

June 29, 2018

CLERK OF THE HAMILTON
CIRCUIT COURT

STATE OF INDIANA)
) SS:
COUNTY OF HAMILTON)

IN THE HAMILTON CIRCUIT COURT

CAUSE NO. 29C01-1805-PL-003969

INDIANA TRANSPORTATION)
MUSEUM,)
)
 Plaintiff,)
)
 vs.)
)
(1) CITY OF NOBLESVILLE, IN;)
(2) CITY OF NOBLESVILLE, IN, PARKS)
AND RECREATION BOARD; and)
(3) HOOSIER HERITAGE PORT)
AUTHORITY.)
)
 Defendants.)

CITY OF NOBLESVILLE and)
NOBLESVILLE PARKS AND)
RECREATION BOARD,)
)
 Plaintiffs,)
)
 vs.)
)
INDIANA TRANSPORTATION)
MUSEUM, INC.,)
)
 Defendant.)

CAUSE NO. 29C01-1805-PL-004434

FINDINGS OF FACT, CONCLUSIONS, AND ORDER

This matter comes before the Court on dueling requests from the Indiana Transportation Museum, Inc. ("ITM"), and the City of Noblesville and the Noblesville Parks and Recreation Board (jointly, "the City"), regarding whether ITM may continue to occupy the premises formerly leased to ITM by the City at Forest Park (the "Premises"). Through injunctive relief, ITM also seeks to require the

Hoosier Heritage Port Authority ("HHPA") to permit use of its rail system outside the Premises. On May 3, 2018, ITM filed a Verified Complaint and Temporary Restraining Order in Cause No. 29C01-1805-PL-003969, seeking a preliminary injunction against the City. In turn, on May 16, 2018, the City filed a Complaint in Cause No. 29C01-1805-PL-004434, seeking to evict ITM. The two matters were, after consultation with and consent from the parties, consolidated by the Court on May 18, 2018. On May 30 and May 31, 2018, an evidentiary hearing was held which addressed (1) ITM's request for a preliminary injunction and (2) a show cause hearing on prejudgment possession which was consolidated by Court order with the final hearing on possession.

Prior to the hearing, the City and HHPA filed on May 16, 2018 and May 23, 2018, respectively, Trial Rule 12(B)(6) motions to dismiss ITM's complaint for failure to state a claim, which, following ITM's presentation of evidence during the hearing, the City and HHPA supplemented with a motion for a directed judgment under Trial Rule 41(B). Both motions were taken under advisement by the Court. An evidentiary hearing was conducted on May 30 and May 31 at which the Court received both testimony and exhibits.

FINDINGS OF FACT

1. ITM is a 501(c)(3) nonprofit organization. ITM was established in 1964 and is an historical train museum. ITM has been located at the Premises since 1973.

2. ITM's operations are conducted mainly by volunteers – most of whom volunteer only on the weekends. Until the end of 2015, ITM had been able to hire a few paid employees – part-time only.

3. ITM's assets currently include approximately ninety (90) railroad units (engines, variety of passenger and box cars, and cabooses), two (2) cranes, six (6) buildings, fifteen thousand (15,000) feet of rail, and thousands of train parts and accessories

4. The Premises is a large 110-acre municipal park consisting of playgrounds, miniature golf, a skateboarding area, a carousel, and a walking trail amongst other amenities.

5. ITM and the general public access the train yard via Forest Park Drive and a rail line operated by HHPA. There are two rail connections for ITM out of the Premises, one running north, the other south.

6. ITM does not own any rail track outside the Premises. ITM has for years used HHPA's rail line to move units and conduct historical, educational, and entertainment excursions (Fair Train and Polar Bear Express).

7. Within the Premises, ITM has been leasing a space that consists of approximately 10 acres. Although it appears there have been multiple leases between ITM and the City over the years, this conflict revolves around the Lease Agreement ("the Lease") which was signed by the City and ITM in 2015.

8. According to the terms of the Lease, ITM's original term began on the 4th day of February, 2015, and ended on the 1st day of March, 2016. See Ex. 9,

Article I. The Lease was to automatically renew for four additional one year terms unless ITM or the City elected not to renew the Lease by giving written notice to the other party not less than sixty days prior to the end of each term.

