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Fitness franchise fails to obtain injunction to stop rebranding of fitness studio during the pandemic

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The COVID-19 pandemic has been particularly hard on businesses operating gymnasiums and personal training studios since public health authorities have deemed it unsafe for groups of people to workout indoors. While some workout classes have migrated online, the lack of members being able to attend in-studio activities has had devastating effects on the cash flow of indoor athletic facilities. At the same time, however, their expenses continue, including any required by franchise agreements.

In *Greco Franchising Inc. v. Franco Milito*, 2021 ONSC 3950 (CanLII), the Honourable Justice C.T. Hackland considered whether the plaintiff, Greco Franchising Inc., which operated "the Greco System of fitness studios" franchise, was entitled to an injunction to force a fitness studio to maintain its agreement to operate under the "Greco Fitness" banner.

The defendants had acquired a Greco Fitness studio franchise in an Ottawa suburb in October 2015 under a Franchise Agreement. As part of the Franchise Agreement, the corporate franchise chain had limited day-to-day involvement in the operations of the fitness studio. The studio operators recruited members, set prices, and collected revenue while remitting a franchise fee back to Greco.

The defendants objected to the Greco franchise's handling of the business during the COVID-19 pandemic and various lockdowns. Following the onset of the pandemic, Greco introduced an online fitness program titled the Greco Method At-Home ("GMAH") and marketed it directly to the franchisee's members. Under the GMAH, Greco imposed fees and collected them directly from members after which they were split 50/50 with the franchisees. Greco prohibited the franchisees from developing or marketing their own at-home fitness programs.

The position of the defendants was that the GMAH imposition violated the terms in the Franchise Agreement which entitled each franchisee to "the exclusive right to a defined territory," the right to collect revenue from members and set prices, amongst other terms. The

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defendants argued that the imposition of the GMAH constituted a fundamental breach of the Franchise Agreement bringing their relationship with the plaintiff to an end.

Negotiations between the parties as to how the studio would "debrand" its location were ongoing when the operator of the studio sent a mass email to its members advising that the location was being converted from a Greco Fitness Studio to TG Athletics. Greco considered this action to be a breach of the non-competition terms in the Franchise Agreement and sought an injunction that would prevent TG Athletics from operating upon the resumption of in-person fitness classes.

Justice Hackland assessed whether Greco had established the traditional criteria for the granting of an injunction: the showing (a) of a serious question to be tried; (b) of irreparable harm if the injunction is not granted; and (c) that the balance of convenience favoured granting the injunction: *RJR MacDonald Inc. v. Canada (Attorney-General)*, 1994 CanLII 117 (SCC), 1994 SCC 117, [1994] 1 S.C.R. 311.

The first bar of the *RJR-MacDonald* test is ordinarily the easiest for an applicant to clear. But as this was a case in which an injunction would interfere with a person's ability to earn a livelihood, Justice Hackland followed the line of cases that required Greco to demonstrate a strong *prima facie* case: *Kapur et al v. Konevic*, 2020 ONSC 5706.

Justice Hackland agreed with Greco that the operation of TG Athletics would be in clear violation of the Franchise Agreement should it continue to bind the parties. However, he noted that there was "a serious issue as to whether the GMAH program, when combined with the financial restructuring which is inherent in the program…undermines the fundamental underpinning of the franchise agreement." In the circumstances, Greco had not demonstrated that it had a strong *prima* facie case and therefore did not clear the first branch of the test.

While not necessary for the result, Justice Hackland addressed the remaining components of *RJR-MacDonald* test. He first noted that any harm to Greco's goodwill, reputation and membership allegiance, if any, had already occurred and would not be prevented by imposing an injunction. Any harm would be compensable in quantifiable monetary damages. Further, the defendants would not be able to pay any damages if they were not permitted to operate the studio in the interim before trial.

Finally, Justice Hackland noted the previous (unsuccessful) negotiations between the parties in which Greco was not opposed to the defendants operating a fitness studio out of the existing location provided that appropriate financial and de-branding arrangements could be agreed to. The multitude of these factors weighed against Greco, and Justice Hackland in turn refused to grant the requested injunction.

As a result, the plaintiff's motion for an injunction was dismissed, with costs reserved to the trial judge. There was undoubtedly a serious issue to be tried, but the court was not prepared to stop the studio from operating as it wanted to do until the trial. The plaintiff may yet prevail at trial if it can prove that the defendants were not entitled to terminate the Franchise Agreement or compete in violation of its terms.

The reasons in the decision were alive to the outward perception of how granting Greco's application would be viewed. As Justice

Hackland commented, ordering "closures of fitness facilities during a pandemic, for non-health related reasons, creates a very poor optic to the public." This statement, along with the decision of *Taylor v. Hanley Hospitality Inc.*, which we wrote about here, are positive signs to gym operators and other business owners who have been disproportionately affected by the COVID-19 pandemic. The courts appear willing to be supportive of a return to normal operations and avoiding undue hurdles to businesses re-opening. While COVID-19 related lawsuits will certainly be prevalent in the courts for the next few years, an effort by the judiciary to discourage technical and competition-stifling lawsuits could go a long way to putting the pandemic in the rear-view mirror.

Contact us

If you have a litigation matter and are in need of legal advice, please contact James Cook, at 416.865.6628 or jcook@grllp.com.

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