

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
98 JUN 24 PM 1:57

NORTHERN DISTRICT OF OHIO
CLEVELAND

In re:)	Case No. 98-12875
)	
6100 COLUMBUS, INC.,)	Chapter 11
)	
Debtor.)	Judge Randolph Baxter
_____)	(on reference to
)	Judge Pat E. Morgenstern-Clarren)
)	
6100 COLUMBUS, INC.,)	Adversary Proceeding No. 98-1197
)	
Plaintiff,)	
)	
v.)	<u>ORDER DENYING MOTION FOR</u>
)	<u>TEMPORARY RESTRAINING ORDER</u>
STAFF BUILDERS INTERNATIONAL,)	
INC.,)	
)	
Defendant.)	

Plaintiff-Debtor 6100 Columbus, Inc. ("Columbus") filed a Motion for a Temporary Restraining Order against Defendant Staff Builders International, Inc. ("Staff Builders"). (Docket 5). A hearing was held on this matter on June 22, 1998. For the reasons stated below, the Motion is denied.

JURISDICTION

The Court has jurisdiction to determine this matter under 28 U.S.C. § 1334 and General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. §§ 157 (b)(2)(A) and (E).

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

FACTS

The material facts are not disputed. On December 1, 1996, Columbus entered into a transaction with CareStar, Inc. ("CareStar") in which it purchased all of the assets of CareStar, assumed certain existing leases, and assumed a franchise agreement entered into by CareStar and Staff Builders. A dispute then arose between CareStar and Columbus which was submitted to arbitration. The arbitrator issued an award in favor of CareStar and against Columbus on February 27, 1998. On March 17, 1998, the Hamilton County Court of Common Pleas entered a judgment in favor of CareStar and against Columbus based on the award. On April 14, 1998, Columbus filed a notice of appeal.

Two relevant events took place on April 17, 1998: Staff Builders delivered a letter to Columbus, dated April 16, 1998, terminating the franchise agreement under § 17.01 of the agreement, and Columbus then filed its petition in bankruptcy. Section 17.01 provides that the franchise agreement is automatically terminated upon the happening of certain events; one such event is the existence of a final judgment against Columbus that is unsatisfied or of record for 30 days or longer without the posting of a bond. After Staff Builders issued the letter, it took possession of certain business offices occupied by Columbus, changed locks, assumed telephone numbers, answered telephones and, in effect, asserted authority over the offices, personnel and customers. The majority of these actions took place in late April 1998, with some occurring in May and one event taking place last week.

Columbus now seeks a temporary restraining order, restraining Staff Builders, its agents and employees from continuing in possession of Columbus' property pending a hearing and determination of Plaintiff's Motion for Preliminary Injunction. Columbus contends that a

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

15- day right to cure the default exists within § 17.03 of the franchise agreement that applies to §17.01. It then argues that the filing of the bankruptcy petition within the cure period preserved Columbus' right to cure the default, as a result of which its rights under the franchise agreement are property of the estate under 11 U.S.C. § 541. Staff Builders contends that § 17.03 does not grant Columbus a right to cure a default as specified in § 17.01. Staff Builders argues that the unambiguous language of § 17.03 provides a possibility to cure only those defaults that are stated in § 17.03. The parties agree that for purposes of this motion, the existence or non-existence of a right to cure is the determinative matter. Columbus does not dispute that the existence of the outstanding judgment would constitute automatic termination under § 17.01.

11 U.S.C. § 105(a) confers the power on this Court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” The authority to issue a temporary restraining order flows from this section. *Am. Imaging Servs., Inc. v. Eagle-Picher Indus., Inc. (In re Eagle-Picher Indus., Inc.)*, 963 F.2d 855 (6th Cir. 1992). The procedures governing motions for temporary restraining orders are set forth in Federal Rule of Civil Procedure 65, which is made applicable with certain exceptions to this proceeding by Federal Rule of Bankruptcy Procedure 7065. “[T]he purpose of a TRO under Rule 65 is to preserve the status quo so that a reasoned resolution of a dispute may be had.” *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 226 (6th Cir. 1996).

The analysis for a temporary restraining order is similar to that required for preliminary injunctive relief. *Id.* There are four standards to consider in determining whether to grant or withhold a preliminary injunction:

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

- (1) Whether the plaintiff has shown a strong or substantial likelihood or probability of success on the merits;
- (2) Whether the plaintiff has shown irreparable injury;
- (3) Whether the issuance of a preliminary injunction would cause substantial harm to others; and
- (4) Whether the public interest would be served by issuing a preliminary injunction.

