2024 WL 4524122
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United States District Court, C.D. California.

M&N LUXURY AV, LLC, Plaintiff,
v.
BANG & OLUFSEN AMERICA, INC., et al., Defendants.

2:24-cv-2230-DSF-KESx
|
Signed September 11, 2024

Attorneys and Law Firms

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J. David Bournazian, K and L Gates LLP, Irvine, CA, for Defendant Bang and Olufsen A S.

Order DENYING Motion for Preliminary Injunction (Dkt. 32)

Dale S. Fischer, United States District Judge

***1** Plaintiff M&N Luxury AV, LLC moves for a preliminary injunction to bar Defendants Bang & Olufsen America, Inc. and Bang & Olufsen A/S (collectively B&O) from terminating the distribution relationship between the parties.

I. Background

Plaintiff owns and operates retail stores in California under the Bang & Olufsen name and logo, selling only B&O manufactured and distributed products. The relationship between the parties is governed by a "Framework Agreement" (the Agreement).

Plaintiff does not contest that it has had a history of late invoice payments through much of the relationship. See generally Decl. of N. Fruensgaard Kristensen (Dkt. 38-9), Ex. 8. However, Plaintiff argues that B&O has historically accepted payments that were considered late under the Agreement as part of the business relationship. Reply at 7-8. Given Plaintiff's long history of late payments and the lack of any evidence in the record to suggest that this was a serious problem for B&O for much of the relationship period, this assertion appears to be supported by the evidence. [1]

However, in January 2023 at the latest, B&O began to become more assertive on the issue of late payment. See generally Kristensen Decl., Ex. 9-11. Of particular note, B&O informed Plaintiff on May 18, 2023, that Plaintiff's past due amount of almost $300,000 was not acceptable and expressed dissatisfaction that "we seem to be in a situation where the overdue [sic] is not really decreasing as it should." Id., Ex. 9. B&O specifically noted that the size of the overdue amount was starting to cause B&O trouble both internally and with its external auditors. See id. In order to work through the problem, B&O provided a separate loan to cover the arrears. See id. The loan was paid off by Plaintiff in November 2023. Declaration of Christine Chang (Dkt. 40-2) ¶ 12.

On September 1, 2023, B&O again raised the failure to pay invoices on time and threatened to "invoke B&O's contractual right to remove M&N Luxury's irrevocability as stipulated in Schedule 24 to the Agreement." Declaration of Jonas Glyager (Dkt. 38-1), Ex. 2. Apparently not satisfied with the results of the September 1 letter, on October 18, 2023, B&O informed Plaintiff that it was exercising its right to alter Plaintiff's "irrevocability," citing an overdue balance of $158,622.77. Id., Ex. 3. This alteration purportedly provided either party with the right to terminate the Agreement on six months' notice. [2] Id.

On February 14, 2024, B&O sent Plaintiff a termination letter. Glyager Decl., Ex. 4. This letter did not provide any specific reasons for termination beyond a vague statement that B&O "no longer believe[s] that M&N possesses the motivation it requires to uphold the authorization as a Bang & Olufsen partner and continue to develop and grow the business in California." Id.

***2** On May 8, 2024, B&O sent another termination notice. Glyager Decl., Ex. 6. This notice provided the reason for termination – nonpayment of amounts due – and stated a specific sum that was in arrears – $88,738.25. The May 8 notice also specified that the Agreement was being terminated for "M&N's repeated failure to comply with the requirements of the Framework Agreement, including, but not limited to, M&N's recurring nonpayment." Id. In response to this notice, Plaintiff made full payment one day later on May 9. Chang Decl. ¶ 15. B&O nonetheless has moved forward with termination of the Agreement, prompting this lawsuit and the present motion for a preliminary injunction.

II. Legal Standard

Rule 65 provides the Court with the authority to issue temporary restraining orders and preliminary injunctions. See Fed. R. Civ. P. 65(a) & (b). The purpose of a preliminary injunction is to preserve the status quo and the rights of the parties until a final judgment on the merits can be rendered. U.S. Philips Corp. v. KBC Bank N.V., 590 F.3d 1091, 1094 (9th Cir. 2010). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Winter v. Natural Res. Def. Council, 555 U.S. 7, 20 (2008); Garcia v. Google, Inc., 786 F.3d 711, 740 (9th Cir. 2015) (en banc).

A preliminary injunction "should not be granted unless the movant, by a clear showing, carries the burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972 (1997). The moving party bears the burden of meeting all prongs of the Winter test. See DISH Network Corp. v. FCC, 653 F.3d 771, 776 (9th Cir. 2011). Although a plaintiff seeking a preliminary injunction must make a showing on each factor, the Ninth Circuit employs the "serious questions" version "of the sliding scale" approach where "a stronger showing of one element may offset a weaker showing of another." Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131-35 (9th Cir. 2011). Under this approach, a court may issue a preliminary injunction where there are "serious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff ... so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." Farris v. Seabrook, 677 F.3d 858, 864 (9th Cir. 2012) (cleaned up). Whether to grant or deny a preliminary injunction is a matter of the district court's equitable discretion. See Winter, 555 U.S. at 32.

III. Analysis

A. Likelihood of Success on the Merits

The first question presented is whether the Agreement should control this dispute under normal contract principles or whether B&O should be limited by California franchise law. While the Court is not completely convinced on this record that Plaintiff should be considered a franchisee, B&O has put forward, at best, a perfunctory counterargument. [3] Therefore, for the purposes of this motion, the Court will proceed on the assumption that Plaintiff was in a franchisor/franchisee relationship with B&O.

