

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ABBY BUCHMILLER, ET AL.) 22-CV-7221-MAS
)
Plaintiff)
vs.)
)
KRANNICH SOLAR WEST)
) Trenton, NJ
) December 15, 2022
Defendant) 9:30 a.m.

ORDER TO SHOW CAUSE/TEMPORARY RESTRAINING ORDER HEARING
BEFORE THE HONORABLE MICHAEL A. SHIPP
UNITED STATES DISTRICT JUDGE

Proceedings recorded by mechanical stenography
Transcript produced by computer-aided transcription

APPEARANCES:

For Plaintiff DAVID GRAFF, ESQUIRE
Buchmiller, et al.: JOHN G. MCCARTHY, ESQUIRE
GRAFF SILVERSTEIN, LLP
3 Middle Patent Road
Armonk, NY 10504
914-844-5939

For Intervenor Plaintiff BENJAMIN P. THOMAS, ESQUIRE
Roseburg: 102 South 200 East, Suite 800
Salt Lake City, Utah 84111
801-532-7080

SHANNAN GAGLIARDI, RDR, CRR
OFFICIAL COURT REPORTER
U.S. DISTRICT COURT, DISTRICT OF NEW JERSEY
402 East State Street, Suite 3090
Trenton, NJ 08608
(609)815-2750

For the Defendant:

CLAYTON D. HARVEY, ESQUIRE
SMITH, GAMBRELL & RUSSELL, LLP
1301 Avenue of the Americas
21st Floor
New York, NY 10019
212-907-9733

1 (PROCEEDINGS held via teleconferencing before the
2 Honorable Michael A. Shipp, United States District Judge,
3 at 9:30 a.m.)

4 THE COURT: Okay. Good morning, Counsel. This is
5 the matter of Buchmiller, et al., versus Krannich Solar West,
6 Docket No. 22-7221.

7 Who is on the line for the plaintiff?

8 MR. GRAFF: Your Honor, this is David Graff from
9 Graff Silverstein for the plaintiffs.

10 THE COURT: Good morning.

11 And who is on for the defendants?

12 MR. HARVEY: Clayton Harvey from Smith, Gambrell &
13 Russell.

14 MR. MCCARTHY: John McCarthy from Smith, Gambrell &
15 Russell. As I told your clerk earlier, my application for
16 admission for pro hac vice was filed last night, and it's
17 consented to.

18 THE COURT: Okay. That's not going to be a problem.
19 Thank you for letting me know.

20 Who is on for, I guess it's the intervenor here?
21 There's another party I have here.

22 MR. THOMAS: Ben Thomas, attorney for Amanda
23 Roseburg.

24 THE COURT: Okay. Is there anyone else on the line
25 today?

1 Okay. So, folks, we are here and we're on the record
2 in the matter of Buchmiller, et al. So at this juncture I have
3 received your papers. I'm holding this telephonic conference
4 just to discuss any application for the order to show cause and
5 the temporary restraining order, which was filed on
6 December 11. (See generally Pls.' Moving Br., ECF No. 4-1.)
7 The complaint in this matter was also filed on that day.
8 (Compl., ECF No. 1.)

9 As a preliminary matter, the Court is in receipt of
10 third-party Amanda Roseburg's petition to join as a plaintiff
11 to the complaint and to the motion for order to show cause
12 which was filed yesterday. (ECF No. 17.)

13 I take it that there's no issue or any opposition to
14 the Roseburg application. Let me hear from Mr. Graff and the
15 folks from Smith Gambrell.

16 Any opposition?

17 MR. GRAFF: No opposition, Your Honor.

18 THE COURT: Okay. We'll proceed and I'll go ahead
19 and allow Roseburg to join this order to show cause and
20 complaint as a plaintiff.

21 This is plaintiffs' application, and the burden is on
22 the plaintiffs to demonstrate why they're entitled to
23 injunctive relief. I've received your papers.

24 Is there anything else that I need to know about or
25 anything else you want to say that's not in your papers for the

1 plaintiff? I don't want to have a full-blown oral argument
2 here. I just want to know if there's anything else you need to
3 add or if there's anything that may not have been fully
4 covered. This would be your opportunity.

