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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN JOAQUIN

TOMASITO FIDER, et al.)	Case No. CV020873
)	
Plaintiffs,)	MEMORANDUM OF POINTS AND
)	AUTHORITIES IN SUPPORT OF EX
v.)	PARTE APPLICATIONS FOR
)	ORDER TO SHOW CAUSE AND
PACIFIC BREWPUB CONCEPTS, INC.,)	TEMPORARY RESTRAINING
et al.)	ORDER
)	Hearing: May 14, 2003, 1:30 p.m.
Defendants.)	Dept. 13
_____)	Judge K. Peter Saier

I. BACKGROUND

In 2001 defendants Curt and Regina Nizzoli (“the Nizzolis”) formed the defendant corporation Pacific Brewpub Concepts, Inc. (“Pacific”) which would do business under the name Opera House Restaurant & Brewery (“Opera House” or the “restaurant”). Both of the Nizzolis are shareholders, officers and directors of Pacific. Pacific prepared a business plan, which it distributed to prospective investors. A revised version of this plan was provided to plaintiff Tomasito Fider in or about June 1.

2002. (Fider Decl. ¶ 3; and Ex. A)

As a result of the representations made by Mr. Nizzoli and in the Business Plan, plaintiffs Tomasito and Elizabeth Fider (“the Fiders”) borrowed \$330,000 secured by a mortgage on an apartment building they own in Tracy, and loaned that money to Pacific for use as “seed money” for the restaurant. That loan (the “Pacific loan”) was secured by the furniture, fixtures and equipment of the restaurant, and was personally guaranteed by the Nizzolis. (Fider Decl. ¶ 4; Ex. D) In consideration of the loan, Pacific promised (and the Nizzolis guaranteed) to make payments equal to the payments due on the loan the Fiders took out to obtain the \$330,000, to pay the Fiders an additional \$2,000 per month, and to provide 9% of the stock in Pacific to the Fiders. (Fider Decl. ¶¶ 4-6; Ex. B, C and D)

The Pacific loan was defaulted almost immediately. Although Pacific made a few of the payments necessary to cover the Fiders’ obligations on the loan they took out, those payments have not been made since February 2003. Furthermore, Pacific never delivered the shares of stock it promised, and never made the \$2,000 monthly payments. (Fider Decl. ¶¶ 7-10; Ex. F and G) On January 22, 2003, Mr. Fider gave written notice to Pacific and Mr. Nizzoli that the Pacific loan was in default, and demanded payment. The default has not been cured. (Fider Decl. ¶ 11-12; Ex. H)

The furniture, fixtures and equipment that secure the Pacific loan are now used, and their value is nowhere near the amount due under the Pacific loan. Defendants, through their counsel, have admitted that the unsecured portion of the their obligations to plaintiffs is in excess of \$200,000 (Fider Decl. Ex. J). The total unsecured portion of plaintiffs’ claim, including estimated allowable attorneys’ fees, is at least \$245,444 (Chilvers Decl. ¶¶ 7-9), and is probably much larger than that.

Plaintiffs apply ex parte for appointment of a receiver to take possession of Pacific’s assets and for a writ of attachment attaching the Nizzolis’ residence.

II. PACIFIC IS INSOLVENT, AND ITS PROPERTY IS IN IMMINENT DANGER OF BEING LOST OR MATERIALLY INJURED

Under the management of Mr. Nizzoli the financial condition of the restaurant has deteriorated to the point where its prospects for survival are very dim. Unless a receiver is put in place promptly it may not survive. Despite Mr. Nizzoli's representations that he was an experienced and successful restaurant operator, and that he would be actively involved in the management of the restaurant, his conduct has been quite different. According to Cathy Carrisosa, the General Manager of the restaurant, and Daniel Kinnemore, the Executive Chef, Mr. Nizzoli is rarely there. (Carrisosa Decl. ¶ 25; Kinnemore Decl. ¶¶ 13-15) His gross mismanagement of the restaurant is evidenced by the following:

- There are no books of account. Mr. Nizzoli blames this grievous mismanagement on a former employee, who left several months ago. According to Mr. Nizzoli, this former employee (who he obviously failed to supervise) failed to set up QuickBooks, and failed to input the financial data. Mr. Nizzoli admits "Some information was input, but most was not ... information, records and receipts [are] scattered everywhere ... In other words, there are no books to review ..." (Cordell Decl. ¶ 19; see also Carrisosa decl. ¶ 18 and Fider Decl. ¶ 18)

- The suppliers have not been paid, and at this point, several major suppliers will not provide supplies to the restaurant because of overdue invoices. (Cordell Decl. ¶ 14; Kinnemore Decl. ¶¶ 6-7; Carrisosa decl. ¶ 12) Mr. Nizzoli has lied to the senior staff about payment of these accounts. (Kinnemore Decl. ¶¶ 7, 9; Carrisosa Decl. ¶¶ 13, 20)

- Employees have not been paid, or have been paid with checks drawn on insufficient funds that the banks and local merchants refuse to cash. As a result several employees have quit, and others are threatening to do so. Among other things, this has led to terrible relations with the local business community, and loss

of business. (Carrisoa Decl. ¶¶ 14-17, 21; Kinnemore Decl. ¶ 10; Cordell Decl. ¶ 14)

