

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

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TAKOMA PARK-SILVER SPRING :

COOPERATIVE, INC., :

:

Plaintiff, :

:

v. : Civil No. 485554

:

NEIGHBORHOOD DEVELOPMENT :

COMPANY, LLC, :

:

Defendant. :

:

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JUDGE'S RULING

Rockville, Maryland

May 13, 2021

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Rockville, Maryland

May 13, 2021

WHEREUPON, the proceedings in the above-entitled
matter commenced

BEFORE: THE HONORABLE HARRY C. STORM, JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

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FOR THE DEFENDANT:

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I N D E X

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THE COURT: Counsel, good morning.

THE CLERK: Good morning, Your Honor.

MS. ROSENFELD: Good morning, Your Honor.

MR. EDNEY: Good morning, Your Honor.

THE COURT: Go ahead and call the case please.

THE CLERK: Yes, sir. Calling civil number 185554V,
Takoma Park-Silver Spring Cooperative v. Neighborhood
Development Company, et al.

THE COURT: All right counsel ask you to identify
yourself please.

MS. ROSENFELD: Michele Rosenfeld here on behalf of
the plaintiff Takoma Park Food Coop.

THE COURT: Good morning.

MS. ROSENFELD: Good morning.

MR. Good morning Michael Edney, Mike Stoll and John
Byron from the Steptoe Johnson firm on behalf of the
defendants, the Neighborhood Development Company entities.

THE COURT: All right, good morning.

MR. CORNBROOKS: Good morning Your Honor. This is
Cornbrooks on behalf of the City of Takoma Park.

THE COURT: All right and Mr. Cornbrooks good
morning. All right once again I would remind everyone that the
Court's standing rules prohibiting video and audio recording
and photographing remain in effect so everyone is prohibited

1 from recording or photographing these proceedings. Official
2 transcripts may be ordered in the normal course from out
3 Technical Department.

4 All right this case, anything to report?

5 MS. ROSENFELD: Your Honor I would just say the
6 Court's encouragement the Coop did send out a letter yesterday
7 to both NDC and the City by asking to open discussions for
8 purposes of settlement. It's clear to me the parties remain at
9 least with respect to the Coop and NDC remain significantly far
10 apart but we did endeavor to try and start those discussions.

11 THE COURT: All right.

12 MR. EDNEY: Your Honor just by our own report from
13 the aspect of the defendants, NDC wants to resolve this matter,
14 we want to put a permanent solution in place. We were pleased
15 to receive the opening of discussions from the Coop and
16 willingness to discuss safety adjustments and we will be
17 dedicated to trying to resolve this in the next days or weeks.
18 Having said all of that Your Honor we are very much of the view
19 that this emergency relief is not warranted. No matter how
20 Your Honor rules we're going to try to put a permanent solution
21 in place potentially with the Coop. But having said that we do
22 think that the factors for emergency relief here are absent and
23 would remind the Court of these Side Vendors case, 2006 Court
24 of Appeals decision that says we can't just do this on the
25 merits. We need every one of the four factors and we don't

1 think showing is the main.

2 THE COURT: All right, thank you counsel. All right
3 so this case is before the Court on plaintiff's motion for
4 temporary restraining order and preliminary injunction that was
5 filed on May 6th of 2021 and was supported by an affidavit
6 and/or its Exhibits. Upon reviewing the plaintiff's motion the
7 Court held a video conference with counsel for the parties on
8 May 7th and scheduled a hearing on the motion for yesterday
9 with an opportunity for briefing by the defendants.

10 The NDC defendants filed their opposition to the
11 motion and that opposition was supported by a declaration and
12 other supporting papers. The Court heard argument on the
13 motion yesterday morning. The hearing yesterday in my view
14 satisfied the adversary hearing requirement of the Maryland
15 Rule 15-505 and accordingly I will treat the motion at this as
16 one for a preliminary injunction. The following factual
17 summary is for purposes of the preliminary injunction hearing
18 only based upon the limited record in the case at this time.

19 For many years the plaintiff, Takoma Park-Silver
20 Spring Cooperative, Inc. has operated a cooperative food market
21 at 201 Ethan Allen Avenue in Takoma Park. Adjacent to the
22 Cooperative market is a surfaced parking lot owed by the City
23 of Takoma Park. Since at least 1998 the City licensed a
24 portion of the parking lot to the Cooperative for use as a
25 loading dock to allow it to receive deliveries and to provide

1 space for trash receptacles and recycle bins and customer
2 parking. The remainder of the lot has been available for
3 public parking. During all of this time the Coop has
4 apparently received deliveries at its site with trucks
5 accessing the market by way of the Takoma Junction parking lot.

