IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PARK DISTRICT HOLDINGS, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Appellant,
vs.
SAKE ROK, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Respondent.

No. 82491-COA

FILED

SEP 23 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER VACATING JUDGMENT AND REMANDING

Park District Holdings, LLC (Park) appeals from a district court order granting a preliminary injunction to plaintiff-respondent Sake Rok, LLC (Sake Rok). Eighth Judicial District Court, Clark County; Jerry A. Wiese, Judge.

Park and Sake Rok entered into a ten-year lease agreement in 2015 under which Park agreed to convey possession of a commercial space in the Park Complex, located between the Las Vegas Strip and T-Mobile Arena, to Sake Rok to operate a sushi restaurant in the leased space.[1] The lease specified that Park would abate Sake Rok's rent if the arena failed to host fifty ticketed events per year, permitting Sake Rok to pay only ten percent of its gross sales between "Zero Dollars ($0) up to and including [$5.5 million] for such Lease Year in which the Event Threshold was not met." In addition to rent, Sake Rok was also responsible for monthly maintenance fees and tax payments.

The parties amended the lease four times since 2015 to address rent abatement. In late 2019, the parties entered negotiations for a fifth

[1]We do not recount the facts except as necessary to our disposition.

amendment to cover rent for the 2020 lease year. However, the parties had not agreed to an amendment by January. Although Sake Rok paid rent for January, it did not pay rent for February; yet in March, the parties orally agreed to a rent abatement that allowed Sake Rok to pay ten percent of its gross monthly sales in rent for the remainder of the lease year as previously permitted in the fourth amendment to the lease. The parties' agreement, however, was not reduced to writing.

Shortly thereafter, Governor Sisolak issued an executive order mandating all non-essential businesses to close due to the COVID-19 pandemic. Sake Rok complied and remained closed for the duration of 2020.[2] Having zero sales and revenue, Sake Rok paid nothing to Park for the remainder of 2020. In September of 2020, Park sent Sake Rok a five-day notice, commanding that Sake Rok pay the overdue rent or lose possession of the premises. Sake Rok took no action, and Park did not repossess the premises after the five days passed. In October, Sake Rok filed suit against Park, seeking damages for misrepresentation, breach of contract, breach of the implied covenant of good faith and fair dealing, as well as declaratory relief to maintain its leasehold. On November 20, 2020, Park sent another notice to Sake Rok, this time ordering Sake Rok to reopen its restaurant by November 30, 2020. Sake Rok took no action to reopen the restaurant or to

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[2]Although restaurants were permitted to reopen with capacity restrictions, Sake Rok chose not to due to economic considerations. The district court found this position to be reasonable, and we do not reweigh this factual determination. *Univ. & Cmty. Coll. Sys. of Nev. v. Nevadans for Sound Gov't*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004) (affording district courts discretion in factual determinations at the preliminary injunction stage).

pay anything to Park. This time, however, Park changed the locks on the premises, preventing Sake Rok from reentering its restaurant.

Sake Rok moved for a temporary restraining order and a preliminary injunction to enjoin Park from terminating its leasehold. The district court granted the preliminary injunction in February 2021, following its January hearing, relying upon the terms of the lease and the declaration from Sake Rok's CFO.[3] The district court in its order repeatedly referenced the Governor's COVID-19 order. For example, the district court acknowledged the financial strains that businesses like Sake Rok endured were significant because they were forced to completely close. Later "they were allowed to reopen [ ] only at 50% capacity, and then reduced to 25% capacity shortly thereafter" as set forth in the Governor's COVID-19 order. The district court continued: "[I]t is understandable why Sake Rok has not reopened, considering the COVID-19 restrictions, which have resulted in 'foot traffic' to and from and around the T-Mobile Arena being nil."

Park filed the instant appeal, arguing the district court abused its discretion when it issued its preliminary injunction and determined that Sake Rok is likely to prevail on the merits, will suffer irreparable harm, or be equitably disadvantaged. Park also argues the $22,000 bond set by the court is insufficient to cover its future losses should it prevail on the merits.

