) misrepresentation; (III) violation of G.L. c. 93A; and (IV) breach of contract. The misrepresentation claim stems from communications between defendant and plaintiff's attorney, before the verified complaint was filed, in which defendant allegedly misrepresented the proportion of sandwich sales to overall sales at Panera stores.

Defendant claims that it and Panera have each expended considerable time and money in preparing for Panera's proposed lease and business operations.

DISCUSSION

Preliminary Injunction Standard

Courts must consider three factors when deciding motions for preliminary injunctions: (1) plaintiff's likelihood of success on the merits; (2) the risk of irreparable harm to the plaintiff if the motion for an injunction is denied; and (3) the irreparable harm to the defendant if the motion for an injunction is allowed. Packaging Industries Group, Inc. v. Cheney, 380 Mass. 609, 617 (1980).

Disposition of plaintiff's motions depends on whether the proposed Panera store's "main principal business" is the sale of "Deli-type" sandwiches. This court has little difficulty finding that Panera is engaged in the sale of "Deli-type" sandwiches.[4] Thus, this court must determine the meaning of "main principal" business. As the plaintiff's lease contains no definition of "main principal business," the court must ascertain the ordinary meanings of those terms.

Main has been defined as an adjective as "most important; principal," and as a noun as "the chief or largest part." The American Heritage Dictionary of the English Language (4th Ed. 2000). Principal has been defined as "first, highest, or foremost in importance, rank, worth, or degree; chief." Id.

According to Panera's national sales data, as provided by defendant, sandwich sales

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[4] Defendant submitted a Panera menu that lists a variety of sandwiches Panera sells. As the language of the lease contains no definition of "Deli-type" sandwiches, this court applies the ordinary meaning of that term and finds that Panera's sandwiches fall under the ordinary definition of "deli." See Kobayashi v. Orion Ventures, 42 Mass. App. Ct. 492 (1997) for a discussion of the definition of "deli."

accounted for 25 percent of Panera's sales in 2003 and 23.6 percent in 2004. However, Panera lists sales figures for paninis separately from sandwich sales figures; under the broad definition of "deli" paninis clearly are to be considered deli sandwiches.[5] When panini sales figures are combined with sandwich sales, those numbers are 31 percent in 2003 and 30.6 percent in 2004. The next highest sales item figures are listed in a category named "Not Available," which appears to be combined sales of coffee, sodas, etc., at 26.5 percent in 2003 and 26.6 percent in 2004. After the Not Available category, soup comprises Panera's largest sales item, at 18.3 percent in 2003 and 19 percent in 2004.

It is clear that Panera has a diverse array of sales items, including sandwiches, soups, salads, bread, bagels and cream cheese, and the miscellaneous items that apparently are lumped into the "Not Available" category. However, according to Panera's own data, deli sandwiches – sandwiches and paninis – account for the largest percentage of Panera's sales. In other words, deli sandwiches are the "main" or "principal" sales items on Panera's menu. Under the terms of Subway's lease with defendant, plaintiff has established a likelihood of success on the merits that Panera's sale of deli-type sandwiches is its main principal business, and is therefore covered by the restrictions in the lease.

In balancing the potential harm to each party in light of plaintiff's likelihood of success on the merits, this court finds that the potential harm to plaintiff outweighs the potential harm to defendant. Plaintiff's Subway shop is the only source of income for his wife and constitutes her full-time job; plaintiff submitted data that the profitability of his store would disappear if he were to lose only 28 customers per day. Allowing a company to compete with plaintiff in violation of

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[5] A panini is simply a particular Italian style of deli sandwich.

the plain terms of the Subway lease would effectively eliminate or greatly reduce plaintiff's ability to operate a profitable location.[6]

