

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM YORK COUNTY
Equity Court

The Honorable S. Jackson Kimball, Master-in-Equity

Case No.: 2012-CP-46-02286

Charles Sonnenberg, Festival Corp., Phillip Pulley
and Robert Foster. Plaintiffs,

Of whom Phillip Pulley and Robert Foster are the Appellants,

v.

D&T Imports South Carolina, Inc., a Nevada Corporation,
d/b/a Area 51 Fireworks, and York County, a political
subdivision of the State of South Carolina, ... Defendants,

Of whom D&T Imports South Carolina, Inc., a Nevada Corporation,
d/b/a Area 51 Fireworks is the Respondent.

Supplemental Record on Appeal

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SC COURT OF APPEALS

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Respondent's Motion to Dissolve Ex Parte TRO
filed June 26, 2012 (complete copy).....SROA2

Certificate of Counsel SROA10

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Charles Sonnenberg, Festival Corp., Phillip)
Pulley and Robert Foster,)

Plaintiffs,)

vs.)

D&T Imports South Carolina, Inc., d/b/a)
Area 51 Fireworks, and York County,)
South Carolina,)

Defendants.)

Case No. 2012-CP-46-2286

(Scheduling Priority)

**NOTICE OF AND MOTION TO
DISSOLVE EX PARTE TRO AGAINST D&T**

To: Plaintiffs and their counsel, B. Bayles Mack, Esq. and Daniel J. Ballou, Esq.

PLEASE TAKE NOTICE that defendant D&T Imports South Carolina, Inc., d/b/a Area 51 Fireworks, (D&T), through its undersigned counsel, hereby moves, as soon as it may be heard, for entry of an order dissolving pursuant to Rule 65, SCRPC, the *ex parte* temporary restraining order entered against it. In support of this Motion, D&T respectfully submits as follows.

1. On June 21, 2012, the Court entered an *ex parte* Order Granting Injunctive Relief (the "TRO") enjoining York County from issuing any further permits or taking any other administrative action on the applications of D&T to develop the Subject Property (as defined therein), and enjoining D&T from renovating, building, upfitting or constructing the Subject Property for the purpose of selling fireworks. (Order, p.4).

The Order was entered without any bond posted by Plaintiffs. "... [N]o restraining order ... shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." Rule 65(c), SCRCP. (Emphasis added.) There are four exceptions to this mandatory bond requirement, viz., divorce, child custody, non-support, or the State as an applicant. None of the exceptions are applicable here. The TRO should be dissolved because no bond was posted when the restraint went into effect.

2. While a temporary restraining order may be granted under certain circumstances without notice, Rule 65(e), SCRCP, contains a specific mandatory requirement for injunctions seeking to suspend business. Rule 65(e) provides:

No temporary restraining order shall be granted to suspend the general and ordinary business of an individual, partnership, association or corporation. Same may be suspended only by injunction after notice.

Based on the documents filed with the Court, there is no indication that Plaintiffs made any attempt to contact D&T prior to filing the Motion for Temporary Restraining Order and Preliminary Injunction (TRO Motion). D&T was not served with a copy of the TRO Motion or TRO until late in the day on June 21st, and only after the TRO had been issued. The TRO should be dissolved because it suspends the business of a corporation without notice.

3. Rule 65(b), SCRCP, prohibits the entry of an *ex parte* temporary restraining order "... unless it clearly appears from specific facts ... that immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had thereon. Every temporary restraining order ... shall define the injury and state why it is irreparable and why the order

was granted without notice; ..." (Emphasis added.) The TRO states that Plaintiffs could suffer irreparable harm. (Order, p.3, ¶ 12). The TRO Motion says Plaintiffs will suffer immediate and irreparable harm. (TRO Motion, p.2, ¶5; p.3, ¶11). The Verified Complaint alleges that Plaintiffs' revenues from sales of fireworks will dramatically and precipitously fall if D&T is allowed to open. (Verified Complaint, p.7, ¶29). Nothing in the TRO, the TRO Motion or the Verified Complaint is specific; rather, all of the assertions are conclusory. No mention is made at all in the TRO, the TRO Motion or the Verified Complaint of why the injury was so immediate and irreparable that the TRO had to be granted without notice. Because the mandatory factual predicate for entry of an *ex parte* temporary restraining order has not been met, the TRO should be dissolved.

