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STATE OF MAINE
CUMBERLAND, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-19-252

ANTONIA SOTIROPOULOS, et al.,

Plaintiffs

v.

ORDER

FORESIDE HOUSE OF PIZZA, et al.,

Defendants

STATE OF MAINE
Cumberland ss Clerk's Office
SEP 27 2019 10:33AM
RECEIVED

Before the court is a motion by plaintiffs Antonia and Sotirios Sotiropoulos for a temporary restraining order.

The original filings were plaintiffs' motion, accompanied by the affidavit of Antonia Sotiropoulos, defendants' memorandum of law in opposition (unaccompanied by any affidavits), and plaintiffs' reply memorandum, accompanied by the affidavit of Nicholas Sotiropoulos. More than two weeks after plaintiffs' reply memorandum was filed and the motion was fully submitted, defendants filed an affidavit of George Sotiropoulos. Defendants did not seek leave to file an untimely affidavit,¹ and plaintiffs immediately objected to its filing.

The court has nevertheless considered the George Sotiropoulos affidavit but finds that, on the existing record, plaintiffs have established that is highly likely that they have acquired a common law right to the "FHOP" trademark and that injunctive relief is called for because

¹ In their original memorandum defendants essentially argued that they did not need to submit any evidence because, they contended, plaintiffs' argument for injunctive relief failed as a matter of law. Defendants' Memorandum in Opposition to Plaintiff's Motion, dated August 5, 2019, at 1-2.

defendants are engaged in efforts to portray themselves as the continuation of the “FHOP” business.

Based on the record before the court, the court finds as follows:

1. Plaintiffs have demonstrated a probability of success on the merits of their claim that defendants are not entitled to use the name “FHOP” in connection with the operation of the Foreside House of Pizza.²

Specifically, although the George Sotiropoulos affidavit offers a number of examples of Falmouth House of Pizza menus and menu boards that did not use the term “FHOP,” there is undisputed evidence that the Falmouth House of Pizza did previously use “FHOP” on some of its menus and menu boards and that, as George Sotiropoulos acknowledges, customers began using “FHOP” as a nickname for the Falmouth House of Pizza.³ Perhaps most tellingly, defendants have recognized the viability of the “FHOP” mark in portraying the proposed reopening of the Foreside House of Pizza as the continuation of the “FHOP” business. *See* Exhibit 4 to the Antonia Sotiropoulos affidavit (notice posted by defendants on the restaurant door referring to “the temporary closure of FHOP” and signed by “the FHOP Team”).

Even if plaintiffs’ prior use of the “FHOP” trademark was not extensive, there is authority for the proposition that the public’s use of a nickname is alone sufficient to create trademark rights.

² Defendants argue that since they are now using “FHOP” and have registered “FHOP” as a trademark, any order directing them not to use “FHOP” would go beyond maintaining the status quo. Since the evidence before the court on the instant motion establishes that plaintiffs were using “FHOP” prior to any use by defendants, the court does not agree. However, assuming that plaintiffs’ motion is interpreted as a request for affirmative relief, the court finds that on this record plaintiffs have established a clear likelihood of success allowing affirmative relief. *Department of Environmental Protection v. Emerson*, 563 A.2d 762, 768 (Me. 1989).

³ *See* Ex. 1 to Antonia Sotiropoulos Affidavit; Exs. 3 and 4 to Nicholas Sotiropoulos Affidavit; George Sotiropoulos Affidavit ¶ 12.

See, e.g., National Cable Television Association v. American Cinema Editors Inc., 937 F.2d 1572, 1577-78 (Fed. Cir. 1991); 1 McCarthy on Trademarks and Unfair Competition § 7:18 (5th ed. 2019).

2. Plaintiffs have demonstrated that in the absence of injunctive relief, there will be irreparable harm because of consumer confusion and because of the likely impossibility of determining monetary damages with any degree of certainty.

