

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA

Le v. Huynh

Le · No. 23-cv-00914-SI · Decided March 13, 2023

SUMMARY

The United States District Court for the Northern District of California denied Dien Le’s ex parte motion for a temporary restraining order against Trinh Ngoc Huynh and Huynh Dining. The court held that plaintiff failed to provide the certification required by Federal Rule of Civil Procedure 65(b)(1)(B) and did not establish the requirements for injunctive relief, including likelihood of success and irreparable harm. The court stated that plaintiff could seek a preliminary injunction after providing defendants notice and an opportunity to be heard.

CASE DETAILS

COURT	United States District Court for the Northern District of California
WRITING FOR THE COURT	Susan Illston
JURISDICTION	United States District Court for the Northern District of California
DECIDED	March 13, 2023
DOCKET	23-cv-00914-SI
DISPOSITION	denied
PROCEDURAL POSTURE	Plaintiff sought ex parte relief under Federal Rule of Civil Procedure 65(b), requesting a temporary restraining order and an order to show cause why a preliminary injunction should not issue.
STANDARD OF REVIEW	A temporary restraining order requires the movant to establish a likelihood of success on the merits, a likelihood of irreparable harm absent relief, that the balance of equities favors relief, and that relief is in the public interest. An ex parte TRO additionally requires compliance with Rule 65(b)(1), including specific facts showing immediate and irreparable injury and a written certification regarding notice.
PRECEDENTIAL VALUE	unpublished

TOPICS

- injunctions
- civil procedure
- trademark infringement
- copyright infringement
- commercial litigation

PRACTICE AREAS

civil procedure

intellectual property

commercial litigation

remedies

QUESTIONS PRESENTED

1. Whether plaintiff satisfied Federal Rule of Civil Procedure 65(b)(1)(B) by certifying in writing the efforts made to provide notice and the reasons notice should not be required.
2. Whether plaintiff established the elements required for a temporary restraining order, including likelihood of success on the merits, irreparable harm, favorable balancing of equities, and consistency with the public interest.

HOLDINGS

1. An ex parte temporary restraining order cannot issue when the movant fails to provide the written certification required by Federal Rule of Civil Procedure 65(b)(1)(B). Plaintiff's failure to file that certification was independently fatal to the motion.
2. Plaintiff was not entitled to a temporary restraining order because plaintiff failed to establish the required elements, including a likelihood of success on the merits, irreparable harm, and a public-interest basis for relief.

KEY QUOTATIONS

"Rule 65(b) of the Federal Rules of Civil Procedure permits a court to issue a temporary restraining order without notice to the adverse party only where "specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant...." (at 2)

"Plaintiff has failed to file the certification necessary for the Court to grant its ex parte motion for a temporary restraining order. In addition, plaintiff has failed to establish the elements necessary for a temporary restraining order." (at 4)

FACTUAL BACKGROUND

Dien Le owned Hue Restaurant in San Jose and alleged that former employee Trinh Ngoc Huynh opened Huynh Dining across the street. Le alleged that Huynh Dining used a confusingly similar name, similar food offerings, and an almost identical menu, infringing Le's copyright and trademarks. The court observed that the restaurant names, logos, and menus were materially different and that the menus were not identical.

PROCEDURAL HISTORY

Dien Le filed an action alleging copyright infringement, Lanham Act infringement and unfair competition, and California unfair competition. Plaintiff then filed an ex parte motion for a temporary restraining order. The district court denied the motion because plaintiff failed to provide the Rule 65(b)(1)(B) certification explaining why notice should not be required and failed to establish the requirements for temporary injunctive relief.

DISPOSITION

denied

CASES CITED

- *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 438-39 (1974)
- *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n. 7 (9th Cir. 2001)
- *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)
- *Reno Air Racing Ass'n, Inc. v. McCord*, 452 F.3d 1126, 1131 (9th Cir. 2006)

OPINION

Le v. Huynh

PER CURIAM.

1 2 3

4 UNITED STATES DISTRICT COURT

5 NORTHERN DISTRICT OF CALIFORNIA

6 7 DIEN LE, Case No. 23-cv-00914-SI 8 Plaintiff,

ORDER DENYING EX PARTE

9 v. MOTION FOR TEMPORARY

RESTRAINING ORDER

10 TRINH NGOC HUYNH, et al., Re: Dkt. No. 9 11 Defendants. 12 13 Before the Court is
plaintiff Dien Le's ex parte motion for a temporary restraining order 14 against defendants Trinh
Ngoc Huynh and Huynh Dining. Dkt. No. 9. For the reasons discussed 15 below, the motion is
DENIED. 16

17 BACKGROUND1

18 Plaintiff's allegations are as follows. Plaintiff owns Hue Restaurant, which is located in a 19
shopping center in San Jose, California, and serves Vietnamese food. Dkt. No. 1, Complaint, at 2–
20 3. Plaintiff owns a valid copyright on his menu. Id. at 3. Plaintiff's former employee, Trinh
Ngoc 21 Huynh, has opened a restaurant called Huynh Dining across the street from plaintiff.
Plaintiff 22 alleges defendants' restaurant has “a confusingly similar name and [the] same
offerings,” Id. 23 Plaintiff alleges defendants' restaurant “features an almost identical menu to
Plaintiff's copyrighted 24 Hue Restaurant menu.” Id. 25 Plaintiff sued on March 1, 2023, alleging
copyright infringement, infringement under the 26 Lanham Act, unfair competition under the
Lanham Act, and unfair competition under the California 27 1 Business and Professions Code. Id.
at 4–7. Plaintiff filed an ex parte application for a temporary 2 restraining order and order to show
cause why a preliminary injunction should not issue on March 3 9. Dkt. No. 9. 4