The California Franchise Investment Law (CFIL) generally requires a franchisor to provide a franchisee at least 60 days to remedy violations of a franchise agreement before the agreement can be terminated. Cal. Bus. & Prof. Code § 20020. However, under certain circumstances, a franchisee agreement can be terminated immediately. See Cal. Bus. & Prof. Code § 20021. Included among these enumerated reasons is where "[t]he franchisee repeatedly fails to comply with one or more requirements of the franchise, whether or not corrected after notice." Cal. Bus. & Prof. Code § 20021(g).

***3** While the meaning of "repeatedly" could be subject to dispute in some contexts, the evidence shows that Plaintiff regularly maintained a past-due balance with B&O and a failure to pay on time was "repeated" behavior under any reasonable definition. Even if one could argue that B&O acquiesced to late payment earlier in the relationship, there is no question that by early 2023, B&O had made it clear that it expected invoices to be paid on time in accordance with the Agreement, and that it was a problem that Plaintiff was failing to do so. Even after B&O raised the issue repeatedly – including to the point where B&O extended a loan to cover the past due amounts – Plaintiff continued to fall behind on payments to B&O.

Plaintiff implicitly suggests, via a footnote, that B&O has waived the right to payment in the timeframes specified in the Agreement. See Reply at 8-9 n.5. However, Plaintiff fails to provide any analysis to support its argument other than to note the fact that late payments were accepted prior to 2023. Many of the earlier late payments were only slightly late and often for relatively small amounts. Acceptance of this kind of breach does not, absent further evidence, necessarily suggest that B&O would waive late payment generally, especially lateness that suggested more serious problems.

Plaintiff also argues that the stated reason for termination – late payment – is a pretext and the real reason B&O wants to terminate the Agreement is that Plaintiff refused to sell two stores to B&O at below-market prices. Junk Decl. (Dkt. 32-2) ¶ 18. But even if B&O's true subjective motivation for termination is Plaintiff's refusal to sell the stores, it does not affect B&O's legal right to terminate. Unhappiness over the refusal to sell the stores may have affected B&O's incentives to work out the late payment problems, but it did not create the problems that led to the right to terminate. [4]

B. Irreparable Harm

While Plaintiff's motion largely fails on the question of likelihood of success on the merits, its showing on irreparable harm is also mixed. It certainly appears that Plaintiff will not be able to continue in business in anything like its current form if the arrangement with B&O is terminated. The loss of essentially the entire business likely cannot be completely remedied by a monetary judgment. However, much of Plaintiff's loss would plainly be monetary and a judgment could generally compensate the contractual damages suffered. In short, while Plaintiff's mixed showing on irreparable harm probably would not have prevented it from succeeding if its merits case were strong, such a showing cannot overcome Plaintiff's inability to show a likelihood of success on the merits. [5]

C. Balance of the Equities and Public Interest

Neither party is clearly favored by equity. Plaintiff's breaches, while probably annoying to B&O, do not appear to have had a significant impact on B&O's operations. In other words, on the evidence before the Court at this time, it does not appear that B&O was meaningfully prejudiced by Plaintiff's cash flow issues. This is further demonstrated by B&O's general patience with – if not acquiescence to – Plaintiff's late payments over the course of most of the relationship. So, while it is likely within B&O's rights under the law to terminate the contract at this time for repeated late payment, the Court questions whether the destruction of Plaintiff's business is an equitable result under the circumstances.

***4** That said, B&O worked with Plaintiff for at least a year to get Plaintiff to pay its invoices on time consistently. This included extended a loan to restructure past due amounts to provide more time for payment. But even after these efforts, Plaintiff still missed payments. At some point it is fair for B&O simply to run out of patience.

The Court finds that the public interest might slightly favor Plaintiff. California has enacted special rules to protect franchisees from termination given the precarious position a franchisee is in vis-à-vis the franchisor. As discussed above, while franchise law likely allows B&O to terminate the relationship, termination in this context is arguably the type of act that the spirit of the franchise laws is intended to prevent. When the final notice of nonpayment was issued on May 8, 2024, Plaintiff paid almost immediately in an attempt to maintain the business and as contemplated by the cure provisions in the CFIL. Nevertheless, general public interest and conclusions based on the spirit of the CFIL cannot outweigh Plaintiff's failure to show a sufficient likelihood of success on the merits and its mixed showing of likelihood of irreparable harm.

IV. Conclusion

The motion for a preliminary injunction is DENIED.

IT IS SO ORDERED.

All Citations

Slip Copy, 2024 WL 4524122

Footnotes

1 In response to the Court's questioning at oral argument, neither party provided any further details regarding the relationship's pre-2023 history.

2 The Court is not told what altering Plaintiff's "irrevocability" was intended to mean, and B&O's counsel had no explanation when asked about it at oral argument. From context, it appears that B&O was exercising a purported right to alter the terms on which the Agreement could be terminated or renewed.

3 B&O's limited counterargument is not even included in its opposition to the preliminary injunction motion; it is only made in support of B&O's motion to transfer the case and the Court discusses the issue in the order resolving that motion.

4 It is unclear exactly when the request to sell the stores was made by B&O, but context suggests it was in January 2024 or possibly late 2023. See Junk Decl. ¶ 18. By that time, B&O had been expressing dissatisfaction with Plaintiff's payment practices for around a year.

5 B&O argues that Plaintiff delayed in seeking a preliminary injunction and that should count against a finding of irreparable harm. Plaintiff counters that it put off filing the motion because it thought that the matter could be resolved through mediation, which was then in progress. The Court finds that the timing of the motion neither favors nor harms Plaintiff's showing on irreparable harm.

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