DISTRICT COURT, ARAPAHOE COUNTY, COLORADO 7325 S. Potomac St. Centennial, CO 80112 Phone: 303-649-6355	DATE FILED: September 19, 2018 7:41 PM FILING ID: B6886080666FA CASE NUMBER: 2018CV32126
Plaintiff, THE SOUTHPARK OWNERS ASSOCIATION, INC. a Colorado non-profit corporation, v. Defendants, TRIPLE J ARMORY, INC., a Colorado corporation; PARKLANE BUSINESS PARK, an unincorporated association; RHR INVESTMENT, LLC, a Colorado limited liability corporation; and SOUTHPARK LANE, LLC, a Colorado limited liability corporation.	▲ COURT USE ONLY ▲
Attorneys for Triple J Armory, Inc. Colin C. Deihl, #19737 Nicholas M. Cassidy, #40836 Polsinelli PC 1401 Lawrence Street, Suite 2300 Denver, CO 80202 Phone No.: (303) 572-9300 Fax No: (303) 572-7883 cdeihl@polsinelli.com ncassidy@polsinelli.com	Case No. 18CV32126 Division/Courtroom:

TRIPLE J ARMORY, INC.'S RESPONSE IN OPPOSITION TO FORTHWITH MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION HEARING

Defendant Triple J Armory, Inc. ("Triple J"), by and through counsel, Polsinelli PC, responds in opposition to Plaintiff's motion for a temporary restraining order and preliminary injunction hearing as follows:

I. BACKGROUND

1. Triple J is in the process of retrofitting the interior of a building located at 8152 SouthPark Lane in Littleton, Colorado in order to open a combined retail gun store and indoor shooting range.

2. In an email to Triple J dated October 26, 2017, Channing Odell, writing on behalf of the SouthPark Owners Association, Inc. ("SPOA"), advised Triple J that SPOA "has no objection to the proposed use of the building in question, as a retail gun sale/shooting range. The use would fall within the permitted uses at SouthPark." **Exhibit A, October 26, 2017 email.** Mr. Odell copied his email to three SPOA board members who attended the October Board Meeting: Pat Dunahay, Mike McKesson, and Tim Rogers.

3. Mr. Odell's email went on to state: "If you decide to move forward with the project, you may need to submit for review by the Architectural Development Control Committee (ADCC), if any proposed work will alter/change any exterior element(s) of the property. The ADDC [sic] is not concerned with interior aspects on any alterations, unless that interior alteration necessarily affects the exterior – for example, any required exhausting/exchange of air for a gun range may require a new exterior HVAC system. This may trigger an ADCC review. Same with any alteration of a parking lot, landscaping, painting, etc." (Underlining added.)

4. None of the work Triple J has done at 8152 SouthPark Lane altered or changed the exterior elements of the property. Accordingly, no submittal for review by the ADCC was triggered or is necessary.

5. Mr. Odell's email went on to state: "Of note regarding any proposed gun range;

any noise from the range that can be heard from the exterior may pose a nuisance to adjacent property owners. This could subject you to covenant violations at SouthPark for which, if uncorrected, could result in the assessment of fines. SouthPark does not anticipate this being an issue, as gun ranges are constructed all the time in such a manner as to fully deaden/shield noise, and we would expect that any range you built would be of the best quality."

6. Triple J relied on Mr. Odell's October 26, 2017 email advising that the proposed use "would fall within the permitted uses at SouthPark" by leasing the property and obtaining permits and approvals from the City of Littleton to open the combined retail gun store and shooting range.

7. On August 2, 2018, SPOA's counsel sent a **CEASE AND DESIST** letter to Defendants Parklane Business Park and SouthPark Lane, LLC (Triple J's landlord) "to demand that Parklane . . . compel Triple J Armory to immediately cease all occupancy and operations at Parcel 2, 8152 SouthPark Lane." **Exhibit B, Cease and Desist Letter.** The letter incorrectly claims that Triple J did not make "the proper submittals to, or receive[] the necessary approval from, the SPOA in accordance with the recorded Declaration."

8. On September 5, 2018, Plaintiff filed a complaint, and the motion to which Triple J now responds.

9. The complaint alleges Triple J:

a. Failed to submit specifications and plans for a change of use and construction of improvements to the Architectural Development Control Committee and the Board of Directors of Plaintiff, The SouthPark Owners Association, Inc. Compl. ¶ 10.

b. Failed to obtain approval for change of use and construction improvements from "any sub-association," including Parklane Business Park, in violation of "the Declarations, the Reciprocal

> Agreement, and/or the policies and procedures of the Association as to the approval process." Compl. ¶¶ 18-19.

