

In the Circuit Court of Raleigh County, West Virginia

**GLADE SPRINGS VILLAGE
PROPERTY OWNERS,**
Plaintiff,

v.

Case No. CC-41-2019-C-357
Judge Joseph Reeder

**EMCO GLADE SPRINGS
HOSPITALITY,
ELMER COPPOOLSE,
ELAINE B. BUTLER,
GSR, LLC,
JAMES TERRY MILLER ET AL,**
Defendants

**ORDER DENYING PRELIMINARY INJUNCTION REGARDING TRANSPONDER FEE
REVENUE**

On October 19, 2022, this matter came before the Court pursuant to *Glade Springs Village Property Owners Association, Inc.'s Verified Motion for Temporary Restraining Order and Preliminary Injunction Regarding Transponder Fee Revenue*. Ramonda C. Marling, Esq. and Mark A. Sadd, Esq. appeared on behalf of the plaintiff, Glade Springs Village Property Owners Association ("GSVPOA"). Arie M. Spitz, Esq. and Clayton T. Harkins, Esq., and Shawn P. George, Esq. appeared on behalf of the defendants, GSR, LLC ("GSR") and EMCO Glade Springs Hospitality, LLC. ("EMCO"). Bryan N. Price, Esq. appeared on behalf of the defendants, Elmer Coppoolse, James Terry Miller, and R. Elaine Butler. After review of the Motion and the subsequent pleadings, hearing testimony and arguments of the parties, and reviewing all relevant legal authorities, the Court **FINDS** and **ORDERS** as follows:

Procedural History

On September 30, 2022, GSVPOA filed the instant motion seeking a temporary restraining order and preliminary injunction enjoining defendant GSR and its employees, agents, contractors, and others from soliciting or accepting transponder fee payments from GSVPOA

members, including lot owners within the planned communities of Glade Springs Village, Phase I, The Farms, and their guests.

GSVPOA argued that the transponder fees are a specific assessment that it alone has the power to impose under the Glade Springs Village Declaration and West Virginia Code § 36B-3-102(a)(10). GSVPOA argued that GSVPOA paid for and has title to the transponder system, GSVPOA is the licensee of the transponder system software, and GSVPOA members have paid their transponder fees through the auspices and offices of the GSVPOA, including through GSVPOA's website portal.

GSVPOA contends that GSR's efforts to divert and expropriate transponder fees from GSVPOA by directing GSVPOA members to tender transponder fees to GSR rather than to GSVPOA is improper. GSVPOA further contends that GSR is falsely claiming right to the transponder system fee income.

Before Defendant GSR filed its *Response*, by Administrative Order from the Supreme Court of Appeals dated October 4, 2022, the undersigned was appointed to the Business Court Division, and by Order entered October 5, 2022, the undersigned was appointed as Presiding Judge in this civil action.

On October 11, 2022, this Court entered its *Order Granting Verified Motion for Temporary Restraining Order of Glade Springs Village Property Owners Association, Inc.*, ordering that GSR be temporarily restrained and enjoined from taking any action to alter, interfere with and/or discontinue GSVPOA's current direction to member to tender transponder fees to it; from directing GSVPOA members to tender transponder fees to any entity other than GSVPOA; from transmitting electronic mail on the subject matter of the instant motion to GSVPOA members other than as agreed upon by GSVPOA or a duly authorized representative of GSVPOA; from using any other means of communication, including personal solicitation, to or of GSVPOA members on the subject matter of the instant motion; from directly or indirectly

soliciting GSVPOA members on procuring use of the transponder system or paying transponder fees; from directly or indirectly accepting transponder fees from GSVPOA members; and otherwise appropriating transponder fee revenue from GSVPOA.

On October 14, 2022, GSR filed its *Response to Motion for Preliminary Injunction*. In its *Response*, GSR contends that GSVPOA is not entitled to a preliminary injunction under this civil action because the injunctive relief requested is not related to any claims at issue in this civil action. Additionally, GSR contends that GSVPOA cannot meet the standard for issuance of a preliminary injunction. It is GSR's position that under the Deed of Easements and Licenses between GSR and GSVPOA, GSR permits GSVPOA members to access the resort property via a transponder gate in exchange for the payment of the transponder fees. Therefore, GSR contends, GSVPOA has no right to the transponder fees at issue. A hearing on GSVPOA's Motion was held on October 19, 2022 wherein the Court heard testimony and arguments of the parties.