6 Starting at about 2012 if not before, the City
7 determined that the site should be redeveloped and a
8 competitive bid process was established. And Mr. Edney I'm
9 just going to ask you, I think you unmuted and are still
10 unmuted and I'm getting a little bit of feedback and I don't
11 know if it's coming from you. So if you could just mute things
12 on your end I'd appreciate it.

13 MR. EDNEY: I can mute from here.

14 THE COURT: All right, thank you. Mr. Edney you got
15 it. All right so starting at about 2012 if not before, the
16 City determined that the site should be redeveloped and a
17 competitive bid process was established. In 2015 the City
18 adopted a resolution authorizing negotiations with the
19 defendant and the City which had been selected as the developer
20 for the project. That resolution expressly mentions a date in
21 the provision that the Coop would be the anchor tenant in the
22 perspective development. The resolution also recognizes the
23 commitment made by NDC of assuring the Coop's continuity of
24 operation during construction. As I mentioned yesterday it's
25 clear that the Coop is an important business to the Takoma Park

1 community.

2 In August of 2016 the City entered into a development
3 agreement with the defendant NDC, Neighborhood Development
4 Company, LLC for redevelopment of the site for mixed use to
5 include office and retail space. The development agreement
6 states that NDC is to provide reasonable accommodations at the
7 Coop for loading of deliveries and Coop customer parking. At
8 the same time the City and NDC entered into a 99-year ground
9 lease for the site. NDC has been and continues receive
10 necessary government approvals for the project which according
11 to NDC has taken much longer than anticipated.

12 As relevant to the issues before the Court, on July
13 26, 2018 the City adopted another resolution, number 2018-41.
14 That resolution authorized NDC to submit its combined site plan
15 to the Montgomery County Planning Board for review. It also
16 affirmed the City's commitment to ensuring continuity of the
17 Coop operations during construction and reasonably
18 accommodating the parking and delivery needs of the Coop.

19 Shortly thereafter on September 1st of 2018 NDC
20 through an affiliate entered into a month-to-month parking lot
21 sublease with the Coop. That sublease was entered according to
22 its recitals for the purpose of continuing in the restricted
23 area as defined the uses for which the Coop had previously used
24 the premises. Those uses being parking spaces for employees
25 and customers, storage, trash receptacles and loading and

1 unloading area. At some point in the prime of all this the
2 idea of the Coop becoming the anchor tenant at the site was
3 abandoned.

4 Getting back to the 2018 resolution, that resolution
5 also provided that to address the Coop's concern that the site
6 plan did not adequately address the Coop's concerns about
7 reasonable accommodation for deliveries, parking, trash and
8 business continuity during construction. Up to \$5,000 was
9 provided by the City to allow for a facilitative discussion
10 between NDC and the Coop.

11 Mediation between the Coop and NDC followed and in
12 October of 2018 resulted in a cooperation agreement between NDC
13 and the Coop. The cooperation agreement provides in the
14 recital that the parties have agreed to coordinate their
15 activities on their respective properties prior to, during and
16 after the construction of the project as set forth in the body
17 of the cooperation agreement.

18 A joint public statement was made that the
19 cooperation agreement and the 2018 resolution provide a
20 sufficient set of reasonable accommodations to the business
21 operation of Coop before, during and after the construction of
22 the new Takoma Junction project to justify entering into the
23 cooperation agreement.

24 The cooperation agreement provides in paragraph one
25 that the parties have entered into a sublease to allow the Coop

1 to continue its current use of the parking lot until the
2 commencement of the construction of the project. In paragraph
3 two the agreement states that the Coop will be able to use the
4 parking lot as currently used including for deliveries, storage
5 of trash bins and trash pickup. The Coop agreed to provide NDC
6 with certain delivery information by the end of September 2018
7 to include the name of its suppliers, the lengths and type of
8 truck used by each and the like which apparently the Coop did.

9 During the construction period the cooperation
10 agreement calls for NDC to construct a "lay by" and that prior
11 to the construction of the lay by the Coop will have access to
12 the parking lot provided it is not in default on the sublease.
13 After construction it is envisioned under the cooperation
14 agreement that the Coop will continue to have access by way of
15 the Takoma Junction site through the lay by or otherwise
16 including access for trucks up to 18 feet in length through the
17 project's underground garage.

