

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

Case No. 03-Civ-80515-Hurley/Lynch

KATY JOHNSON,

Plaintiff,

vs.

TUCKER MAX,

Defendant.

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR CLARIFICATION

Plaintiff's Motion for Clarification, dated July 2, 2003, conflicts with a number of clear rules of federal procedure and should accordingly be summarily denied.

First, it is clear under binding Supreme Court precedent that an *ex parte* temporary injunction entered by a state court prior to removal expires automatically no later than ten (10) days from removal. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423, 439-40 (1974) ("An *ex parte* temporary restraining order issued by a state court prior to removal remains in force after removal no longer than it would have remained in effect under state law, but in no event does the order remain in effect longer than the time limitations imposed by Rule 65(b), measured from the date of removal.").

Second, while a plaintiff has the right under Rule 65(b) to apply for an extension of a temporary restraining order before it expires, it is abundantly clear that the Plaintiff in this case never sought such an extension. Indeed, in reality, Plaintiff's Motion for Clarification seems to be nothing more than a thinly-guised attempt to make up for Plaintiff's complete failure to timely

seek such an extension – a failure for which Plaintiff conspicuously offers no excuse. In fact, Plaintiff’s motion for clarification does not even mention that Plaintiff had the ability under Rule 65(b) to seek an extension, perhaps because Plaintiff does not want to call attention to the fact that she could have sought an extension, but failed to do so.

Third, while the Court conceivably had the power, prior to the injunction’s expiration, to extend the injunction *sua sponte* without a motion by Plaintiff, to do so would have required a clear statement to that effect by the Court, as well as the entry of findings of fact and conclusions of law in support of any such extension. *See* Rules 52 and 65(b), Fed.R.Civ.P. Indeed, Plaintiff’s own Motion for Clarification cites *Granny Goose* as holding that an enjoined party should assume the injunction is expired automatically absent an express directive from the court to the contrary. *See* Plaintiff’s Motion at ¶ 15. As is plain, the Court’s June 19th Briefing Order does not contain any statement extending the injunction beyond the time limits of Rule 65(b), nor any findings of fact or conclusions of law that would support such an extension. Moreover, Defendant would have been entitled to notice of and an opposition to any extension of the injunction on the merits.

Fourth, even if, *arguendo*, an extension could have been made without notice to Defendant, an extension of an *ex parte* injunction can only last a maximum of another ten (10) days. *See* Rule 65(b), Fed.R.Civ.P. Therefore, to play out Plaintiff’s fantasy to its illogical conclusion, even if the injunction was extended by the June 19th Briefing Order and therefore lasted a total of twenty (20) days from removal – it still expired prior to the filing of Plaintiff’s “motion for clarification.”

Fifth, to the extent Plaintiff is improperly requesting in her motion that the *ex parte* injunction should last indefinitely, then that would make it a Preliminary Injunction, which can only be issued following notice to Defendant and a full opportunity to be heard in opposition. See Rule 65(a)(1), Fed.R.Civ.P. (“No preliminary injunction shall be issued without notice to the adverse party.”); see also, *Four Seasons Hotels and Resorts, B.V. v. Consorcio Barr, S.A.*, 320 F.3d 1205, 1210 (11th Cir. 2003) (“In order for a preliminary injunction to issue, the nonmoving party must have notice and an opportunity to present its opposition to the injunction.”) (citing *Granny Goose*, 415 U.S. at 433 n.7).

If anything is clear in this case, however, it is that Defendant has never been afforded any notice, or any opportunity to be heard on the merits, of the injunction. Accordingly, a finding that a Preliminary Injunction now somehow magically exists is a procedural impossibility.

Next, as for Plaintiff’s assertion that Defendant did not seek a modification of the injunction prior to its expiration (see Plaintiff’s motion at ¶ 12), that is a rather disingenuous suggestion for Plaintiff to make, considering that Defendant went much further than seeking a mere modification of the injunction, and instead filed a comprehensive motion seeking its full and immediate dissolution. Moreover, as set forth in Defendant’s dissolution motion, and in the supporting brief filed by *amicus curiae* American Civil Liberties Union, the *ex parte* temporary injunction was blatantly invalid procedurally, devoid of legal merit, and unconstitutional on its face.

Finally, as for Plaintiff’s complaint that SHE might be denied an opportunity “to be heard at the appropriate hearing [on a motion for dissolution of the injunction]” (Plaintiff’s motion at ¶ 24), that is strikingly akin to the pot calling the kettle black, considering that it was the Plaintiff who intentionally sought and obtained the injunction on an *ex parte* basis in the first instance.

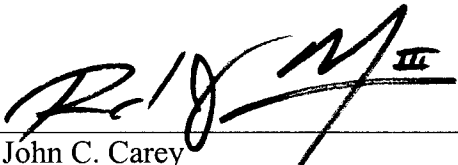
What's more, Plaintiff's "complaint" ignores the fact if Plaintiff had wanted to extend the injunction beyond the time limits provided for in Rule 65, then the Rule clearly provided her with a mechanism to do just that – she could have filed an appropriate motion for extension prior to the injunction's expiration. *See* Fed.R.Civ.P. 65(b). Of course, Plaintiff did not do that here, either because she simply neglected to do it, or more likely because that would have required notice to the Defendant and his ability to submit an opposition on the merits – two things of which Plaintiff is desperate to deprive Defendant in this matter.

For the foregoing reasons, Plaintiff's Motion for Clarification should be denied, and the proposed Order entered that was attached to Defendant's Notice of Mootness of Defendant's Emergency Motion to Dissolve *Ex Parte* Temporary Injunction vacating the injunction *nunc pro tunc*. *See Biomedical Instrument and Equipment Corp. v. Cordis Corp.*, 797 F.2d 16, 18 (1st Cir. 1986) ("when a case is removed to federal district court, that court must dissolve any *ex parte* state court injunction or temporary restraining order – once the maximum time limits that Federal Rule of Civil Procedure 65(b) authorizes for an *ex parte* order have expired") (citing *Granny Goose*; emphasis in original).

Dated: July 7, 2003

Respectfully submitted,

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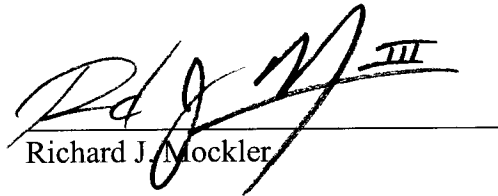
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Counsel for Defendant

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing was served by United States mail this 7th day of July, 2003, on **Michael I. Santucci, Esq.**, Law Offices of Michael I. Santucci, P.A., Counsel for Plaintiff, 500 West Cypress Creek Road, Suite 500, Fort Lauderdale, Florida 33309.


Richard J. Mockler