Applicable Law

Under W. Va. Code § 53-5-4 and Rule 65 of the W. Va. Rules of Civil Procedure, the court has the express authority to grant injunctive relief under its general jurisdiction and powers funded in equity.

The West Virginia Supreme Court of Appeals has held:
The granting or refusal of an injunction, whether mandatory or preventive, calls for the exercise of sound judicial discretion in view of all of the circumstances of the particular case; regard being had to the nature of the controversy, the object for which the injunction is being sought, and the comparative hardship or convenience to the respective parties involved in the award or the denial of the writ.

Camden-Clark Mem'l Hosp. Corp. v. Turner, 212 W. Va. 752, 756, 576 S.E.2d 362, 366 (2002).

Further, the "Court must consider 'in flexible interplay,' the following four factors in determining whether to issue a preliminary injunction: (1) the likelihood of irreparable harm to

the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest." *Id.* (quoting *Jefferson County Bd. of Educ. V. Jefferson County Educ. Ass'n*, 183 W. Va. 15, 24, 393 S.E.2d 653, 662 (1990)).

I. Relatedness of the Injunctive Relief to any Claims at Issue in this Action

GSR argues that GSVPOA is not entitled to injunctive relief because the relief requested is not related to any claims at issue in this civil action. GSVPOA argues that GSR opened the door to the injunctive relief sought when it alleged that GSVPOA breached the DOE by failing to reimburse it for services provided pursuant to the DOE between March 2019 and May 2020 in its counterclaims against GSVPOA.

West Virginia Civil Procedure Rule 65(a)(2) states:

Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial.

The construction of Rule 65(a)(2) assumes that an application for a preliminary injunction must be related to claims made requiring a trial on the merits. Further, the United States District Court for the Southern District of West Virginia has frequently held that "an injunction is merely a remedy flowing from the underlying substantive claims rather than an independent cause of action itself." *City of Charleston, W. Va. v. Joint Commission*, 473 F.Supp.3d 596, 632 (S.D.W. Va. 2020) (citing *Pinnacle Min. Co., LLC v. Bluestone Coal Corp.*, 624 F.Supp.2d 530, 539 (S.D.W. Va. 2009)).

The Court sees no relation between the injunctive relief sought and the facts alleged in GSVPOA's *Second Amended Complaint*. GSVPOA argues that GSR referenced the alleged transponder fee agreement in GSR's counterclaims against GSVPOA. Specifically, GSR alleged

that “[t]he POA and GSR entered into an oral contract pursuant to which GSR provided services to the POA and the POA paid GSR for such services. The oral contract includes, but is not limited to, the provision of golf services and maintenance and security services for Glade Springs Village.” *Answer Counterclaims, and Third-Party Complaint of GSR, LLC annd Answer of EMCO Glade Springs Hospitality, LLC* (filed June 9, 2021), ¶¶ 46-47.

However, the pleading goes on to state that “[t]he practice of the POA and GSR was for GSR to invoice the amounts for such services on a monthly basis and for the POA to then pay such amounts. . . .” “From March 2019 to May 2020, GSR provided golf services and maintenance and security services . . . to the POA. . . . The POA has refused to pay GSR for these services.” *Id.* at ¶¶ 48-50.

According to the facts alleged in both GSVPOA’s *’s Verified Motion for Temporary Restraining Order and Preliminary Injunction Regarding Transponder Fee Revenue* and GSR’s *Response*, at no time prior to October 2022 did GSR ever take payments from the GSVPOA for the transponder fees at issue. While it was alleged in previous pleadings that GSVPOA paid for the monthly service fee for the transponder system to GSR, GSVPOA has never paid the transponder fee revenue tendered from GSVPOA members to GSR. Therefore, the Court **FINDS** that the facts alleged in GSVPOA’s *Motion* are not related to any claims at issue in this action.

