

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: PAUL G. FEINMAN
Justice

PART 7

Filibino Board Plus of NY Inc.

INDEX NO. 602678/04
MOTION DATE 10-4-2004
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

Amato R. Sy

The following papers, numbered 1 to 5 were read on this motion to/for PI

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... & Memo
Answering Affidavits — Exhibits & Memo
Replying Affidavits _____

PAPERS NUMBERED
1, 2
3, 4
5
FILED
NOV 16 2004
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion for a preliminary injunction is granted in accordance with the annexed decision & order after a hearing held on Sept. 28, 2004 and October 4, 2004

Preliminary Conference = 12/9/04 11AM

Dated: 11/12/2004 Paul G. Feinman
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 7

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Filipino Social Club of New York, Inc.,
Plaintiff,

against

Amado R. Sy, Medadie S. Sy, Johnny Paras, Francisca
Langit, Josefina Labao, Luciano Dumaguing, Lolita C.
Dumaguing, Thelma Garcia, and Mrs. Philippines-USA, Inc.
Defendants.

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Index No.: 602678/2001
Submission Date: Oct. 4, 2004
Motion Seq. No. 001

**DECISION AND ORDER
AFTER HEARING ON
PRELIMINARY
INJUNCTION**

Appearances:

For the Plaintiff

Frank J. Monteleone, Esq.
113 University Place, 8th Fl.
New York, NY 10003
(212) 475-9764

For the Defendants

Tomas Carino, Esq. & Leopoldo A. Abad, Esq.
Abad Constancio & Mallonga, LLC
350 Fifth Avenue, Suite 1009
New York, NY 10118
(212) 714-2277

Papers considered in review of this motion for a preliminary injunction:

Papers	Numbered
Order to Show Cause, Complaint, Affidavits, and Exhibits Annexed & Memorandum of Law	1, 2
Answering Affidavits and Exhibits Annexed & Memorandum of Law	3, 4
Reply Affirmation and Exhibits Annexed	5

PAUL G. FEINMAN, J.:

By order to show cause signed August 18, 2004, plaintiffs move for a preliminary injunction which, among other things, would restrain the defendants from using the name "Mrs. Philippines-USA" in the promotion of a coronation and dinner dance to be held on November 27, 2004. At the time it signed the order to show cause, the court granted the plaintiff's application for a temporary restraining order, which was then continued by stipulation of the parties, dated August 25, 2004, pending a hearing of this motion. Oral argument on the motion was held on September 23, 2004, after which the court set the matter down for a factual hearing. The hearing

was held on September 28, 2004 and October 4, 2004. At the conclusion of the hearing, the court indicated on the record in open court that it would continue the temporary restraining order pending final determination of the motion, as well as the general outlines of its findings of fact and conclusions of law that the plaintiff would be entitled to a preliminary injunction. This written decision and order now supplement that record.

Findings of Fact

At the hearing , plaintiff called four witnesses: Juliette Payabab; Joann Carman; Simon Robeniol; and Ofelia S. Segard. The defendants called four witness: Medadie S. Sy; Luciano Dumaguing; Amado S; and Sunngy G. Rodriguez. The testimony of the various witnesses is credited to the extent it is consistent with the court's findings of facts. The court also received into evidence multiple exhibits on behalf of both sides, which included, but were not limited to, pageant and contest rules, contracts with contestants, resolutions, correspondence, a certificate of incorporation, treasurer's report and financial statements, and various advertisement and articles.

The plaintiff, Filipino Social Club of New York, Inc. ("the Social Club") is a not-for-profit organization whose purpose is to promote the well-being of Filipino-Americans in the United States and Filipinos in the Philippines by raising funds for various charitable organizations. Over the years, one of the principal funding mechanisms for the plaintiff's good works has been its annual "Mrs. Philippines-USA" pageant. Reduced to its core, the pageant is a fundraising contest open to married, divorced or separated women of Filipino descent and of good moral character. The contestant who succeeds in raising the most money either through ticket sales, advertising in the annual journal, or by other means, is crowned Mrs. Philippines-USA at the annual coronation ball held in November of each year. In addition to the honor of

wearing the Mrs. Philippines-USA sash and tiara, the annual winner of the contest is awarded a free round trip ticket to the Philippines, and the right to designate the beneficiary city and charities in the Philippines for that year's proceeds. The winner's picture, in gown, sash, and tiara, appears on the cover of the annual dinner journal.

The organization has an elaborate auditing system for determining the annual pageant winner. Sometime in the late 1980's a dispute arose because two of the contestants were fairly close in the dollar amount raised, and one argued that certain "late" checks should not be counted as they were dated or received after the relevant deadline. Unfortunately, that dispute, like this one, resulted in litigation in the New York State Supreme Court. In that litigation the Filipino Social Club was the defendant, and was required to defend its designation of a winner by the losing contestant. The court mentions this long ago lawsuit only because it provides the context for why a separate not-for-profit corporation was apparently formed known as the Mrs. Philippines-USA, Inc.

As originally conceived, the new not-for-profit corporation would run and operate the annual contest, thus shielding the Social Club from any potential liability or lawsuits in the future. However, the plan was never carried out as conceived by its proponents. In actuality, the persuasive and credible testimony, as well as the unambiguous documentary evidence makes clear that the contest has been continually and exclusively promoted and overseen by the plaintiff Social Club. Separate meetings were not held and a separate bank account was never opened. It cannot be said that the contest corporation ever exercised its independent identity or in any manner operated or promoted the annual pageant. Nothing was ever put into print by the way of contracts, contest rules, advertising, or journals which would inform potential contestants, guests,

and the public that it was any other group or organization than the Social Club which was promoting and operating the annual pageant. This state of affairs apparently continued unabated and without incident from the time of the creation of the not-for profit bearing the pageant name until sometime last year, when a group of ousted officers and members of the Social Club, remembering the existence, at least on paper, of the moribund Mrs. Philippines-USA, Inc. decided to run a separate pageant and coronation ball. The identity of the format, title, and the potential for confusion is not seriously disputed by the defendants.