While this court does not doubt that defendant will suffer some harm if an injunction is granted, such as financial losses from its negotiations with Panera and expenses in finding another lessee for its space, that harm must be considered in light of the fact that defendant's proposed lease with Panera would likely violate the plain terms of the restriction in the Subway lease. Defendant is allowed to lease its space to a wide variety of stores, including restaurants, as long as the "main principal" business of those stores is not the sale of deli-type sandwiches. And while defendant argues that its lease with Subway was only intended to preclude its leasing of commercial space to Subway-style sub and sandwich shops, and not more item-diverse, café-style shops like Panera, that argument does not change the fact that the plain terms of the Subway lease preclude the leasing of commercial space to any business whose main principal business is deli-sandwich sales. Defendant could have used more specific language or definitions for the terms in the lease, but having failed to do so is bound by the language that it ultimately agreed to.

As Panera's sales data establishes the principal significance of its deli-type sandwich sales, plaintiff has established a likelihood of success on the merits and the probability that plaintiff will suffer more harm if the injunction is not granted than will defendant if the injunction is granted.

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[6] Defendants argue that an injunction is inappropriate where only monetary loss is involved. While plaintiff certainly alleges that competition with Panera will lead to economic losses, the thrust of his allegations are that the economic losses plaintiff will suffer from competing with Panera (in violation of the lease terms) will be so severe that his business could not survive. Such potential harm is subject to the remedy of an injunction. See Hull Municipal Lighting Plant v. Massachusetts Municipal Wholesale Electric Co., 399 Mass. 640, 643 (1987) (while economic loss alone does not usually constitute irreparable harm, "recoverable monetary loss may constitute irreparable harm where the loss threatens the very existence of the movant's business.").

ORDER

For the foregoing reasons, plaintiff's motion for a preliminary injunction is **ALLOWED**. It is hereby **ORDERED** that defendant R.K. Associates, Inc. is preliminarily enjoined from leasing its Marlborough commercial space, currently home to Dress Barn, to Panera Bread Bakery Café.

Wendie I. Gershengorn
Justice of the Superior Court

DATED: July 16 2004

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

04-J-344

JOHN R. ALLEN

vs.

R.K. ASSOCIATES, INC.

ORDER

This matter is before the court on the defendant, R.K. Associates, Inc.'s (R.K.), petition seeking review, pursuant to G. L. c. 231, § 118, par. 1, of an order of the Superior Court allowing the plaintiff, John R. Allen's motion for injunctive relief. After review of the petition and opposition, I vacate the injunction dated July 16, 2004.

R.K. owns a shopping center in Marlborough, Massachusetts (the mall). In 1994, R.K. entered into a lease with Subway Real Estate Corp. for the operation of a Subway shop at the mall. Allen, a sublessee, operates the Subway shop.[1]

The lease between R.K. and Allen to operate the Subway shop contains the following restrictive covenant:

> "Landlord agrees not to sell, lease, let, use, or permit to be used, any property owned or controlled by it within one mile of the leased premises now or at any time during the period of this Lease or an extension to any [*] tenant or subtenant whose main principle (sic) business is the sale of submarine sandwiches or deli-type sandwiches, such as Miami Sub, D'Angelos, Blimpies, Kelly's Roast Beef, Scholtzsky. . . . [**] [Notwithstanding] the above, Landlord shall have the right to lease space to a pizza restaurant and/or Brueggers Bagel or to any restaurant whose primary business is not the sale of submarine or deli-type sandwiches."

On June 29, 2004, Allen filed a verified complaint seeking, inter alia, an injunction,

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[1] For ease of reference, the claim of the plaintiff Allen may from time to time be attributed to the business, Subway.

enjoining R.K. from leasing space in the mall to the operator of a Panera Bread Bakery Café (Panera). After a hearing, a Superior Court judge enjoined R.K. "from leasing its Marlborough commercial space, . . . to Panera Bread." This petition followed.