5 MR. GRAFF: Your Honor, you reviewed both -- I just
6 want to be clear. You reviewed the verified complaint,
7 Exhibits 1 through 10, the order to show cause, the brief in
8 support of the order to show cause, the two declarations that I
9 subsequently submitted, and the letter brief that was submitted
10 yesterday by the plaintiffs?

11 THE COURT: Yes. And so I take it then with all
12 that, you don't have anything further to add?

13 MR. GRAFF: I do not, Your Honor. I have nothing
14 further to add at this time.

15 THE COURT: Okay. How about the defendants, defense
16 counsel?

17 MR. MCCARTHY: Your Honor, it's Mr. McCarthy, if I
18 may. So the only thing -- our understanding is, Your Honor,
19 that the only issue this morning, the only issue is on the TRO.

20 THE COURT: The TRO.

21 MR. MCCARTHY: Right. So in addition to what we said
22 in our letter motion, we would just like to inform you about
23 the current schedule in front of the arbitrator. The parties
24 have previously consented that the -- there was a deadline this
25 Friday, tomorrow, to submit witness statements and expert

1 reports. The parties have previously consented to stay that
2 deadline.

3 And then there's a procedural conference scheduled
4 next week with the arbitrator on the 21st to discuss prehearing
5 briefs and dispositive motions and at this point to discuss
6 when the statements and expert reports are due.

7 After that, the next date on the current schedule for
8 the arbitration is January 6, which is supplemental witness
9 statements. And then I think it's already in the papers that
10 the full evidentiary hearing is not scheduled until the end of
11 January.

12 I understand that Your Honor has been provided with a
13 copy of the arbitrator's determination regarding jurisdiction.

14 THE COURT: Yes.

15 MR. MCCARTHY: Okay. So then it's our view that
16 there's, well, first, as we said in our letter, cannot find any
17 authority and the plaintiff has not provided --

18 THE COURT: Counsel, I don't want to rehash what's
19 already in your letter.

20 MR. MCCARTHY: Okay. So the only thing I have to add
21 was just the schedule. There's nothing, in the time that we
22 would likely brief this preliminary injunction application,
23 there's no irreparable harm that would come to the plaintiffs
24 by a participation in arbitration over the next few weeks.

25 MR. GRAFF: Your Honor, may I briefly respond to

1 that?

2 THE COURT: This is what I did not want to happen,
3 Counsel. I had made very clear that I received your papers. I
4 don't want to have a reargument on it. If there's something
5 succinct that you want to say, I'm happy, but this is not a
6 full-blown oral argument. I've looked at these papers already,
7 and I'm pretty clear on what's at issue here. It is a very
8 narrow issue. It's not the entire case. So I think we're in
9 good enough shape that we're not going to just go back and
10 forth on things that you may not agree upon. The Court is
11 aware. It's not lost on me that you don't agree on everything.

12 MR. GRAFF: Your Honor --

13 THE COURT: Who is speaking?

14 MR. GRAFF: This is David Graff. I have nothing
15 further to add.

16 THE COURT: Okay. And, Mr. Thomas, I take it that
17 you don't need to be heard.

18 MR. THOMAS: That's correct. Thank you.

19 THE COURT: Okay. All right. Folks, then let me go
20 ahead. After reviewing the papers, I've had a chance to pull
21 together an opinion on this, and for the sake of time, I'm not
22 going to read any citations or footnotes. Those certainly will
23 be included in the transcript if you should choose to order it.

24 Of course everyone knows that preliminary injunctive
25 relief is an extraordinary remedy and it should be granted only

1 in limited circumstances. *Kos Pharms., Inc. v. Andrx Corp.*,
2 369 F.3d 700, 708 (3d Cir. 2004) (quoting *American Tel. & Tel.*
3 *Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1427 (3d
4 Cir. 1994)).

5 In deciding to issue temporary restraints or
6 preliminary injunction, the Court must weigh four factors:
7 First, whether the movant has shown a reasonable probability of
8 success on the merits; second, whether the movant will be
9 irreparably injured by denial of the relief; third, whether
10 granting preliminary relief will result in even greater harm to
11 the nonmoving party; and fourth, whether granting the
12 preliminary relief will be in the public's interest. *Gerardi*
13 *v. Pelullo*, 16 F.3d 1363, 1373 (3d Cir. 1994).

