

Case No. _____

OLDHAM CIRCUIT COURT
DIVISION _____
JUDGE _____

[PLAINTIFF H]

PLAINTIFF

v.

NOTICE – MOTION – ORDER

[DEFENDANTS]

DEFENDANTS

NOTICE

To: Counsel for Defendants

Please take notice that the undersigned will make the Motion and tender the Order set out below in the courtroom of the above Court on Friday, October 30, 2009, at 9:00 a.m.

MOTION FOR INJUNCTIVE RELIEF
and MEMORANDUM OF LAW

Comes now the Plaintiff, [Plaintiff H], by and through counsel, and moves this honorable Court to issue an injunction pursuant to Kentucky Rule of Civil Procedure 65.04 and the Local Rules of the Twelfth Judicial Circuit, and in support thereof tenders this Memorandum of Law:

BACKGROUND

This case arises from a motor vehicle accident. While driving her vehicle through a retail store parking lot at approximately 3:00 a.m. on November 6, 2008, Defendant collided with Plaintiff's parked security vehicle, causing him injury. See *Affidavit* accompanying this Motion, as well as Plaintiff's *Complaint*, attached as Exhibit 1. Defendant was thereafter charged by the Commonwealth with operation of a motor vehicle under the influence of alcohol or drugs, her second such offense in Kentucky. *Id.*

After months of fruitless settlement negotiations, Plaintiff's counsel contacted Defendant's counsel on October 2, 2009, to inquire once more about any drinking establishments Defendant had patronized prior to the collision. See *id.* Plaintiff's counsel specifically expressed his concern that the statute of limitations for suit against third-party tortfeasors under KRS 413.241, commonly known as the Dram Shop Act, may have been fast approaching,¹ but Defendant's counsel still refused to name any such establishments. Plaintiff filed suit on October 5, 2009.

Through interrogatories propounded under CR 33, Plaintiff has requested information concerning all business establishments, including drinking establishments, Defendant may have patronized in the 24 hours preceding the collision:

INTERROGATORY NO. 7: Please specifically describe your activities for the 24-hour period preceding the collision that is the subject of this lawsuit, specifically identifying in your answer

- (a) the name and address of each and every place you visited or event you attended during that time period, including but not limited to visits to any retail establishments, business establishments, offices, restaurants, taverns, individual residences, or any other public or private venues; and
- (b) the time periods of your visit or attendance at each such place or event.

See *Plaintiff's First Set of Interrogatories to [Defendant]*, attached as Exhibit 2.

As of this date, Defendant has refused to provide the names or addresses of third-party tortfeasors potentially liable under the Dram Shop Act, KRS 413.241. Because Plaintiff is

¹ The issue of a time limitation on the filing of causes of action arising under KRS 413.241, also known as the Dram Shop Act, has not been litigated in the Kentucky appellate courts. While an argument can be made that the five-year statute of limitations under KRS § 413.120 for causes of action created by statute applies, the one-year statute of limitations for personal injury actions may also apply, or indeed the two-year MVRA statute may apply. As of this date, there is no case law on the issue in Kentucky, thus Plaintiff now moves the Court to grant immediate injunctive relief so that, should the one-year statute apply, his due process rights regarding any such tortfeasors will not be forever lost.

already entitled to this information, and because the time for filing suit against such potential third-party tortfeasors may run on November 6, 2009, Plaintiff respectfully requests that the Court grant the order attached hereto and require that [Defendant J] respond to Plaintiff's request for information immediately so that his cause of action will not be irretrievably lost and his due process rights abrogated.

ARGUMENT

Under Kentucky Rule of Civil Procedure 65.01, a circuit court may grant an injunction to "mandatorily direct the doing of an act." Specifically, in considering an award of injunctive relief under CR 65.04, the court is to apply a three-level analysis under Kentucky law:

First, the trial court should determine whether plaintiff has complied with CR 65.04 by showing irreparable injury. This is a mandatory prerequisite to the issuance of any injunction. Secondly, the trial court should weigh the various equities involved. Although not an exclusive list, the court should consider such things as possible detriment to the public interest, harm to the defendant, and whether the injunction will merely preserve the status quo. Finally, the complaint should be evaluated to see whether a substantial question has been presented. If the party requesting relief has shown a probability of irreparable injury, presented a substantial question as to the merits, and the equities are in favor of issuance, the temporary injunction should be awarded. However, the actual overall merits of the case are not to be addressed in CR 65.04 motions.

Maupin v. Stansbury, 575 S.W.2d 695, 699 (Ky.App.1978).

I. The Plaintiff will suffer immediate, irreparable and serious injury if injunctive relief is not granted

In the affidavit accompanying this motion, Plaintiff presents clear evidence that his right to pursue a cause of action against his tortfeasors will be forever lost if he is unable to name those tortfeasors in his Complaint before the expiration of the one-year statute of limitations. By losing his right to sue those who contributed to the causation of his injuries, Plaintiff will be denied not only potential monetary compensation for those injuries, but more importantly will be denied his basic due process rights as a citizen to seek justice through the courts.

