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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0165**

Inland Ryan, LLC,
Respondent,

vs.

Halle Properties, LLC,
Appellant,

Sieco Construction, Inc.,
Defendant.

**Filed October 9, 2012
Reversed and remanded
Ross, Judge**

Hennepin County District Court
File No. 27-CV-11-19149

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Minneapolis, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Ross, Judge; and
Connolly, Judge.

UNPUBLISHED OPINION

ROSS, Judge

Halle Properties, LLC, constructed a Discount Tire retail store in Maple Grove at a height that complies with local land-use restrictions but that, according to Inland Ryan, LLC, the company that owns the lot and that contracted with Halle to allow the construction, violates the height restrictions of the Halle-Inland contract. Halle appeals the district court's grant of a temporary injunction in Inland's favor requiring Halle to reduce the height of the nearly completed store. It argues that the district court abused its discretion by granting the temporary injunction because Inland is not likely to succeed on the merits of its declaratory judgment claim and will not be irreparably harmed without the temporary injunction. Halle also contends that the district court inappropriately awarded the ultimate relief sought by Inland and failed to require Inland to post a security bond. Because Inland failed to establish that it will be irreparably harmed without the injunctive relief, we reverse and remand.

FACTS

Inland Ryan, LLC, owns real property at the Dunkirk Square shopping center at the intersection of Dunkirk Lane and County Road 30 in Maple Grove. The parties call this property the "developer tract." Inland leases a portion of this property to Roundy's for the operation of a Rainbow Foods. Another company, Dunkirk Lane Maple Grove, LLC, also owns real property in the Dunkirk Square shopping center. This is the "target tract." Dunkirk sold Halle Properties, LLC, a lot on the target tract in 2010 so that Halle could construct a Discount Tire retail store.

Halle's construction plan faced height restrictions. Before purchasing the lot, Halle secured city approval of its plan, and it secured approval from Dunkirk. But the property is also subject to a 1998 Operations and Easement Agreement (OEA) that limits the use and development of property in the Dunkirk Square shopping center. The OEA was amended in 2008 to allow for the development of the developer tract and target tract, but the amendment limits the height of target tract buildings to ensure that the intersection view of businesses in the developer tract is not obstructed. The easement's general height restriction for buildings is 22 feet, but it permits "peaked roofs, entrance elements, and other architectural elements" to reach 28 feet. The Halle-Inland purchase agreement incorporates the easement's height restrictions.

Halle began construction in June 2011. It built the exterior walls, roof joists, and roof decking. It then constructed a parapet, which is a nonloadbearing upward extension of the exterior wall face above the roof decking. The roof surface was completed with a rubber membrane.

Inland notified Halle in August that the parapet was 24 feet high, violating the 22-foot height restriction. Halle agreed to investigate and stopped construction for two weeks. Inland's counsel sent Halle a letter stating that the exterior walls violate the OEA's height restrictions and demanding that building cease and that plans be provided assuring that the building will comply with the restrictions. Halle responded, stating that the roof complies with the general 22-foot limit and that only its architectural elements extend to about 28 feet, also within the OEA restrictions.

Inland sued Halle. Its complaint asked the district court to declare that the height of the building's exterior walls violate the OEA and must be reduced. Inland alleged that the Discount Tire building not only exceeds the OEA's height limits but also that it obscures the view of the shopping center and the Rainbow Foods store. Inland moved the district court for a temporary restraining order (TRO). By the time of the scheduled evidentiary hearing on the TRO in October 2011, Halle had placed faux brick on the exterior walls up to 18'4" and installed metal coping (a cap with a sloping top) atop the parapet with a cornice (horizontal molding). Halle had also installed skylights, HVAC units, and mechanical equipment on the roof. The roof measured 20'6" on the low side of the building and 21'10" on the high side. The parapet wrapped around the entire top of the building and was at least 43 inches higher than the roof surface on the north side and 59 inches higher than the roof on the south side. The parapet extended even higher above the roof surface in the middle of the building on the north, south, and west sides. The parties refer to the north and south extensions of the parapet as "bump-ups." These "bump-ups" measured 67 inches above the roof on the north side and 83 inches above on the south side. The extension of the parapet on the west side of the building, referred to as the "entrance element," also extended above the roof. No portion of the building exceeded 28 feet.