4. Based on the TRO Motion and the Verified Complaint, the TRO recites that one of the reasons D&T will suffer no harm from being enjoined is that it has failed to register to do business in South Carolina. (TRO, p.3, ¶ 13). D&T has been registered and authorized to do business in South Carolina since June 4, 2012. See attached at Tab A. The TRO Motion and Verified Complaint are plainly wrong to the extent either suggests otherwise.

5. No consideration in the TRO is given to whether D&T will lose revenues from not being able to complete its development plans in time to sell fireworks around the July 4th holiday. The other basis for no injury to D&T is that the restriction is valid and enforceable. In other words, there can be no irreparable injury to D&T assuming the restriction is enforceable by Plaintiffs against D&T. The restriction is not enforceable by Plaintiffs.

¹ Plaintiffs do not have the only fireworks store in the Carowinds vicinity. The House of Fireworks, Red Rocket Fireworks Co., Inc., and Uncle Sam's Fireworks are each within a tenth of a mile from the Subject Property.

Plaintiffs are a property owner and the lessor and lessees of property that is adjacent to D&T's property. They do not own D&T's property, nor are they in the chain of title to such property. As the Verified Complaint alleges, to the extent there is a deed restriction that encumbers D&T's property, that restriction does not extend to Plaintiffs' property, as they operate a fireworks business there. (Verified Complaint, p.3, ¶ 10). As such, Plaintiffs do not have standing to enforce the deed restriction, nor do they have a right to enforce a negative reciprocal easement, as their own property is not so encumbered.

For example, in *Bomar v. Echols*, 270 S.C. 676, 679-80, 244 S.E.2d 308, 310 (1978), the South Carolina Supreme Court held that a property owner who wished to develop his tract into a mobile home subdivision was not prohibited from doing so because adjacent property owners purchased their lots subject to restrictions prohibiting any use other than residential use, because the adjacent property owners could not demonstrate all of the following elements required to assert a reciprocal negative easement: (1) a common grantor; (2) a designation of the land or tract subject to restrictions; (3) a general plan or scheme of restriction in existence for the designated land or tract; and (4) the restrictive covenants were intended to run with the land. Most importantly, the adjacent property owners failed to show a "general plan or scheme of restriction." *Id.* at 681, 244 S.E.2d at 311. *See also Marathon Finance Co. v. HHC Liquidation Corp.*, 325 S.C. 589, 483 S.E.2d 757 (Cl. App. 1997) (General plan or scheme is a necessary element to establish a negative reciprocal easement.).

Similarly, in *McLeod v. Baptiste*, 315 S.C. 246, 433 S.E.2d 834 (1993), the South Carolina Supreme Court was asked to determine whether or not the original grantor of a restrictive covenant

had standing to enforce that covenant against a remote grantee when the grantor no longer owned any real property that would be benefitted by its enforcement. The Court held that the grantor lacked standing to enforce the covenant against the remote grantee since the grantor no longer owned real property that would benefit from the enforcement of that restrictive covenant. *Id.* at 247, 433 S.E.2d at 835. *See also, Charming v. J.P. Scurry & Co., Inc.*, 296 S.C. 312, 372 S.E.2d 120 (S.C. App. 1988) (grantor did nothing to affirm or reaffirm at any point that the covenant was to run with the plaintiff's land or for his benefit).