Mason County Med. Assoc. v. Knebel, 563 F.2d 256, 261 (6th Cir. 1977). These “. . . are factors to be balanced and not prerequisites that must be satisfied.” *Am. Imaging Servs., Inc. v. Eagle-Picher Indus., Inc. (In re Eagle-Picher Indus., Inc.)*, 963 F.2d 855, 859 (6th Cir. 1992).

Each factor will be considered in turn.

Likelihood of Success on the Merits.

Columbus argues that it has a right to cure the default under §17.03 and, consequently, that it has rights under the franchise agreement that are property of the estate. The franchise agreement does not support the interpretation offered by Columbus.

The default in this case took place under §17.01 when the judgment remained in place for at least 30 days without a bond being posted. Section 17.03 states that “except as provided above,” Columbus has a right to remedy any default “hereunder” or under any management agreement. The language “except as provided above” most likely refers both to § 17.01 (automatic termination without notice) and to § 17.02 (termination with notice, but without an opportunity to cure). Both of these sections appear above § 17.03. Also, the content of those two paragraphs meshes with the notion that there is no right to cure. If a breach results in automatic termination under § 17.01, the termination has taken place and there is nothing to cure.

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

The franchisee might still dispute that the event of default took place and that the section was improperly invoked, but once properly invoked there is no right to cure.¹ Similarly, § 17.02 specifically states that there is no right to cure.

The conclusion that § 17.03 does not apply to § 17.01 is also supported by the language that the right to cure applies to any default “hereunder.” A lengthy list of defaults addressed by this section appears at the end of the section. A logical reading of the section is that except for the matters addressed “above” in § 17.01 and .02, the franchisee has a right to cure the specific defaults identified “hereunder.” The defaults stated “hereunder” do not include the existence of an unsatisfied judgment against the franchisee for 30 days or longer without a bond being posted. The most likely meaning of this agreement, therefore, is that Columbus does not have a right to cure the default based on such a judgment. In the absence of a right to cure, the franchise agreement would have been effectively terminated before the bankruptcy was filed. Columbus has not, therefore, shown a strong or substantial likelihood or probability of success on the merits.

Irreparable Injury

Columbus argues that it will suffer irreparable harm to its business because it is unable to operate and its assets are being depleted. The irreparable injury claim appears to be based on Staff Builders’ taking control of certain of Columbus’ business offices rather than on Staff Builders’ termination of the franchise agreement. Columbus has not cited to any irreparable harm caused directly by Staff Builders’ termination of the franchise agreement. The Court also

¹ Here, Columbus agrees that a breach did take place under § 17.01 when the judgment remained in place at least 30 days. The only issue is whether there is a right to cure.

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

notes that several weeks have gone by since Staff Builders took action with respect to at least three of the locations. That time lag tends to show that it is less likely that Columbus will suffer irreparable harm in the absence of a temporary restraining order.

Hardship

Columbus stated that a temporary restraining order would not harm Staff Builders, but neither party directly addressed the balancing of hardships which would result from the issuance of a temporary restraining order.

Public Interest

Columbus argued in its Motion that the public interest favors the issuance of a temporary restraining order because Columbus' customers would continue to receive services. There was no showing, however, that customers are not being served at the moment and, in fact, the statements of both counsel seemed to indicate that customers are being served.

* * * * *

On balance of the four relevant considerations, Columbus has not established that a temporary restraining order should issue. Columbus' Motion for a Temporary Restraining Order is, therefore, denied.

There is one final issue that warrants comment in this context. Columbus argued at the hearing that Staff Builders, without authority, asserted control over certain of its offices. Staff Builders acknowledges that it has been in control, but claims it has done so with the consent of Columbus. The issue of how a Chapter 11 debtor's assets are being administered is, of course, a critical one. The argument about the office leases was not, however, set forth in the Motion for a Temporary Restraining Order as a legal basis for the requested relief. This Court will, therefore,

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

leave that issue for consideration by Judge Baxter in the context of Columbus' Motion for Preliminary Injunction which is scheduled for hearing on June 30, 1998.

IT IS SO ORDERED.

Dated: 24 Jun 1998

Pat E. Morgenstern-Clarren
Pat E. Morgenstern-Clarren
United States Bankruptcy Judge
(for Judge Randolph Baxter)

Served by telecopy on:
Kenneth Freeman, Esq.
Richard Hardy, Esq.
Craig Tractenberg, Esq.

By: Joyce L. Gordon, Secretary

Date: 6/24/98