The district court granted Inland's motion for a temporary injunction, enjoining Halle from continuing to violate the OEA's height restrictions. The district court concluded that injunctive relief is appropriate under the factors articulated in *Dahlberg Bros., Inc. v. Ford Motor Co.*, 272 Minn. 264, 137 N.W.2d 314 (1965), in part, because

Inland would likely succeed on the merits of its claim and it would likely suffer significant harm if the temporary injunction was not issued.

The district court held that the general parapet is really an extension of the wall rather than an architectural element, and it ordered Halle to alter the building, reducing the general parapet to 22 feet. It held that the “bump-up” portions of the parapet are architectural elements, and it allowed both the west entrance element and the north-wall and south-wall “bump-up” portions of the parapet to remain. The district court ordered that any mechanical equipment that reaches 22 feet above ground level to be moved behind the bump-ups or the entrance element. It did not require Inland to post bond as security for the temporary injunction. Halle submitted the affidavit of its general contractor’s project coordinator, stating that complying with the temporary injunction would require the employment of 13 different subcontractors, cost \$250,000, and take at least 12 weeks.

Halle filed this appeal and moved the district court for a stay of enforcement of the injunction. The district court granted the motion.

D E C I S I O N

Halle challenges the district court’s award of the temporary injunction to Inland. We will reverse a district court’s decision to issue a temporary injunction only if it appears that the court clearly abused its discretion. *Carl Bolander & Sons Co. v. City of Minneapolis*, 502 N.W.2d 203, 209 (Minn. 1993). We will rely on the district court’s fact findings unless they are clearly erroneous. *Haley v. Forcelle*, 669 N.W.2d 48, 55 (Minn. App. 2003), *review denied* (Minn. Nov. 25, 2003). And we view the facts in the light

most favorable to the prevailing party. *Queen City Const., Inc. v. City of Rochester*, 604 N.W.2d 368, 372 (Minn. App. 1999), *review denied* (Minn. Mar. 14, 2000).

A temporary injunction is an extraordinary equitable remedy meant to maintain the status quo until trial on the merits can resolve the dispute conclusively. *Id.* The party seeking the injunction must establish that no adequate remedy at law exists and that the injunction is needed to avoid irreparable harm. *Medtronic, Inc. v. Advanced Bionics Corp.*, 630 N.W.2d 438, 451 (Minn. App. 2001). Five factors inform the court's decision whether to issue a temporary injunction:

- (1) the nature of the relationship between the parties preexisting the dispute giving rise to the request for relief,
- (2) the harm to be suffered by one party if the temporary injunction is denied compared with the harm inflicted on the other party if relief is granted,
- (3) the likelihood that one party or the other will prevail on the merits,
- (4) public policy,
- and (5) the administrative burdens in supervising and enforcing the injunction.

Softchoice, Inc. v. Schmidt, 763 N.W.2d 660, 666 (Minn. App. 2009) (citing *Dahlberg Bros. Inc. v. Ford Motor Co.*, 272 Minn. 264, 274–75, 137 N.W.2d 314, 321–22 (Minn. 1965)).

Halle argues that the district court abused its discretion by concluding that Inland would be irreparably harmed without temporary injunctive relief. The failure to show irreparable harm is alone enough to deny a motion for a preliminary injunction. *Morse v. City of Waterville*, 458 N.W.2d 728, 729 (Minn. App. 1990), *review denied* (Minn. Sept. 28, 1990). We believe Halle has the better position.

Inland made several assertions of irreparable harm. Its complaint alleges that, as a result of the height-restriction violations, the Rainbow Foods and other facilities on the developer tract cannot be seen from the intersection of Dunkirk Lane and County Road 30. It also alleges that this reduction in visibility diminishes the attractiveness and utility of Inland's portion of the shopping center. Inland argued to the district court that, without an injunction, Halle will complete construction, making it virtually impossible to bring the Discount Tire store's exterior walls into compliance with the OEA. Inland vice president Frederick Plessner testified that intersection visibility of the developer tract is critical to tenants like Rainbow Foods, who rely on location to attract customers. He also expressed concerns about losing tenants:

[O]ur business is predicated on our tenants being able to pay the rent; and if our tenants don't have enough sales to pay the rent, then they'll stop paying. If our tenants suffer and find a better location, they leave the center and then we're stuck with a vacant store. . . . Every day the store is up we're losing potential business and customers.

