

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA

Le v. Huynh

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

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

1 *Id.* at 10-13. The menus do feature similar dishes, but they are not identical; for example, Hue
2 || 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 4 hesitates to enjoin
defendants from using their menu or name, which would likely prevent 5 defendants from doing
business altogether. While the Court is sympathetic to plaintiff's concerns 6 that it is losing
business due to customer confusion, plaintiff has failed to show that it would suffer 4 irreparable
injury if the Court waited long enough to hear full arguments on a motion for a 8 preliminary
injunction. Nor has plaintiff shown that the public interest weighs one way or another. 9 10
Plaintiff has failed to file the certification necessary for the Court to grant its *ex parte* motion 11
for a temporary restraining order. In addition, plaintiff has failed to establish the elements
necessary 12 || for a temporary restraining order. The Court sees no justification for the extreme
remedy of a 13 temporary restraining order. If plaintiff wishes to file a motion for a preliminary
injunction that 14 || gives defendants proper notice and an opportunity to be heard, plaintiff may
do so. 15 16

CONCLUSION

17 5 *ig* 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. 19 20 IT IS SO
ORDERED. 21 Dated: March 13, 2023 22

23 SUSAN ILLSTON

United States District Judge 25 26 27 28