Moreover, the acts of the adverse party here will, in the language of CR 65.04, “tend to render” any judgment in this matter “ineffectual,” as Plaintiff will not be able fully to pursue justice against all those who have caused his injuries under Kentucky law. Such harm is not merely substantial, but irreparable: it goes directly to the Plaintiff’s due process rights. See Sampson v. Murray, 415 U.S. 61, 90, 94 (1974). Where the remedy at law is not “sufficient to furnish the injured party full relief to which he is entitled in the circumstances,” injunctive relief is the appropriate remedy. Cyprus Mountain Coal Corporation v. Brewer, 828 S.W.2d 642, 645 (Ky.1992). Plaintiff’s inability to pursue justice through the courts, absent an order of the Court requiring that the names of all tortfeasors be disclosed, constitutes an immediate and irreparable injury warranting the granting of injunctive relief under CR 65.04.

II. A weighing of the equities favors the granting of injunctive relief

After determining that the Plaintiff has shown a reasonable probability of irreparable harm, this Court must next weigh the various equities involved, looking at all of the relative benefits and detriments of granting a temporary injunction. Maupin, 575 S.W.2d at 699.

Under CR 33, Plaintiff is already entitled to the information sought through interrogatories. Because Plaintiff is already entitled to the information under the Kentucky Rules of Civil Procedure, delaying its disclosure until after the running of the statute of limitations for a cause of action against a third party harms only the Plaintiff, not the Defendant. By withholding the information concerning third-party tortfeasors, Defendant is attempting to shut the Plaintiff out of the courthouse before suit can be brought against all proper parties. Granting the injunction here would present no harm to the public interest, nor will Defendant be harmed. Balancing any remote or tenuous possibility of harm to the Defendant against the clear and immediate harm to Plaintiff’s due process rights favors the granting of injunctive relief here.

III. The Complaint presents substantial questions warranting trial on the merits

Finally, the Court must evaluate the complaint to determine whether the moving party has presented a substantial question for trial on the merits. Maupin, 575 S.W.2d at 699. The moving party is not required to show a substantial probability of success on the merits, but need only raise a serious question in the complaint warranting a trial. *Id.* The actual overall merits of the case are not to be addressed on the motion for injunctive relief. *Id.*

In this instance, there is no question as to the substantial merits presented, as all of the legal and factual issues raised by Plaintiff's Complaint still stand: the existence of a duty of care, the breach of that duty, and the causation of the Plaintiff's injuries and damages. Plaintiff now seeks injunctive relief so that he can pursue his claims against all those tortfeasors who may have breached their duty owed to him under Kentucky law.

CONCLUSION

Plaintiff has met the requirements for demonstrating the need for injunction relief under CR 65.04 and Kentucky law by showing (1) a reasonable probability that he will suffer immediate and irreparable injury if Defendant is allowed to continue concealing information to which Plaintiff is entitled, (2) the equities of the situation justify the granting of a temporary injunction, and (3) the Complaint presents substantial questions to be finally resolved by this Court.

WHEREFORE, Plaintiff respectfully requests this Court to grant the attached Order and require the Defendant to reveal the names of all known potential tortfeasors forthwith.

Respectfully submitted,

Counsel for Plaintiff [Plaintiff H]

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ORDER

[DEFENDANTS]

DEFENDANTS

* * * * *

Having considered the arguments of both parties at a hearing held in this Court on Friday, October 30, 2009, and having considered all motions submitted in this matter, the Court hereby **GRANTS** Plaintiff's Motion for Injunctive Relief under CR 65.04, and here enters Findings of Fact and Conclusions of Law, as required by CR 65.04(5) and CR 52.01:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Through the Affidavit accompanying his motion, Plaintiff has presented evidence of a substantial and likely possibility of immediate and irreparable harm to his interests if injunctive relief is not granted. Specifically, Plaintiff will be unable to pursue a cause of action against his potential tortfeasors under KRS 413.241, commonly known as the Dram Shop Act, if Defendant does not provide to him the names of any persons or entities that may have served intoxicating beverages to Defendant within the 24 hours prior to her collision with Plaintiff's parked security vehicle on November 6, 2008. Because the issue of which statute of limitations may apply to actions brought under the Dram Shop Act has not yet been clarified by the Kentucky appellate courts, Plaintiff may forever lose his right to pursue a cause of action against potential tortfeasors if he is unable to name said tortfeasors in an amended Complaint before November 6, 2009, and serve summons to same said tortfeasors before that date. Further, a weighing of equities favors granting Plaintiff the relief requested, and substantial questions have been raised in the Complaint warranting a trial on the merits.

WHEREFORE, pursuant to the powers vested in it by CR 65.01, this Court does **GRANT** Plaintiff's Motion for Injunctive Relief and does hereby **ORDER** [Defendant J] to disclose forthwith, and in no event later than 9:00 a.m., Monday, November 2, to Plaintiff [Plaintiff H] the names and addresses of any persons or entities that served her intoxicating beverages in the twenty-four (24) hours prior to the motor vehicle accident described in Plaintiff's Affidavit and Complaint.

DONE and ORDERED, this _____ day of _____, 2009.

HON. _____, JUDGE
OLDHAM COUNTY CIRCUIT COURT