18 Based upon the record before me nothing of note
19 happened from the time the cooperation agreement was signed in
20 the fall of 2018 until on or about March 10th of 2021. At that
21 time the City issued a report claiming that the use of the
22 Takoma Junction parking lot for deliveries by large vehicles
23 could not be done safely nor could transportation design
24 standards for deliveries be met. The report goes on to state
25 that delivery trucks regularly and illegally cross the double

1 yellow line to enter and exit the City owned parting lot.
2 According to the Coop it learned of this report only after it
3 was posted on the City website. Upon learning of this notice
4 the Coop through its manager Mr. Houston contacted the City
5 Manager requesting verification of the allegations.

6 Defendant NDC claims it was troubled by this report
7 and hired The Traffic Group to evaluate the situation. A
8 telephone call was scheduled with the Coop which occurred on
9 November 19th of 2020, nothing happened as a result of that
10 conversation. NDC claims it remained concern about the
11 potential unsafe delivery practices.

12 On April 15th of this year NDC issued a letter
13 directing the Coop to immediately halt loading and unloading in
14 the parking lot. The letter further indicated that it served
15 as landlord's 30-day termination of the sublease because of
16 alleged unsafe loading and unloading practices being conducted
17 at that site as detailed in the City Manager's notice of March
18 10th. Shortly thereafter however, the City retracted the
19 statements that formed the basis for the March 10th notice.
20 With NDC apparently unwilling to change its position regarding
21 the termination the Coop filed this action. I also note that
22 under the terms of the sublease the Coop agrees and apparently
23 it has complied with its requirements to provide insurance and
24 to pay a required rent.

25 In its response memorandum NDC focuses primarily on

1 the sublease and claims that the Coop did not meet as well as
2 claiming that the Coop did not meet its heavy burden of
3 satisfying the factors needed to entitle it to injunctive
4 relief. NDC asserts that its April 15th letter in addition to
5 asking that its unsafe practices be halted notifies the Coop
6 that it intends to terminate the sublease on May 15th absent
7 intervening corrective action by the Coop. That is not in my
8 view what the letter says. The letter is unconditional in its
9 terms and provides for the intended termination of the sublease
10 on May 15th. This according to the Coop presents the need for
11 immediate injunctive relief.

12 The standards for preliminary injunctive relief are
13 set forth in cases such as Lerner v. Lerner, 306 Md. 771 (1986)
14 and Fritzsche v. Maryland State Board of Elections, 397 Md. 331
15 (2007). First the likelihood on the success of the merits,
16 second the balance of convenience which is determined by
17 whether greater injury would be done to defendant by granting
18 the injunction than would result from its refusal. Third
19 whether the plaintiff will suffer irreparable injury unless the
20 injunction is granted which can include the need to maintain
21 status quo. And fourth, where appropriate the public interest.

22 The burden is on the party seeking relief to show its
23 entitlement under these factors. In terms of maintaining the
24 status quo between the parties during the pendency of the
25 litigation, status quo means the last actual peaceable non-

1 contested status which preceded the pending controversy as
2 stated in Maloof v. Department of Environment, 136 Md. App. 682
3 (2001).

4 JUDGE'S RULING

5 After analyzing the factors and the evidence at the
6 Coop's request for a preliminary injunction will be granted.
7 First I find that the Coop has (unintelligible) bit of success
8 on the merits. Here while NDC emphasizes its rights under the
9 sublease, that sublease cannot be viewed in isolation. Other
10 agreements and documents are also important in analyzing the
11 rights and obligations of the parties particularly the
12 cooperation agreement. That agreement may certainly be found
13 to impact if not modify the sublease. It envisions the Coop
14 having continued use of the parking lot and access to its
15 property for deliveries and the like through the
16 preconstruction period at a minimum.

17 The Court did not find at this juncture based upon
18 the evidence of record that NDC's claim of termination right
19 under the sublease is absolute as NDC argues. After all the
20 parties entered into the cooperation agreement following
21 mediation to resolve the very type of issues about which the
22 controversy relates. And the sublease itself expressly
23 provides in the permitted use section, section six that it
24 would be used by the Coop for among other things a means of
25 ingress and egress for deliveries, as a loading and unloading

1 area in connection with the operation of its business.

2 Under the circumstances presented here I believe that
3 the plaintiff has shown the required likelihood of success on
4 the merits. Plaintiff has shown a likelihood of being able to
5 show that it complied with its obligations under the agreements
6 which must be read together in my view, and that NDC's
7 termination action was precipitous and not justified by the
8 terms thereof. As to NDC's argument that the plaintiff was
9 required to resort to mediation before filing this action I do
10 not find the mediation provision to be a mandatory precondition
11 to filing the suit.