The district court was persuaded by Inland's assertions. It concluded, "The harm to Inland if the temporary injunction is not issued would be significant." It reasoned, "[i]f the visibility of tenants on the Developer tract is limited, it diminishes the attractiveness and utility of Inland's property" and "the potential harm to Inland and its tenants if the injunction is not granted is greater than Halle's self-inflicted harm."

Halle focuses mostly on the lack of evidence of the irreparability of Inland's alleged harm. "An injunction will not be granted to prevent the mere assumption of a possible result; rather, some *irremediable* damage must be shown." *Hideaway, Inc. v.*

Gambit Investments Inc., 386 N.W.2d 822, 824 (Minn. App. 1986) (emphasis added). Halle argues that only Plessner's bare assertions, rather than actual evidence in the record, supports the claim that Inland's property value will diminish or that its tenants will lose customers. It maintains that because of this, the irreparability of Inland's harm is merely speculative. The argument is well taken.

Although Plessner testified that location and visibility are essential for certain tenants and that suffering tenants would leave for a better location, Inland provided no evidence supporting its theory that, because of the construction of Discount Tire, other retail sales or sales traffic is down. In fact, it appears that Inland provided no evidence that sales or traffic is down at all, for any reason. Inland's litigation theory is plausible, but to secure a temporary injunction requiring costly reconstruction of a building before the district court has had the opportunity to finally resolve the merits of the claim, evidence is necessary. Without this evidence, Inland has not established that its threatened possible injury is real or substantial or could not be compensated by damages established at trial.

Halle further contends that the view of Inland's allegedly obscured property would be obstructed even if the Discount Tire store is partially reconstructed in the manner required by the temporary injunction. The contention seems accurate; the record supports the contention that the visibility obstruction from the intersection would continue even if the allegedly improperly extended parapet, cornice, and coping are removed.

Plessner's own testimony supports the contention. He testified that there would be visibility problems even without the parapet, cornice, and coping. He viewed a photograph of the Discount Tire store and Big Lots, which is located in the Dunkirk Shopping center, looking in the direction of Rainbow Foods from the intersection of Dunkirk Lane and County Road 30. He agreed that the brick cap on the store was the same height as the height of the Big Lots store. He also agreed that "even if the height of the Discount Tire store was reduced only to the height of this brick cap, the visibility of the Big Lots would be obstructed." Plessner saw another photograph of the tire store from the intersection at a different angle, one that reveals that Rainbow Foods is partly visible. Plessner agreed that from that angle the cap on the Discount Tire store is higher than the top of the Rainbow Foods store so that "even if the height of the Discount Tire store was reduced to the height of the brick cap, the visibility of the Rainbow Foods store would still be partially obstructed." Plessner saw a third photograph from the intersection from yet another angle. And again he agreed that, from there, the brick cap on the Discount Tire store is "basically equal to the top of the Rainbow Foods store" and that "if the height of the Discount Tire store was reduced to the height of the brick cap, the visibility of the Rainbow Foods store would still be obstructed."

Inland has failed to establish either that the alleged height violation by the parapet, cornice, and coping have caused a real and substantial injury, or that the alleged injury would be remedied by the temporary injunctive relief that the district court granted. On this record, we must conclude that the district court lacked a sufficient basis to grant Inland's request for a temporary injunction.

Halle also argues that the district court abused its discretion by issuing a temporary injunction because Inland will not likely succeed on the merits of its claim, because the temporary injunction provides the ultimate relief sought, and because the district court did not require Inland to post bond or provide security. We do not reach these additional arguments because evidence of irreparable harm is necessary before a temporary injunction, and we hold that the district court lacked sufficient evidence of irreparable harm to support the injunction.

Reversed and remanded.