"Appellate review of a trial court order disposing of a preliminary injunction application . . . focuses on whether the trial court abused its discretion – that is, whether the court applied proper legal standards and whether the record discloses reasonable support for its evaluation of factual questions." Edwin R. Sage Co. v. Foley, 12 Mass. App. Ct. 20, 25 (1981). To obtain a preliminary injunction, the moving party must demonstrate "both a likelihood of success on the merits and a substantial risk of irreparable harm." Wilson v. Commissioner of Transitional Assistance, 441 Mass. 846, 851 (2004).

In this case, the turning points in assessing likelihood of success depend on whether Panera's sandwich "offerings," using Panera baked breads, fall within the class of "deli-type" sandwiches prohibited by the lease and whether, if so, deli sandwiches are the main and principal business of Panera. Panera contends its sandwiches are speciality sandwiches -- not deli-like -- and that, moreover, sandwiches comprise only roughly 30% of its sales, the remaining approximately 70% consisting of the sale of other Panera products.

Applying the preliminary injunction standards above stated, if the Panera sandwiches are not truly deli sandwiches, and if such sales are not the greater, i.e., the principal amount of, and primary component of, the Panera business, then, it would not be more probable than not that Subway would prevail on its complaint for enforcement of the restrictive covenant, nor on its claim that the lease was violated by Panera having space in the mall. In my opinion, based on the extant record, the probabilities do not tilt toward Subway, which has the burden of proof at this

litigation point in seeking an injunction pendente lite. (This is not, of course, to be construed as any assessment of the ultimate merits to be developed at trial). The specific references in the lease benote a discrete and limited class -- submarine and deli sandwiches -- and do not encompass the varied and diverse universe of all "structures" of bread with embedded contents, such as the composite of Panera bread surrounding sandwiches, a version of which is named panini. Even the named exclusions in the lease, e.g., Miami Sub, D'Angelos, Blimpies, Kelly's Roast Beef, Scholtzsky benote submarine/deli based sandwiches; contrast the name Panera Bread Bakery Café.

Second, in my opinion, Subway's claim fails on the other preliminary injunction prerequisite, demonstrating substantial risk of irreparable harm. On this point, I am not persuaded that the extant record supports the Superior Court determination that Subway would be irreparably harmed if an injunction did not issue. Nor does the record, contrary to the summary conclusion set forth in a short footnote in the Superior Court order, establish that the potential economic loss is such that the very existence of the Subway business is threatened. The information compiled by Subway by having an investigator randomly view two other Panera stores in different places on four days is foundationally inadequate to demonstrate the economic end of (e.g. the ultimate irreparable harm to) Subway, if a preliminary injunction is not granted. See Hull Municipal Lighting Plant v. Massachusetts Municipal Wholesale Electric Co., 399 Mass. 640, 643 (1987). In addition, the prospect of economic harm to Subway can be reduced by accelerating the case for disposition (as was requested by the defendant R.K. -- and apparently opposed by Subway) including but not limited to by an expedited and consolidated trial on the merits pursuant to Mass.R.Civ.P. 65(b)(2).

Third, there is an inherent error of law in the terms of the injunction. The injunction prohibited the defendant R.K. from leasing the property to Panera. That part of the injunction is contrary to sworn statements from R.K. that a lease has already been entered into between Panera and R.K., and that Panera has already commenced a build out of the premises. That being so, the form of the injunction as entered is erroneous and unenforceable.

For all of the foregoing reasons, the order dated July 16, 2004 is vacated.

By the Court (Berry, J.)

Assistant Clerk

Entered: August 2, 2004.

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

04-P-1142

JOHN R. ALLEN

vs.

R.K. ASSOCIATES, INC.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

John R. Allen, appeals from an order issued by a single justice of this court vacating a Superior Court judge's order that purported to preliminarily enjoin R.K. Associates, Inc. (R.K.) from leasing specified commercial space to the Panera Bread Bakery Café (Panera). A. at 3-4. For the reasons stated below, we set aside the single justice's order vacating the injunction and remand the case to the Superior Court for appropriate action in light of the current circumstances confronting the parties.