S.C. Code Ann. § 6-29-1145(B) (2007) (Emphasis added.) provides as follows:

If a local planning agency has actual notice of a restrictive covenant on a tract or parcel of land that is contrary to, conflicts with, or prohibits the permitted activity: ... (3) from any other source including, but not limited to, **other property holders**, the local planning agency must not issue the permit unless the local planning agency receives confirmation from the applicant **that the restrictive covenant has been released for the tract or parcel of land by action of the appropriate authority or property holders or by court order.**

South Carolina counties interpret the term "other property holders" to mean those who are similarly bound by the restrictive covenants and not (as in this case) an adjacent property owner who is not so bound. In a Technical Bulletin, the South Carolina Association of Counties interpreted the Statute in this manner, noting that "Section 6-29-1145(B)(3) states that the waiver can be by action of the other property holders subject to the covenant or by court order."² (Emphasis added.). Here, Plaintiffs acknowledge that the deed restriction on D&T's property does not extend to their own property. As such, they cannot establish the likelihood of success necessary for this Court to take

² South Carolina Association of Counties Technical Bulletin, "2007 Legislative Changes Related to Land Use and Planning" FN (Aug. 8, 2007) (<http://www.sccounties.org/legislation/bulletins/2007.aspx#Aug8>)

the "drastic" step of stopping D&T from conducting its business. This is yet another reason why the TRO should be dissolved.

WHEREFORE, for the foregoing five reasons, any one of which is sufficient and compelling, D&T requests that the TRO be dissolved.

Date: 6/25/12

DRISCOLL SHEEDY, P.A.

By: [Signature]

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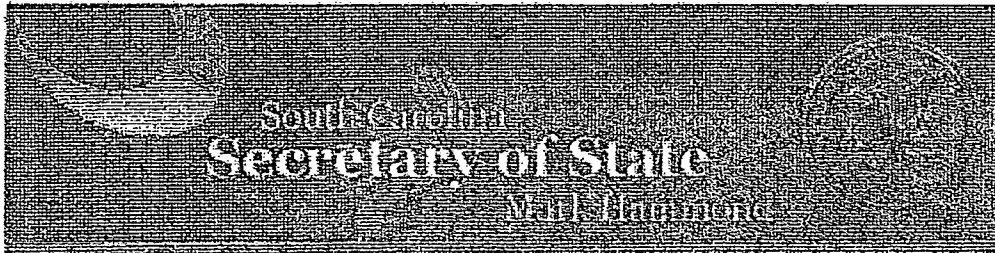
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ATTORNEYS FOR D&T

TAB A

SROA000008

**D&T IMPORTS SOUTH CAROLINA, INC.**

*Note: This online database was last updated on 6/24/2012 6:01:31 PM.
See our Disclaimer.*

DOMESTIC / FOREIGN:	Foreign
STATUS:	Good Standing
STATE OF INCORPORATION	NEVADA
ORGANIZATION:	Profit

REGISTERED AGENT INFORMATION

REGISTERED AGENT NAME:	PARACORP INCORPORATED
ADDRESS:	2 OFFICE PARK CT
CITY:	COLUMBIA
STATE:	SC
ZIP:	29223
SECOND ADDRESS:	STE 103
FILE DATE:	06/04/2012
EFFECTIVE DATE:	06/04/2012
DISSOLVED DATE:	//

Corporation History Records

CODE	FILE DATE	COMMENT	Document
Authority	06/04/2012	AUTHORITY	

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Defendants,

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d/b/a Area 51 Fireworks is the Respondent.

Appellate Case No.: 2013-000604

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CERTIFICATE OF COMPLIANCE

SC Court of Appeals

The undersigned hereby certifies that the Supplemental Record On Appeal
complies with Rule 211(b).

October 29, 2013.

W. Keith Martens

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& CARROLL, LLC
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SROA000010

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CERTIFICATE OF SERVICE

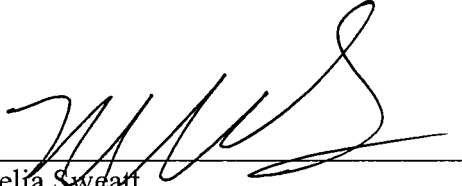
The undersigned, an employee of Hamilton Martens Ballou & Carroll, LLC
certifies that the Appellant's SUPPLEMENTAL RECORD ON APPEAL were served
upon other counsel of record by depositing same in the United States Mail, with
sufficient postage affixed and addressed as follows:

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SC Court of Appeals

James Sheedy
Driscoll Sheedy, PA
11520 North Community House Road
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Charlotte, NC 28277

The is the 29th day of October, 2013



L. Melia Sweatt