II. RESPONSE IN OPPOSITION

Injunctive relief is within the sound discretion of the trial court, but should not be "loosely granted." *Crosby v. Watson*, 355 P.2d 958, 959-60 (Colo. 1960). Rather, injunctive relief should only be granted "sparingly and cautiously and with a full conviction on the part of the trial court of its urgent necessity." *Rathke v. MacFarlane*, 648 P.2d 648, 653 (Colo. 1982). Before it may obtain injunctive relief, Plaintiff must establish the six prerequisites set forth in *Rathke*, and must comply with C.R.C.P. 65.

A. Plaintiff cannot satisfy the *Rathke* prerequisites.

Before a trial court may grant a motion for injunctive relief, it must find that the moving party has demonstrated:

> (1) A reasonable probability of success on the merits;
>
> (2) a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief;
>
> (3) that there is no plain, speedy, and adequate remedy at law;
>
> (4) that the granting of a preliminary injunction will not disserve the public interest;
>
> (5) that the balance of equities favors the injunction; and
>
> (6) that the injunction will preserve the status quo pending a trial on the merits.

Rathke, 648 P.2d at 653-54. Plaintiff bears the burden of showing the necessity of an injunction. *Anderson v. Applewood Water Assoc., Inc.*, 2016 COA 162, ¶ 16. If Plaintiff is not able to satisfy even one of these prerequisites, the Court must deny Plaintiff's motion. *High Plains Library Dist. v. Kirkmeyer*, 2015 COA 91, ¶ 25.

1. Plaintiff cannot show a reasonable probability of success on the merits.

Plaintiff states: "The covenants clearly require compliance with the submittal and approval process, such process has not been completed." Pl's Mot. ¶ 4. Plaintiff's statement ignores its October 26, 2017 letter to Triple J approving Triple J's proposed use, and advising that submittal and approval to the ADCC may be necessary, but only if the proposed work would alter/change the exterior of the property. *Supra* ¶¶ 2-3. Since none of the work Triple J performed altered or changed the exterior of the property, ADCC review has not been triggered. *Id.* ¶¶ 3-4.

Because Triple J already obtained approval from SPOA for its proposed use, no additional submittal and approval is necessary. Accordingly, Plaintiff has not met its burden to show a reasonable probability of success on the merits.

2. Plaintiff cannot demonstrate a danger of irreparable injury.

Plaintiff states: "The completion of the construction will require extraordinary evidence to undo such construction." Pl's Mot. ¶ 4. This conclusory argument, devoid of supporting facts, is insufficient to establish that Plaintiff will suffer irreparable injury absent an injunction.

First, Plaintiff cannot show that "undoing such construction" would be its responsibility. Plaintiff is not the owner of the property; Defendant SouthPark Lane, LLC ("SouthPark Lane") is the owner. Compl. ¶ 5. If Plaintiff somehow determined it was necessary to undo the construction, SouthPark Lane, or its tenant Triple J, would bear the costs of doing so, not Plaintiff.

Second, to the extent Plaintiff has any problems with the gun store/shooting range after opening (*e.g.*, noise, parking, etc.), the Declaration provides enforcement rights. *Supra* ¶ 5.

Plaintiff could move to enjoin, or seek damages for, any alleged violations if and when they occurred. Declaration ¶ 6.1; *supra* ¶ 5 (regarding SPOA's enforcement rights for noise violations). Given the availability of these enforcement mechanisms (particularly money damages), Plaintiff will not suffer irreparable injury—by definition—if the gun store/shooting range opens; Plaintiff will be able to address any problems it experiences if and when such problems arise. *Gitlitz v. Bellock*, 171 P.3d 1274, 1279 (Colo. App. 2007) ("Generally, irreparable harm has been defined as 'certain and imminent harm for which a monetary award does not adequately compensate.'").

3. A plain, speedy, and adequate remedy is available at law.

Plaintiff states without explanation: "No such mechanism exists." Pl's Mot. ¶ 4. But Plaintiff ignores the availability of an action for declaratory judgment. C.R.S. § 13-51-101 *et seq.* (Uniform Declaratory Judgments Law); *see Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 285 (1988) ("Actions for declaratory judgments are neither legal nor equitable."). Under C.R.C.P. 57(m), the "court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar." Plaintiff could ask the Court to determine whether under the Declaration Triple J must once again obtain approval for its proposed use despite having done so in October 2017. Plaintiff could then obtain "further relief" if the Court found in its favor. C.R.C.P. 57(h).