5 LEGAL STANDARD

6 Rule 65(b) of the Federal Rules of Civil Procedure permits a court to issue a temporary

7 restraining order without notice to the adverse party only where “specific facts in an affidavit or

a 8 verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to 9 the movant....” Fed. R. Civ. P. 65(b)(1)(A). The movant’s attorney must certify in writing “any 10 attempts to give notice and the reasons why it should not be required.” Fed. R. Civ. P. 65(b)(1)(B). 11 These requirements “reflect the fact that our entire jurisprudence runs counter to the notion of court 12 action taken before reasonable notice and an opportunity to be heard has been granted both sides of 13 a dispute.” *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 14 438-39 (1974). 15 The standards for issuing a temporary restraining order and a preliminary injunction are the 16 same. See *Stuhlbarg Int’l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n. 7 (9th Cir.2001). 17 Like a preliminary injunction, a temporary restraining order may only issue if the movant establishes 18 (1) a likelihood of success on the merits, (2) a likelihood that the movant will suffer irreparable harm 19 in the absence of relief, (3) that the balance of equities tips in the movant’s favor, and (4) that an 20 restraining order is in the public interest. See *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 21 (2008). The Ninth Circuit has noted that “very few circumstances justify[] the issuance of an ex 22 parte TRO.” *Reno Air Racing Ass’n., Inc. v. McCord*, 452 F.3d 1126, 1131 (9th Cir. 2006). 23

24 DISCUSSION

25 As a preliminary matter, it is unclear why plaintiff brings this motion ex parte. Plaintiff’s 26 attorney has not made the certification, required by Rule 65(b), explaining why notice should not be 27 required. Dkt. No. 9-4, Watters Decl. ¶¶ 1–5; see Fed. R. Civ. P. 65(b)(1)(B). Instead, plaintiff’s 1 notice should not be required is itself fatal to the motion for a temporary restraining order. Fed. R. 2 Civ. P. 65(b)(1)(B). 3 Moreover, the Court is skeptical of the necessity of any injunctive relief based on the 4 arguments before it. Plaintiff alleges that defendants are using plaintiff’s mark, but the names of 5 the two restaurants – Hue Restaurant and Huynh’s Dining – are distinct. The Court is reluctant to 6 enjoin defendant Trinh Ngoc Huynh from using her own last name for her restaurant on the basis 7 that it shares two letters with plaintiff’s restaurant name. Nor is the design of the logos similar. Dkt.

8 No. 9-3, Exhibit B, at 10–12. The Hue Restaurant logo is circular with two slashes through it and 9 features the restaurant name in bold, sans serif font, with “HUE” on a tilt and “RESTAURANT” 10 following the curve of the circle. *Id.* at 10. In contrast, the Huynh Dining logo is square, with an 11 icon of a knife, spoon, and fork above the restaurant name, which is featured in a thin, slightly 12 convex font. *Id.* at 12. 13 Nor are plaintiff’s copyright arguments persuasive. Although plaintiff claims the menus are 14 “almost identical,” the design of the menus is distinct. *Id.* at 10–13. The Hue Restaurant menu 15 features bold font in white on a black background, using a Latin script without Vietnamese 16 diacritical marks. *Id.* at 10–11. The menu features pictures of various menu items and, in one place, 17 a bridge. *Id.* A column on the left side of the first page displays extra information, including 18 business hours, pickup and delivery options, and the types of credit cards accepted. *Id.* at 10. 19 Section headings are designed with Vietnamese titles in a text box to the left and English titles 20 unboxed and to the right. 21 22 In contrast, the Huynh

restaurant menu features black text on a white background with no pictures or text boxes except for the restaurant logo and a floral pattern in the corners. *Id.* at 12–13. The font is thinner with wider kerning and line spacing, and Vietnamese diacritics are used throughout the text. *Id.* Headings feature Vietnamese titles followed by English titles in parentheses. *Id.* The menus are organized slightly differently: Hue Restaurant’s menu is divided into Appetizers, Hue’s Specialties, Rice Plate, Vegetarian Dishes, and Desserts & Beverages, while

Id. at 10–13. The menus do feature similar dishes, but they are not identical; for example, Hue Restaurant features 76 menu items while Huynh Dining features only 67. *Jd.* 3 Given the lack of evidence that plaintiffs are likely to succeed on the merits, the Court hesitates to enjoin defendants from using their menu or name, which would likely prevent defendants from doing business altogether. While the Court is sympathetic to plaintiff’s concerns that it is losing business due to customer confusion, plaintiff has failed to show that it would suffer irreparable injury if the Court waited long enough to hear full arguments on a motion for a preliminary injunction. Nor has plaintiff shown that the public interest weighs one way or another. Plaintiff has failed to file the certification necessary for the Court to grant its *ex parte* motion for a temporary restraining order. In addition, plaintiff has failed to establish the elements necessary for a temporary restraining order. The Court sees no justification for the extreme remedy of a temporary restraining order. If plaintiff wishes to file a motion for a preliminary injunction that gives defendants proper notice and an opportunity to be heard, plaintiff may do so.

CONCLUSION

For the foregoing reasons, the motion for a temporary restraining order and an order to show cause why a preliminary injunction should not issue is DENIED. IT IS SO ORDERED. Dated: March 13, 2023

SUSAN ILLSTON

United States District Judge