Standard of review. In reviewing the single justice's order, this panel "ask[s] whether the single justice abused [her] discretion by entering an order without having a supportable basis for doing so." Highland Tap of Boston, Inc. v. Boston, 26 Mass. App. Ct. 239, 240 (1988). "Answering that question, however, requires examination of the trial judge's order." Aspinall v. Philip Morris Cos., 442 Mass. 381, 390 (2004). "Considerable deference is . . . required on the part of the single justice to determinations [made] by the [trial] judge,

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especially [when] those determinations involve an exercise of discretion." Ibid.[1]

Propriety of single justice's order. In cases like the present one, in which one party seeks to preliminarily enjoin the other party from introducing business competition that would allegedly violate a lease provision, "[a] remedy which leaves [the party seeking the injunction] to remove an on-going business and to seek damages for diminished profits, if it is ultimately determined that the injunction was wrongfully withheld, is of dubious efficacy" and "[a]ny harm that the [party to be enjoined] might incur is primarily of the sort that can be adequately redressed by an order . . . requiring the [party seeking the injunction] to post security." Edwin R. Sage Co. v. Foley, 12 Mass. App. Ct. 20, 29 (1981). "In these circumstances, the preferred remedy is one [that] will . . . preserve[] insofar as possible the existing state of affairs pending a full trial." Ibid. (citations and internal quotation marks omitted).

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[1] We also note that, "[i]n most cases . . . the single justice will decline to act on an application for relief [from a Superior Court judge's order] that does not disclose clear error of law or abuse of discretion," see Jet Line Servs., Inc. v. Selectmen of Stoughton, 25 Mass. App. Ct. 645, 646 (1988); and that, when reviewing a trial court order granting or denying a preliminary injunction, a single justice "must exercise special care not to substitute [his or her] judgment for that of the trial court [when] the record[] disclose[s] reasoned support for [the trial court's] action." See Edwin R. Sage Co. v. Foley, 12 Mass. App. Ct. 20, 26 (1981).

Applying the foregoing guidelines to the single justice's order, we conclude that, while the single justice set out the correct abuse-of-discretion standard of review, A. at 146, her application of that standard contained error. In considering the likelihood that Allen's action would succeed on the merits at trial, the single justice took a different view from the Superior Court judge of the pertinent portions of the lease provision. A. at 146-147. However, the single justice erred by substituting her judgment for that of the Superior Court judge. See note 1, supra.

The single justice also stated: "I am not persuaded that the extant record supports the Superior Court determination that [Allen] would be irreparably harmed . . . [the record does not] establish that the potential economic loss is such that the very existence of the Subway business is threatened." A. at 147. The Superior Court judge, however, could properly rely upon data in the record that supported the conclusion that Allen's Subway shop would not be able to operate profitably if the shop were to lose to Panera a mere twenty-nine customers per day. A. at 7, 11, 104-105. The Superior Court judge ruled, based upon the record data, that, under Hull Mun. Lighting Plant v. Massachusetts Mun. Wholesale Elec. Co., 399 Mass. 640, 643 (1987), injunctive relief was appropriate in this case because Allen faced the risk of losses "so severe that his business could not survive." A. at

105 n.5.[2]

Given the type of business-competition case that Allen has brought, and the law's preference for preserving the status quo in such cases, we are constrained to set aside the single justice's order.

Order of the single justice reversed. Case remanded to the Superior Court for further action consistent with this memorandum and order.

By the Court (Grasso, Brown & Trainor, JJ.),

Ashley Thomas

Clerk

Entered: August 26, 2005.

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[2] The single justice also cited as a reason to vacate the Superior Court judge's order that the order was unenforceable because it enjoined R.K. from entering into a lease into which R.K. had already entered. A. at 148. The single justice was empowered to modify the injunction, however, see Edwin R. Sage Co. v. Foley, 12 Mass. App. Ct. at 22, to give effect to the Superior Court judge's underlying intent of preventing R.K. and Panera from exercising their rights under their lease pending trial.