12 Second I find that much greater injury would be done
13 to the Coop if the relief is not granted than it would result
14 to NDC by the issuance of the injunction. The Coop has
15 apparently been receiving deliveries in the fashion and has
16 been receiving them for over 20 years. How this has now become
17 a purported safety issue that would justify the immediate
18 termination of a sublease is hard to comprehend.

19 These parties engaged in lengthy negotiations and
20 reached a cooperation agreement that it envisioned deliveries
21 continuing as they had in the past. And those deliveries were
22 apparently were fine for nearly two years or so after reaching
23 this cooperation agreement. Now all of a sudden there's a huge
24 purported safety issue brought about by a notice that the City
25 issued but which it has since retracted. Moreover there's

1 nothing in The Traffic Group's report that presents any issue
2 that has not apparently existed for the last 20 years without
3 incident and I'm not persuaded that any safety concerns raised
4 by NDC would tip the bounds of harm in its favor.

5 The Coop faces the prospect of substantial injury if
6 the injunction is not granted in addition to the logistical
7 problems associated with trying to receive deliveries elsewhere
8 on it's own property. The economic consequences to it would be
9 significant and create other safety issues if deliveries were
10 required to be made in other ways.

11 Next I do find that the plaintiff will suffer
12 irreparable injury and that there is a need to maintain the
13 status quo under the Maloof standard which under the Maloof
14 standard is to maintain things as they are. Right now the Coop
15 has a sublease on a unique parcel of land that is used to
16 facilitate its operations. The loss of that sublease and real
17 property interest is by itself sufficient to show irreparable
18 harm not to mention the difficulty of quantifying any loss
19 including the loss of good will.

20 Finally to the extent of public interest is
21 implicated I do find that its in the public interest to
22 maintain status quo and to maintain the Coop as a viable food
23 source in Takoma Park continuing to operate during the pendency
24 of the litigation as it has historically operated.

25 So having found that the plaintiff Coop has met it's

1 burden showing its entitlement to preliminary injunctive relief
2 I will grant a preliminary injunction prohibiting NDC
3 defendants pending further order of Court from taking any
4 action pursuant to its April 15, 2021 notice by way of
5 attempting to terminate the sublease or attempting to evict the
6 Coop from the Takoma Junction parking lot.

7 With respect to the issue of bond, under the
8 circumstances I will require that the Coop post a fairly
9 nominal bond in the form of cash or surety bond in the amount
10 of \$5,000 by 4:30 on May 17th otherwise the injunction will not
11 be effective. Any party affected by this injunction may move
12 to modify or resolve it at any time. And so if circumstances
13 change anyone is certainly free to move to modify or resolve
14 the injunction. All right is there anything further this
15 morning?

16 MS. ROSENFELD: Not from the plaintiffs, thank you
17 Your Honor.

18 THE COURT: Mr. Edney?

19 MR. EDNEY: Good morning Your Honor. We are going to
20 move and ask the Court to modify its order. Particularly on
21 the grounds of Rule 15-505(a) requiring a full adversary
22 proceeding before the entry of a preliminary injunction. The
23 Coop's arguments and Your Honor's ruling in many places depend
24 on the absence of evidence including whether there is substance
25 behind the City's report. Whether it was prompted by

1 complaints, whether there's been an absence of incidents over
2 the last 20 years. We were responding to this motion in two-
3 and-a-half business days without the benefit of discovery and
4 on the basis of evidence that it is in the hands of third
5 parties.

6 On the basis of that we would ask the Court to modify
7 its order and it remain a temporary restraining order for a
8 period of days or weeks that would permit the type of factual
9 investigation of discovery that could lead to a full
10 adversarial hearing and a full hearing on a motion for
11 preliminary injunction. And we would be in making this motion
12 we would be happy to work with the Court on what that period of
13 time would be beyond 10 days provided in the Maryland Rules.

14 But in this context understand we do appreciate the
15 opportunity to respond but we did so on a very short fuse. We
16 did so on a short fuse we think what was created by the Coop
17 this action could've been filed several weeks ago provided for
18 more opportunity for a full adversarial hearing and
19 respectfully we do not think that the requirements for an
20 adversarial hearing necessary for a full preliminary injunction
21 have been met at this particular time.