II. Likelihood of Irreparable Harm to the Plaintiff

Assuming *arguendo* that, based on GSR’s counterclaims, GSVPOA’s action for preliminary injunction is related to any claims at issue in this action, the Court will analyze the *Camden-ClarkMem’l Hosp. Corp.* factors to determine whether a preliminary injunction is proper.

GSVPOA contends that it will suffer irreparable harm if GSR is permitted to receive the transponder fee revenue at issue. Specifically, GSVPOA argues that it and its members will be deprived of current and future revenue generated by the transponder fees, and the threatened

appropriation of the transponder fee revenue by GSR would deprive GSVPOA of an established interest in financial security for current and future need and jeopardize the current and future ability of GSVPOA to make financial decisions on behalf of its members.

The West Virginia Supreme Court of Appeals has previously held that deprivation of money is almost never an irreparable harm. *Keesecker v. Bird*, 200 W. Va. 667, 682, 490 S.E.2d 754, 769 (citing *Bettman v. Harness*, 42 W. Va. 433, 434, 26 S.E. 271, 272 (1896) (“The word ‘irreparable’ means that which cannot be repaired, restored, or adequately compensated for in money, or where the compensation cannot be safely measured.”)). GSR argues that GSVPOA is essentially claiming potential loss of money, and that is not an irreparable harm.

In its *Motion*, GSVPOA cites to *Northeast Natural Energy, LLC v. Pachira Energy, LLC*.

In *Northeast Nat. Energy*, the Supreme Court found:

“[T]he term ‘irreparable’ does not always mean what it seems to signify, that is, a physical impossibility of reparation.” *Mullens Realty & Ins. Co. v. Klein*, 85 W. Va. 712, 102 S.E. 677, 680 (1920). West Virginia law is clear that “[e]quity will entertain jurisdiction to prevent a threatened injury[.]” *Summers v. Parkersburg Mill Co.*, 77 W. Va. 563, 88 S.E. 1020, 1021 (1916). An “irreparable injury” is one that is “actual and imminent” and “it is likely that the [past] offensive conduct will recur.” 3 N.Y. Practice, Com. Litig. in New York State Courts § 18:9 (4th ed.). See also, *Fretz v. Burke*, 247 Cal. App. 2d 741, 744-45, 55 Cal.Rptr. 879 (1967) (“[A]n injunction may be granted as to past acts if there is evidence that they will probably recur.”).

243 W. Va. 362, 369, 844 S.E.2d 133, 140 (2020).

Thus, GSVPOA argues that pursuant to *Northeast Nat. Energy*, GSR’s threat to take what GSVPOA contends is its property is an actual or imminent harm that qualifies as an irreparable harm.

The Court is not persuaded by this argument. *Northeast Nat. Energy* involved two natural gas companies who entered into two agreements: the first established the Blacksville Area of Mutual Interest and set forth guidelines for exploiting oil and gas leases and other mineral interests, and the second established a plan to develop and operate a water system. *Id.* at 135-36, 364-65. The second agreement was made orally. *Id.* at 136, 365. When Northeast began

a separate venture using the jointly-owned Blacksville AMI water system to transport water to wells in southern Pennsylvania that Pachira had no interest in, Pachira filed a complaint against Northeast and a contemporaneous preliminary injunction. *Id.*

The court in *Northeast Nat. Energy* found that Pachira demonstrated that it was reasonably likely to suffer irreparable harm that could not be compensated by money damages. *Id.* at 140, 369. In its analysis, the *Northeast Nat. Energy* court explained that under the Partnership Act, Pachira, in its capacity as a partner, has a right to seek equitable, injunctive relief, and a partner may bring an action to protect rights and enforce duties, including fiduciary duties, created under the Partnership Act. *Id.* The *Northeast Nat. Energy* court further explained that “when a partner intends to misuse partnership property in the future, the partner is imposing an irreparable harm on the partnership and the other partners. In such cases, an injunction to prevent the future harm is warranted.” *Id.* at 142, 371.