A district court properly grants a preliminary injunction when the moving party demonstrates that it has a reasonable likelihood of success on the merits and will, if the injunction does not issue, suffer imminent irreparable harm. NRS 33.010; *Excellence Cmty. Mgmt., LLC v. Gilmore*, 131 Nev. 347, 350-51, 351 P.3d 720, 722 (2015); *Dixon v. Thatcher*, 103 Nev. 414, 415, 742 P.2d 1029, 1029 (1987). Irreparable injury exists where

[3]Park did not submit any declarations or other evidence.

compensatory damages are inadequate. *Gilmore*, 131 Nev. at 351, 351 P.3d at 722. If granted, a preliminary injunction serves to preserve the status quo until trial. *See* NRCP 65(a) (permitting advance to trial on the merits within injunction hearing); *Dixon*, 103 Nev. at 415, 742 P.2d at 1029. In addition, courts must balance the equities between both parties. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 24 (2008). This inquiry serves to guarantee an injunction does not offend a basic cost-benefit analysis. *See id.*; *Robbins v. Superior Court*, 695 P.2d 695, 698 (Cal. 1985) ("If the denial of an injunction would result in great harm to the plaintiff, and the defendants would suffer little harm if it were granted, then it is an abuse of discretion to fail to grant the preliminary injunction.").

Here, the district court's findings regarding irreparable harm and the balance of the equities relied heavily upon the Governor's COVID-19 executive order that was then in effect, as well as the impact of that executive order on restaurant capacity, pedestrian foot traffic near the property, and the ability of T-Mobile Arena to host large or multiple events. However, during the pendency of this appeal, the Governor's order was lifted and replaced by a different executive order that permits significantly more commerce within the State. At the time the district court issued its injunction, every Las Vegas casino was forced to close, as well as T-Mobile Arena, but they are now open with lesser restrictions. Thus, in June of this year, for example, Las Vegas experienced its first weekend at 100% hotel capacity, and as of August 2021, Nevada health workers had vaccinated approximately 50% of the eligible population. The courts of this State have also re-opened with fewer conditions and district courts have resumed

conducting jury trials, at a reduced rate and with some restrictions.[4] In short, the impact of COVID-19 on the parties is far different now than it was when the district court issued its preliminary injunction when new cases and deaths were peaking. Consequently, the district court's express findings regarding the impact of the COVID-19 executive order upon the parties, though accurate at the time, are no longer valid, and can no longer support the preliminary injunction.

Moreover, with the lifting of the COVID-19 executive order, the parties and the district court likely have greater options available to them than previously existed. Thus, the district court's weighing of the parties' relative hardships and equities will be very different now than it was in January and February 2021. For example, in February, the restaurant could not have re-opened at full capacity regardless of what either Park or Sake Rok wanted to do, and conversely Park likely would not have been able to find another tenant to replace Sake Rok quickly. But because those things are no longer true, the district court's February weighing of the parties' equities, though possibly correct at the time, is no longer valid.

Finally, the scope of the preliminary injunction may be excessive now that the COVID-19 executive order is no longer in effect. At the time of injunction, the district court's trial calendar was in limbo, courts were not permitted to conduct jury trials, and it was not apparent when a jury trial could have been scheduled. Under those circumstances, with no foresight on how long the pandemic would last, the court may have correctly concluded

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[4]Chief Judge Linda Marie Bell authorized the limited return to jury trials as early as February 1, 2021. Administrative Order 21-01. Chief Justice James W. Hardesty rescinded access and practice restrictions in Nevada appellate courts in an order filed on June 10, 2021. ADKT 554.

that the status quo needed to be preserved until the situation became clearer. Now, however, jury trials are underway, and the district court almost certainly has greater clarity on when a trial might be held in the future, which means that it has greater clarity on whether a preliminary injunction is even necessary for whatever time remains until the trial date.

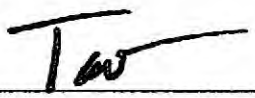
Consequently, the district court may have correctly assessed the situation as it existed in February, but now that situation has dramatically changed. Portions of the court's order expressly relied upon the Governor's COVID-19 executive order. Those portions are no longer in effect and can no longer support a preliminary injunction. Because we cannot ascertain whether the district court would have issued its preliminary injunction had those portions not been part of the court's decision, we cannot affirm the preliminary injunction but rather must vacate and remand to the district court with instructions to reconsider the matter in view of current conditions.

Accordingly, we

ORDER the judgment of the district court VACATED AND REMAND[5] this matter to the district court for proceedings consistent with this order.



_____, C.J.
Gibbons



_____, J.
Tao



_____, J.
Bulla

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[5]In the event the district court elects to maintain the injunction, we note that the $22,000 bond amount originally ordered covered only one month of Park's most basic operating expenses. Thus, the court should also reconsider the bond amount. *See Tracy v. Capozzi*, 98 Nev. 120, 125, 642 P.2d 591, 595 (1982).

cc: Hon. Jerry A. Wiese, District Judge
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Eighth District Court Clerk