- The PG&E bill has not been paid since October 2002, and PG&E is threatening to terminate the restaurant's service. Obviously, this would be fatal. On May 6, 2003, PG&E told the General Manager it would be turning off the service. She told Mr. Nizzoli, who went to the PG&E office to make payment, and faxed a copy of the receipt to the General Manager to show the service representative, so he would not disconnect the service. However, there were insufficient funds in the bank account to cover the check. (Carrisoa Decl. ¶¶ 8-11)

- The rent has not been paid, and the landlord of the restaurant premises has filed an unlawful detainer action. (Cordell Decl. ¶¶ 9-10)

- The county Health Department threatened to shut down the restaurant because Mr. Nizzoli had failed to pay the Health Department fees. The restaurant had passed the Health Department inspection, but the small \$178 fee had not been paid. When Plaintiff Tomasito Fider became aware of this, he went to the Health Department and paid the fee with his own funds to keep the restaurant open. (Fider Decl. ¶¶ 31-32)

- At least 60 checks drawn on the restaurant's bank account have been returned for insufficient funds. (Fider Decl. ¶ 21)

- There is no evidence in the records that any provisions have been made for payroll taxes, FICA, Medicare, SDI, Unemployment Insurance or Workers Compensation Insurance. (Fider Decl. ¶ 21)

- Pacific is more than \$100,000 in debt. Despite this, Mr. Nizzoli has written and cashed checks to himself and his wife, defendant Elizabeth Nizzoli, drawn on the restaurant's bank account, totaling more than \$36,000. (Fider Decl. ¶¶ 21)

- Over the weekend of May 3-4, 2003, the restaurant had credit card receipts of \$6,000 - \$7,000. These funds are automatically deposited into the restaurant's bank account and would be available on Monday May 5, 2003. Despite

this deposit, several employees were unable to cash their paychecks on May 5 and May 6, because those funds had already been withdrawn by Mr. Nizzoli. (Carrisosa Decl. ¶ 6-7) This last weekend, May 2-4, the restaurant had credit card receipts of \$8,300. These receipts were deposited into the restaurant's bank account on Monday, May 5. But again, they were immediately withdrawn by Mr. Nizzoli before any of the employees were able to cash their paychecks. As a result, a number of employees have now quit. (Supplemental Carrisosa Decl. ¶¶ 3-4)

III. THE OPERA HOUSE COULD SURVIVE IF A RECEIVER IS APPOINTED

Notwithstanding all of the problems caused by Mr. Nizzoli's gross mismanagement, the Opera House could be a successful restaurant. (Fider Decl. ¶ 37) According to Ms. Carrisosa, the restaurant has excellent potential (if it was properly managed), there are few restaurants in Tracy of its caliber, and it already has booked almost the entire month of December 2003 for parties. (Carrisosa Decl. ¶ 26) Mr. Kinnemore, the Executive Chef agrees, but emphasizes that "unless the restaurant's financial management is brought under control, it will become impossible to maintain the business. (Kinnemore Decl. ¶ 18)

IV. APPOINTMENT OF A RECEIVER AND ISSUANCE OF A WRIT OF ATTACHMENT ARE APPROPRIATE IN THIS CASE

The legal bases for appointment of a receiver are set forth in section 564 of the Code of Civil Procedure. Section 564 provides that a receiver may be appointed by the court in which an action is pending where, *inter alia*: (1) plaintiffs are creditors who have a claim against defendant, and the appointment of a receiver is necessary to subject the defendant's property to plaintiffs' claim; (2) plaintiffs' right to or interest in the property is probable and the property is in danger of being lost, removed or materially injured; (3) defendant is insolvent, or in imminent danger of

insolvency; (4) where the appointment of a receiver is necessary to preserve the property and rights of plaintiffs. As shown above, and in the declarations submitted in support of this application, all of these grounds clearly apply in this case.

The legal bases for an attachment are set forth in section 483.010 of the Code of Civil Procedure. Under section 483.010, an attachment may be issued in an action on a claim or money, based upon a contract, where the amount claimed is not less than \$500. The property of a natural person may be attached if the underlying claim arose from the conduct of the defendants' trade, business or profession. Here, the claim is based on a contract, the Unconditional Personal Guaranty; the amount is well in excess of \$500, and the claim arose from the Nizzolis conduct of their business as officers, directors and owners of defendant Pacific. Attachment is proper where, as here, the defendants are the guarantors of the primary obligor. *Nakasone v. Randall*, (1982) 129 CA3d 757, 764; *Advanced Transformer Co. v. Superior Court*, (1974) 44 CA3d 127. The attachment is necessary in this case because the property sought to be attached is in danger of being lost or impaired. Mr. Nizzoli has specifically threatened to transfer the property and declare bankruptcy. (Cordell Decl. ¶¶ 14, 24) An attachment is necessary to protect the plaintiffs' right to collect their claim.

Unless the requested provisional relief is granted, plaintiffs will be irreparably harmed, and will have no effective remedy if they prevail in their claims.

V. UNDERTAKINGS

The amount of the undertaking required for an attachment is set by statute at \$10,000, and plaintiffs are prepared to file a bond in this amount. The amount of the undertaking required for ex parte appointment of a receiver is to be fixed by the court to cover damages the defendant may suffer if the receiver was wrongfully appointed. Here, the appointment of a receiver will not cause any damage to defendant, but will improve the defendant's financial situation. (Cordell Decl. ¶ 26) This would be true

even if the appointment was wrongful. Defendant cannot reasonably dispute this.
Therefore, the court should set the amount of the undertaking at a minimal amount.

Dated: May 13, 2003

CHILVERS & TAYLOR PC

By: _____

Robert M. Chilvers

Attorneys for Plaintiffs

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