14 Plaintiffs bear the burden of showing that the
15 factors weigh in favor of granting the injunction. *Kos Pharms.*
16 *Inc.*, 369 F.3d at 708. While all four factors are important,
17 failure to show either likelihood of success on the merits or
18 irreparable harm must necessarily result in a denial of the
19 preliminary injunction. *N.A.A.C.P. v. N. Hudson Reg'l Fire &*
20 *Rescue*, 707 F. Supp. 2d 520, 542 (D.N.J. 2010) (quoting *In re*
21 *Arthur Treacher's Franchisee Litigation*, 689 F.2d 1137, 1143
22 (3d Cir. 1982)).

23 The irreparable harm requirement is met if a
24 plaintiff demonstrates a significant risk that he or she will
25 experience harm that cannot adequately be compensated for after

1 the fact by monetary damages. *Adams v. Freedom Forge Corp.*,
2 204 F.3d 475, 484-85 (3d Cir. 2000). See *Frank's GMC Truck*
3 *Center, Inc.*, 847 F.2d 102-03 (3d Cir. 1988). The burden is a
4 difficult one to meet because economic loss does not constitute
5 irreparable harm. *Acierno v. New Castle County*, 40 F.3d 645,
6 653 (3d Cir. 1994).

7 Irreparable harm connotes that which cannot be
8 repaired, retrieved, put down again, or atoned for. *Id.*
9 (citations omitted). Moreover, the harm must also be
10 immediate. See *Quad/Tech, Inc. v. Q.I. Press Controls B.V.*,
11 701 F. Supp. 2d 644, 655 (E.D. Pa. 2010) ("In order to make
12 this showing [of irreparable harm], the movant must clearly
13 show 'immediate irreparable harm,' rather than a risk of
14 harm.") (quoting *Campbell Soup Co. v. ConAgra, Inc.*, 977 F.2d
15 86, 92 (3d Cir. 1992)).

16 Here, the Court finds that plaintiffs have failed to
17 meet this burden. The pleadings fail to demonstrate that the
18 alleged injury -- of plaintiffs having to submit to various
19 processes in the arbitration, such as the submission of sworn
20 statements and legal arguments -- constitute irreparable harm.
21 (Pls.' Moving Br. 12.) Plaintiffs have already spent over ten
22 months participating in arbitration, and, with that, all
23 parties have already spent ample time and resources on this
24 matter. (Graff Dec. Ex. 2, Arbitrator Jurisd. Op. 14, ECF No.
25 11.)

1 Indeed, as the parties are undoubtedly aware, the
2 arbitrator in this underlying dispute has already written a
3 pretty lengthy opinion finding that he does have jurisdiction
4 over the dispute, an opinion which the Court finds at this
5 juncture just to be persuasive. (See generally *id.*) Only now,
6 about a month away from the commencement of the final
7 evidentiary hearing, perhaps in light of other recent
8 unfavorable decisions by the arbitrator, do plaintiffs seek
9 emergency relief in this court claiming that they are in
10 imminent danger of continued and complete deprivation of their
11 rights to the court system. (Pls.' Moving Br. 3.) The Court
12 also notes that plaintiffs have failed to cite any cases in
13 which a New Jersey district court has granted a TRO to stay an
14 ongoing arbitration proceeding. (Pls.' Moving Br. 3.)

15 Given that a preliminary injunction is an
16 extraordinary remedy and plaintiffs' burden to prove, the Court
17 finds that the plaintiffs failed to meet their burden.

18 In addition, the Court finds that any questions on
19 this matter with respect to the existence, scope, or validity
20 of the arbitration agreement are not appropriate for resolution
21 on TRO application. Thus, at this stage, the Court declines to
22 intervene and, accordingly, denies plaintiffs' request to stay
23 and immediately enjoin the ongoing arbitral proceeding.

24 Because plaintiffs cannot meet their burden to prove
25 irreparable harm, the Court need not run through the other

1 factors. Plaintiffs' application for an order to show cause
2 and temporary restraints is denied for failure to allege the
3 requisite irreparable harm.

4 That's how I look at it, that's my decision, and
5 that's all we have for today. Thank you, Counsel.

6 (Proceedings adjourned at 9:40 a.m.)
7

8 CERTIFICATE
9

10 I certify that the foregoing is a correct transcript from the
11 record of proceedings in the above-entitled matter.
12

13 /s/Shannan Gagliardi 12/20/22

14 Shannan Gagliardi
15
16
17
18
19
20
21
22
23
24
25