22 MS. ROSENFELD: Your Honor if I may briefly respond.
23 It seems to me that the Court's ruling was properly decided and
24 entered. And if during the course of discovery the defendants
25 find evidence that would justify a modification of the

1 preliminary injunction and of course they could seek out before
2 the Court at whatever opportunity would be appropriate. So we
3 would request that you have the order stand as delivered this
4 morning. Thank you.

5 THE COURT: Well I guess what the way I'm trying to
6 view this, I try to view things as practically as I can. And
7 the question of whether there would be a practical difference
8 between having this issued as a TRO or a preliminary
9 injunction. The only I guess practical difference would be
10 that a hearing date would be set for another hearing on this.
11 At this time as opposed to waiting until there's been a motion
12 to resolve it or modify it being filed in a request.

13 MR. EDNEY: Well Your Honor I think our point is a
14 little bit different than that. Obviously we could file a
15 motion to modify it. I suppose this is a motion to modify but
16 it's also a motion to reconsider. If 15-505(a) required the
17 full adversary hearing, the cases interpreting it do
18 contemplate the dual. That in appropriate cases there can be
19 some discovery that proceed that full adversary hearing and we
20 think this is the appropriate case for that. Again Your
21 Honor's ruling which we respect very much did focus on the lack
22 of substance behind the City's report, what motivated it. I
23 think we are entitled, all of us should be entitled to know
24 what fullend of that said report and whether there were
25 complaints in particular instances that required that

1 conclusion. It also turns on the absence of incidents over the
2 20 years. Again these are just assertions of counsel at this
3 point. I think the appropriate course in this situation
4 especially where key evidence is in the hand of third parties
5 including the City is to set a time for this preliminary
6 relief. And you know it doesn't necessarily need to be 10 days
7 under the rules, it could be longer than that, allow for an
8 expeditated discovery process and then have a preliminary
9 injunction hearing that isn't totally adversarial with the
10 benefit of the facts in which Your Honor's order turns.

11 THE COURT: All right. Well I'll tell you what I'm
12 going to do Mr. Edney, and I appreciate your arguments, I
13 appreciate your position. I think that from my perspective
14 right now I'm going to leave it the way it is but I certainly
15 you know encourage you if you believe that if it's proper to go
16 ahead and file your motion and it can be taken up and see if a
17 further hearing would indeed be held at that time and how its
18 going to be held with. So I'll go ahead and get this order out
19 promptly to everyone and counsel I appreciate the
20 professionalism on both sides and the briefing that was done
21 and I'll look forward to seeing back here again.

22 THE CLERK: Your Honor, this is Ben.

23 MS. ROSENFELD: Thank you, Your Honor.

24 THE CLERK: Your Honor this is Ben, can you hear me?

25 THE COURT: Yes, Ben.

1 THE CLERK: Thank you, sir. Just two points of
2 clarification for the courtroom clerk. One there are two
3 current open motions that are under advisement. One at 8 which
4 is the temporary restraining order and the other one is at 9
5 which is the motion for preliminary injunction. Is Your Honor
6 granting both or are we just granting the PI?

7 THE COURT: I'm granting the motion for the
8 preliminary injunction and the motion for the temporary
9 restraining order is assumed within that at this point.

10 THE CLERK: So we are granting that as well. My
11 apologies, I'm not understanding.

12 MR. BYRON: That would be mooted out, Your Honor?

13 THE COURT: Yes, I think the TR is moot.

14 THE CLERK: Thank you, sir. And for the bond it's
15 \$5,000 surety or cash?

16 THE COURT: Yes.

17 THE CLERK: Thank you. That's all I have, thank you.

18 THE COURT: All right. Thank you counsel.

19 MR. EDNEY: Thank you, Your Honor.

20 MS. ROSENFELD: Thank you, Your Honor.

21 THE COURT: All right.

22 (The proceedings were concluded.)

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√ Digitally signed by Tanja G. Gish

DIGITALLY SIGNED CERTIFICATE

DEPOSITION SERVICES, INC. hereby certifies that the attached pages represent an accurate transcript of the electronic sound recording of the proceedings in the Circuit Court for Montgomery County in the matter of:

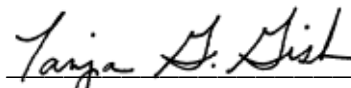
Civil No. 485554

TAKOMA PARK-SILVER SPRING COOPERATIVE, INC.

v.

NEIGHBORHOOD DEVELOPMENT COMPANY, LLC

By:



TANJA G. GISH
Transcriber