The facts in the instant case are distinguishable. First, there is no evidence in the record to show that the parties are operating as partners under the Partnership Act. Further, assuming *arguendo* that the *Northeast Nat. Energy* definition of irreparable harm applies here, the issue remains that the GSVPOA is seeking that GSR be enjoined from collecting *money*. In *Northeast Nat. Energy*, Pachira sought a preliminary injunction to enjoin Northeast Natural Energy from using a water system that it jointly owned for its own monetary gain. While the court found that “Northeast’s future use is probably capable of being reduced to some monetary value, the question is whether the partnership and plaintiff Pachira should be required to submit to having property taken and used without permission.” *Id.* at 142, 371. Here, both parties contend that they are entitled to or “own” the revenue from the transponder fees. Regardless of who is entitled to the transponder fee revenue, the remedy here is solely compensation of monetary damages in some form. Thus, the Court **FINDS** that GSVPOA is unlikely to suffer any irreparable harm in absence of a preliminary injunction.

III. The Likelihood of Harm to the Defendant with an Injunction

GSVPOA argues that GSR would not suffer any harm by an injunction regarding the transponder fee revenue because GSVPOA has been the sole collector of the transponder fee revenue since the inception of the transponder system. GSR contends that GSVPOA has unclean hands by unilaterally altering the basis on which GSR permitted its transponder fees to be used to pay off the United Bank loan by entering into the refinanced United Bank loan without consent of GSR, and by doing so, GSVPOA is converting, diverting, and misappropriating GSR rights and property.

Although both parties contend that they are the “owner” of the rights to the transponder fee revenue, the record shows that GSVPOA has been collecting those fees, either on behalf of itself or GSR, since the transponder system was put in place. GSR contends GSVPOA only has the right to collect the fees to pay off the United Bank loan taken out for the construction of the new gate house, and by refinancing the loan, GSVPOA is misappropriating the transponder fee funds. However, there is no evidence to show that GSVPOA is using the revenue from the transponder fees for anything else but paying off the principal of the amount loaned to GSVPOA to construct the gate house.

Because GSR has not collected the transponder fee revenue since the gate house was built, the Court **FINDS** that issuance of a preliminary injunction would be unlikely to harm GSR.

IV. Plaintiff's Likelihood of Success on the Merits

GSVPOA argues that it is likely to succeed on the merits because the transponder fee revenue has consistently been characterized as an “assessment” income of GSVPOA. GSR argues that, under the DOE, GSR is responsible for providing security services, and GSVPOA is required to pay for those services. Additionally, the DOE does not obligate GSR to provide a

transponder lane. Therefore, GSR argues that, if it opts to provide a transponder lane, it may charge a fee for doing so.

As explained above, this Court is of the opinion that GSVPOA has not asserted any cause of action against GSR with respect to the transponder fees. As such, because there is no cause of action regarding the transponder fees, this Court **FINDS** there are no pending claims upon which GSVPOA may succeed on the merits.

V. Public Interest

The Court agrees with GSVPOA that the public interest favors protection of interests in real estate and protection of individuals from exposure to an unnecessary risk of financial harm. The Court also agrees with GSR that the public interest favors enforcement of rights and obligations.

However, in this case, there is likely no unnecessary risk of financial harm on behalf of GSVPOA. The transponder fees are one part of the revenue GSVPOA receives. The transponder fees are not the sole source of income for the GSVPOA. Also, although it is in dispute as to who controls or “owns” the fee revenue, both Elmer Coppoolse and Clyde Hill, GSVPOA Board member testified that the transponder fee revenue is intended to be used by GSVPOA to pay off the loan amount for the construction of the gate house. GSR has proffered to the Court that it will use the transponder fees to pay off the balance of the United Bank loan allocated to the gate house construction. By allowing GSR to receive the transponder fees from GSVPOA members to pay off the amount of the loan for the construction of the gate house, no financial harm is being done to GSVPOA. The loan is still being paid off, regardless of who is making the payments. Thus, the Court **FINDS** that the public interest factor weighs in favor of GSR.

Conclusion

Wherefore, for the reasons stated *infra*, the Court hereby **DENIES** GSVPOA’s *Motion for Preliminary Injunction*.

The Clerk of this Court is **ORDERED** to provide a copy of this Order to all counsel of record.

Entered this 3rd day of November, 2022.

/s/ Joseph K. Reeder
Judge of the West Virginia
Business Court Division

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courtswv.gov/e-file/ for more details.