Given the availability of a "speedy hearing" in a declaratory judgment action, Plaintiff cannot prove the unavailability of a speedy and adequate remedy at law.

4. A preliminary injunction will disserve the public interest.

Plaintiff states: "The public interest will not be disserved in any way by the granting of

the injunction." Pl's Mot. ¶ 4. This conclusory statement is insufficient to meet Plaintiff's burden of proof. Moreover, as things stand now, 8152 SouthPark Lane does not house a functioning business. Members of the public cannot avail themselves of the goods and services Triple J's store would provide if it were open. An injunction would further delay the public benefits of a functioning business at the property, and thus would disserve the public interest.

5. The balance of equities does not favor an injunction.

Plaintiff states "Triple J Armory has proceeded with construction without proper process, the equities strongly favor Plaintiff in being able to enforce its procedures, no equities favor Triple J Armory." Pl's Mot. ¶ 4. Again, Plaintiff ignores the fact that it gave its approval for Triple J's proposed use in October 2017. Contrary to Plaintiff's suggestion, it would be inequitable to grant an injunction; instead, Plaintiff should be estopped from claiming that Triple J did not satisfy its procedures when SPOA advised Triple J that it "ha[d] no objection" to Triple J's proposed use.

6. An injunction is not necessary to preserve the status quo pending trial.

Plaintiff once again fails to meet its burden of proof on this prerequisite, offering only that "The injunction is the only way to preserve the status quo." Pl's Mot. ¶ 4. Plaintiff ignores the fact that the status quo, since at least October 2017, is that SPOA approved Triple J's application to outfit 8152 SouthPark Lane as a gun store and shooting range, and that Triple J relied on SPOA's representation to obtain permits for and begin building the same within the confines of the property. Thus, it is SPOA that is trying to *alter* the status quo, rather than preserve it.

Additionally, as Triple J highlighted above under the irreparable harm subsection,

preserving the status quo pending trial is unnecessary. First, any responsibility for undoing construction at the property will fall to SouthPark Lane or Triple J, not SPOA. And second, SPOA has enforcement rights under the Declaration. If it experience problems with Triple J's store once it is open, it can enjoin the store's operation or seek damages.

B. Plaintiff has not complied with C.R.C.P. 65(c).

C.R.C.P. 65(c) does not permit the Court to issue a preliminary injunction "except upon the giving of security by the applicant . . . 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." Plaintiff did not attempt to submit any security with its motion, so an injunction may not issue at this time.

Upon information and belief, Triple J will suffer at least several hundred thousand dollars in damages if an injunction is entered, and may suffer up to several million dollars in damages depending on the length of time any such injunction is in place. Triple J will offer testimony on its damages at the September 21, 2018 hearing, but for now the Court should know that Triple J's potential damages include (but are not limited to):

- Rental payments on a building Triple J cannot use (approximately $1,000/day);
- Rental payments on the building from which Triple J is trying to move;
- Interest on its construction loan;
- Construction costs; and
- Lost business revenue (including retail sales and shooting range memberships).

To date, Triple calculates that the issuance of the cease and desist and SPOA's refusal to allow Triple J to operate has resulted in damages in the range of $8 million. Accordingly, if the

Court is inclined to issue an injunction, it should require a bond from Plaintiff in at least that amount.

III. CONCLUSION

Plaintiff bears the burden of proof on the six *Rathke* prerequisites. If it fails to meet its burden on just one of the six prerequisites, the Court must not issue an injunction. Here, Plaintiff's motion offered little more than one conclusory sentence per prerequisite. On the other hand, Triple J has shown that each of the *Rathke* prerequisites weighs against an injunction. Most importantly, Plaintiff has an adequate remedy in a declaratory judgment action and will not suffer irreparable harm absent an injunction because undoing any construction would be the responsibility of SouthPark Lane, not SPOA.

For these reasons, the Court should deny Plaintiff's request for a temporary restraining order and preliminary injunction.

Dated this 19th day of September, 2018.

Respectfully submitted,

POLSINELLI PC

By: s/*Colin C. Deihl*
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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of September, 2018, a true and correct copy of the foregoing was served on all counsel of record via Colorado Courts E-filing.

s/ Liz Gaskins