3. The balance of harms favors plaintiffs because the usurpation of the “FHOP” trademark is harmful to plaintiffs and the Foreside House of Pizza can conduct its business without using that trademark. In his affidavit, George Sotiropoulos argues that it is unlikely that plaintiffs will start their own restaurant. However, even if they do not, the “FHOP” mark is an intangible asset that will lose its value if appropriated by defendants.

4. The public interest would not be harmed in any way by granting an injunction. In fact, granting an injunction would serve the public interest by protecting common law intellectual property rights and preventing seemingly unfair competition.

5. Although plaintiffs have sought that the requirement of security be waived, that is usually done in cases where plaintiffs are impecunious, in public interest litigation, or in cases where compliance with the injunction would not cause any expense. Nevertheless, while George Sotiropoulos alleges in his affidavit that he has expended “significant” sums on promotional materials using the “FHOP” mark, he has offered absolutely no information or estimate on what it would cost to comply with an injunction.⁴ There is no reason why defendants cannot successfully the Foreside House of Pizza without using the “FHOP” trademark. In addition, the essential facts

⁴ It bears emphasis that any investment defendants have made in the use of “FHOP” and their portrayal of the Foreside House of Pizza as the continuation of “FHOP” demonstrates the potential value of the trademark.

– prior use by plaintiffs, even if not extensive, and the public’s use of “FHOP” as a nickname to designate the Falmouth House of Pizza – are not disputed, and the court does not perceive that there is any reasonable likelihood that further proceedings will likely result in a different result with respect to “FHOP” trademark rights.

Accordingly, the court concludes that only a nominal security needs to be provided. *See Arkansas Best Corp. v. Carolina Freight Corp.*, 60 F.Supp. 2d 517 (W.D.N.C. 1999). The preliminary injunction shall go into effect immediately but shall be contingent on plaintiffs posting a bond of \$500.00 or paying the sum of \$500.00 into the court to be held in escrow pending the outcome of the case. The bond shall be posted or the security paid into court within 12 days from the date of this order.

6. Although plaintiffs’ motion is framed as an application for a temporary restraining order, defendants received notice of the motion. They submitted a memorandum of law in opposition to the motion and thereafter submitted a belated affidavit. In a statement that defendants themselves quote, “A hearing on a TRO may be treated as a hearing on a preliminary injunction when there is sufficient notice and when the parties are in a position to present evidence and legal arguments for or against a preliminary injunction.” *Clark v. Goodridge*, 632 A.2d 125, 127 (Me. 1993).

Where the court has considered the assertions in the affidavit filed by defendants and concludes that those assertions do not rebut the essential basis on which plaintiffs are entitled to injunctive relief, the court sees no reason for a hearing and will enter a preliminary injunction.

The entry shall be:

1. Plaintiffs’ motion for a temporary restraining order is granted.
2. Defendants Foreside House of Pizza and George Sotiropoulos are prohibited from using the mark “FHOP” in connection with the operation of Foreside House of Pizza, including but not

limited to the "FHOP" sign recently erected above the restaurant location and any use of "FHOP" on menus, on signs, in advertising, on social media, or in any other materials in connection with the Foreside House of Pizza.

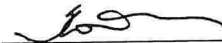
3. Defendants Foreside House of Pizza and George Sotiropoulos shall promptly remove "FHOP" from any sign over the restaurant and from any other signs and any menus, advertising, social media, or other promotional material for the Foreside House of Pizza.

4. Plaintiffs shall provide security in the amount of \$500.00 within 12 days from the date of this order, either by posting a \$500.00 bond or by paying \$500.00 to the court to be held in escrow pending the outcome of this litigation.

5. This order shall remain in effect until the conclusion of the trial in this case or until further order of the court.

6. The clerk shall incorporate this order in the docket by reference pursuant to Rule 79(a).

Dated: September 27, 2019



Thomas D. Warren
Justice, Superior Court

Entered on the Docket: 9/27/19
m.c.v.