Of particular note, was the credible testimony of Simon Robeniol, who was elected Treasurer of the Social Club in 2001. He became a member of the Social Club in 1998, having been introduced to the organization by his sister, the 1991 Mrs. Philippines-USA. The court credits his testimony that it is the Social Club that pays all the expenses associated with the contest, and that there only exists one bank account, with the North Fork Bank. At least since 1998, when Robeniol became a member, there was never any mention or history of any dealing with the defendant not-for-profit corporation bearing the contest's name. The court specifically credits the testimony of Robeniol and others of the plaintiff's witnesses that the existence of the not-for-profit corporation was unknown to most of the members of the Social Club. This comports with its failure to have ever exercised its authority in a meaningful way or to have created its own infrastructure. Indeed, it was only during the course of this hearing that the corporate by-laws, resolutions and early minutes were produced from the archives of the now-deceased attorney who incorporated the not-for-profit organization bearing the contest's name in the late 1980's. Clearly, the whole notion of a separate corporate structure was abandoned by the early 1990's, at the latest.

The court also credits the testimony of Ofelia S. Segard, the 2004 Mrs. Philippines-USA crowned by the Social Club. She testified credibly about the damage caused to the plaintiff's contestants' ability to sell raffle tickets, dinner tickets, and advertisements in the annual journal. This damage was directly traceable to the efforts by the defendants to launch a "copycat" pageant. Similar credible testimony was given by the other witnesses called by the plaintiff.

Finally, while it is clear that the idea of using one bank account for the Social Club and Mrs. Philippines-USA, Inc. as envisioned by the original incorporators of the contest corporation was to minimize expenses, it had the net effect of having all proceeds and dealings being carried out in the Social Club's name. Anyone dealing with the contest, from the restaurant to printers, from contestants to members of the public purchasing tickets or ads, would fairly believe that the contest was promoted and operated for the Social Club's benefit.

Conclusions of Law

It is by now well established that to succeed on its motion for a preliminary injunction, a plaintiff must establish that: (1) it is likely to ultimately succeed on the merits of the underlying complaint; (2) it will suffer immediate irreparable injury were relief to be denied; and (3) a balance of the equities to effect substantial justice and to preserve the status quo is in its favor. (CPLR 6301; Leventhal, Byer's Civil Motions § 38:04, at 438 [revised ed][case citations omitted]). Here, all three have been established by the affidavits submitted by movant, and as supplemented by the credible testimony of the plaintiff's witnesses at the hearing. The court notes that while certain factual disputes were created by several of the affidavits submitted by the defendants, the lack of veracity of these was clearly established at the hearing. Thus, while an injunction does not ordinarily issue where there are sharply disputed issues of fact, here those

have been resolved in plaintiff's favor, and the court is persuaded that the equities lie clearly in plaintiff's favor.

The court is persuaded that the plaintiff has shown that it is likely to prevail on its claims of trademark infringement regarding the use of the pageant name, Mrs. Philippines-USA. The court further concludes that the plaintiff has shown that the harm caused by the loss of reputation and stature in the Filipino-American community is real and immediate, as is the economic loss caused by a competing event with an identical structure and name. Absent the injunction, the plaintiff's organization will suffer irreparable injury not only for this year's contest but for ongoing contests to be held in the future.

Therefore, due deliberation having been had, and it appearing to the court that a cause of action exists in favor of the plaintiff and against the defendants and that the plaintiff is entitled to a preliminary injunction on the ground that the defendants threatens or is about to do, or is doing or procuring or suffering to be done, acts in violation of the plaintiff's rights respecting the subject of the action and tending to render the potential judgment in this action ineffectual, as set forth in this decision and the plaintiff has demanded in its complaint and would be entitled to a judgment restraining the defendant from the commission or continuance of acts, which committed or continued during the pendency of this action, would produce irreparable injury to the plaintiff, as set forth above, it is

ORDERED that the motion for the motion brought on by order to show cause for a preliminary injunction is granted; and it is further

ORDERED that the undertaking is fixed in the sum of \$1,500.00 conditioned that the plaintiff, if it is finally determined that it was not entitled to an injunction, will pay to the

defendant all damages and costs which may be sustained by reason of this injunction; and it is further

ORDERED that the defendants, their agents, servants, employees, and all other persons acting und the jurisdiction, supervision and/or direction of defendants, are enjoined and restrained, during the pendency of this action, from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person under the supervision or control of defendant or otherwise , any of the following acts:

1. Using the name "Mrs. Philippines-USA" to advertise, publicize, sponsor, sell tickets, raise funds for, or otherwise promote or advance a coronation and dinner dance or ball scheduled for November 27, 2004 or any other date thereafter;

2. Destroying or otherwise disposing, or causing to be destroyed or otherwise disposed of any business or financial records of either the Filipino Social Club, Inc. or the Mrs. Philippines-USA, Inc. which may be in their possession; and it is further

ORDERED that counsel for the parties shall appear for a preliminary conference on December 9, 2004 for the purpose of entering into a discovery order to govern the remainder of the action and to retrieve exhibits introduced at the hearing. Counsel appearing for the conference shall be prepared to discuss settlement of all aspects of the complaint, i.e., both the injunctive and monetary claims.

This constitutes the decision and order of the court. The court has mailed copies to counsel.

Dated: November 12, 2004
New York, New York


NOV 16 2004
NEW YORK
J.S.C. COUNTY CLERK'S OFFICE

FILED