

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

PUFF HOOKAH LOUNGE, INC,

Plaintiff,

v

Case No. 14-138904-CK
Hon. Wendy Potts

KARCH, LLC,

Defendant.

OPINION AND ORDER RE:
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION
AND
NONPARTIES THOMAS D. MURRAY AND ORCHARD LAKE GREEN, LLC'S MOTION
TO INTERVENE

At a session of Court
Held in Pontiac, Michigan

On
MAR 14 2014

Plaintiff Puff Hookah Lounge Inc. leased commercial retail space along Orchard Lake Road from Defendant Karch LLC. In addition to its leased spaced, Puff Hookah's lease grants a nonexclusive right to use the adjacent parking lot. According to Karch, the property has been mostly vacant since 2012 and at this time there are only two tenants, Puff Hookah and a sewing center. Karch claims that in late 2012, a Walgreens representative made an offer to purchase a portion of the property near the road. According to non-parties Thomas Murray and Orchard Lake Green, LLC, in November 2012 they entered into an agreement to purchase the property from Karch. Murray and Orchard Lake claim that they plan to build a store for Walgreens. Karch claims that the Walgreens store will be approximately 14,000 square foot and would involve

demolishing an existing building and eliminating a substantial portion of the existing parking lot. Puff Hookah brought this action claiming that the new construction would interfere with its rights under the lease and the loss of use of the full parking lot would amount to a partial eviction. Puff Hookah also asks the Court to enter an injunctive order barring Karch from proceeding with the plans.

The matter is now before the Court on Puff Hookah's motion for preliminary injunction and a motion to intervene brought by Murray and Orchard Lake Green. At the hearing on the motions, counsel for Murray and Orchard Lake Green stated that if the Court denies injunctive relief, his clients will withdraw their motion to intervene. Thus, the Court will first address Puff Hookah's motion.

When deciding a motion for injunctive relief, the Court considers (1) whether the applicant will suffer irreparable injury if the injunction is not granted; (2) the likelihood that the applicant will succeed on the merits; (3) whether harm to the applicant in the absence of relief outweighs the harm to the opposing party if the injunction is granted; and (4) the harm to the public if the injunction issues. *Thermatool Corp v Borzym*, 227 Mich App 366, 376 (1998). The Court should also consider whether granting an injunction is necessary to preserve the status quo before a final hearing or whether it will grant one of the parties final relief before a decision on the merits. *Thermatool, supra*.

Regarding the merits of Puff Hookah's claim that the construction interferes with its leasehold interests, it is not clear at this point whether it has a likelihood of success. The lease grants Puff Hookah a "non-exclusive right to the parking lot adjacent thereto [its leased space]." Puff Hookah interprets this language as giving it the right to use the entire parking lot. However, Karch notes that it retained the unilateral right in the lease to change the "size, dimension, the

opening and closing of, and location and type of the common areas and buildings.” Karch claims that it was not required to obtain Puff Hookah’s consent to sell a portion of the parking lot or reduce its size. Thus, while Puff Hookah may have a right to use the entire lot, it appears that Karch may have the right to determine the size of the lot.

Puff Hookah also appears to be claiming that it had an implied right under the lease to an unobstructed view of its premises from Orchard Lake Road, which would be blocked by the Walgreens store. Although Puff Hookah concedes that there is nothing in the lease that gives it the right to demand an unobstructed view, it claims that it relied on this fact when it negotiated its lease. Because no discovery has occurred yet, the Court cannot determine Puff Hookah’s likelihood of success on its claim that an unobstructed view was a material inducement to the lease. In sum, it is premature for the Court to reach any conclusion on whether Puff Hookah is likely to succeed on its claims that the proposed Walgreens store would interfere with its rights under the lease or constitute a partial eviction. Because Puff Hookah bears the burden of demonstrating its likelihood of success, *Detroit Fire Fighters Assn v City of Detroit*, 482 Mich 18, 34; 753 NW2d 579 (2008), this factor favors Karch.

Even if it had shown a likelihood of prevailing, Puff Hookah fails to demonstrate irreparable harm. An injury is irreparable if it is a “noncompensable injury for which there is no legal measurement of damages or for which damages cannot be determined with a sufficient degree of certainty.” *Thermatool, supra* at 377. Puff Hookah has not presented any evidence that the construction of the Walgreens store will cause it to suffer an injury that would be difficult to determine and remedy with money damages. There is no evidence that the new development would interfere with Puff Hookah’s or its patrons’ use of the lot, other than a reduction of spaces. Puff Hookah presents no evidence of how many patrons it has or how many parking spaces they

regularly use. Karch notes that after the Walgreens store is built, there will be 24 parking spaces in front of Puff Hookah's space and 17 additional parking spaces behind it, which it claims exceeds the spaces required under the city ordinance. Karch further notes that Puff Hookah has enjoyed much greater use of the parking lot over the last few years than it would otherwise receive due to the high vacancy rate. Puff Hookah also presents no evidence of how loss of the unobstructed view would impact its business. To the extent that Puff Hookah's business does decline due to loss of parking or an unobstructed view, the resulting loss of revenue or profits should be quantifiable and could be remedied through money damages. Considering the evidence presented, the Court cannot conclude that Puff Hookah will suffer an irreparable injury if the injunction is not granted.

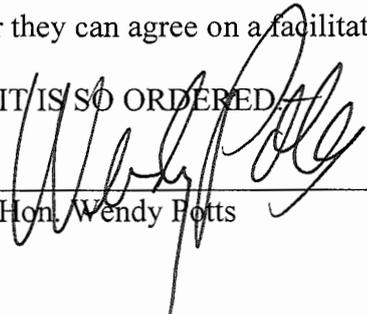
As for the balancing of harms, any speculative harm to Puff Hookah is outweighed by the definite harm Karch will suffer if it is not allowed to proceed with its plans. Karch claims its property has had a long-term high vacancy rate and the sale and redevelopment stands to benefit it greatly. In addition to the proceeds Karch will obtain from the sale of the property, Karch anticipates that the presence of the Walgreens store will add value to the remaining space and improve its ability to lease the vacant spaces. Although the public has no apparent direct interest in this private dispute, Karch claims that the redevelopment of vacant property and improvements to traffic flow will benefit the public.

For all of these reasons, the Court concludes that Puff Hookah has not demonstrated grounds for preliminary injunctive relief and denies the motion. As for the motion to intervene, the Court denies it without prejudice. If Murray and Orchard Lake Green still intend to intervene in this action, they may renounce and repropose their motion.

The Court further orders the parties to facilitate within 45 days. The parties must inform the Court's staff by noon, Monday, March 17, 2014 whether they can agree on a facilitator.

Dated: **MAR 14 2014**

IT IS SO ORDERED



Hon. Wendy Potts