9. HHPA is a political subdivision that was established by Ordinance Number 090794B and its purpose is to protect and preserve the existence of the real property for such uses including but not limited to recreation, transportation, and tourism. The HHPA is responsible for maintaining and managing a rail line owned by Fishers, Noblesville and Hamilton County, Indiana. The rail line managed by HHPA is approximately 37.5 miles long, and located between Tipton and 10th Street in Indianapolis, Indiana ("rail line"). The rail line connects to the land leased by ITM in Forest Park, however, the rail line is self-contained -- it is not connected to any other public rail line.

10. It is with this basic understanding of the relationship between the three parties that ITM operated as what appears to have been a successful train museum.¹ However, around 2015, whether it be due to conditions, misunderstandings, negligence, or something else, ITM's welcome within the City and as an operator on the HHPA lines began to wane.

11. ITM had a contract with HHPA to operate on the rail line between 1996 and 2006. Subsequent to 2006, following the expiration of their contract, and following unsuccessful attempts to reach a new contract, HHPA instead adopted

¹ This Judge celebrated his child's fifth birthday on a train ride at this museum. Additionally, from my chamber windows, I have enjoyed watching the historical trains move through downtown Noblesville. The trains and ITM represent a link to our history.

a policy of use. The Policy of Use was understood by ITM to be "unilateral" in nature and subjected ITM to multiple conditions in order to use the HHPA rail line. In 2016, a detailed Conditional Policy of Use was adopted by HHPA. Once again, this was understood to as a directive from HHPA to ITM as to what they were required to do in order to use the HHPA line. This was not a contract nor an agreement between the parties. ITM could either accept it, comply, and use the rails; or, they could reject it and not be permitted to use the rails. Around July 2016, due to HHPA's belief² that ITM was non-compliant with the Conditional Policy of Use, HHPA forbid ITM to operate on the rail line.

12. Shortly after the troubles began to brew between ITM and HHPA, in May 2017, the City became aware of environmental concerns on the Premises related to the storage and leakage of solid and liquid chemicals. John McNichols ("McNichols"), the Chair of ITM, admitted that ITM allowed a number of environmental issues to develop on the Premises. In fact, there were substantial amounts of debris on the Premises, numerous exposed chemical containers and batteries, staining on the ground from chemical spillage, and, what appears to have been, a systemic lack of regard for the environment.

13. After the City notified ITM of its environmental concerns, ITM, by its environmental counsel, filed a disclosure with the Indiana Department of Environmental Management ("IDEM"), detailing potential violations related to

² Whether true or not, which is not relevant to the court's considerations today, HHPA believed ITM had failed to give advance notice of its use of the rail line, failed to maintain the rail line, and failed to provide reporting, all of which was required under the unilateral conditions of use.

compliance with the Occupational Safety & Health Administration's (OSHA's) Hazard Communication Standard (29 CFR 1910.1200), the National Pollutant Discharge Elimination System (NPDES) permit process (327 IAC 5-2-2) and stormwater discharge management (327 IAC 15-6-2). See Ex. 7.

14. In turn, IDEM issued to ITM a Notice of Violation, stating in part, "[b]ased on an investigation including inspections conducted on June 9 and November 9, 2017, [IDEM] has reason to believe that [ITM] has violated environmental statutes and rules." The Notice of Violation outlined specific instances of violations. See Ex. 6.

15. ITM contracted with The ELAM Group, an environmental consulting service, to oversee the environmental remediation process on the Premises. As part of that process, The ELAM Group did a materials inventory of 1,063 items on-site to determine if the items were useable or waste. Of the 1,063 items, approximately 400 items were determined to be waste. Of the 400 items, a subcontractor hired by ELAM Group determined that more than 150 items were hazardous waste. ELAM Group requested a pre-renovation asbestos survey, in which samples from ten railcars were collected and analyzed for asbestos by Americo, Inc. Samples collected identified a number of asbestos-containing materials. Americo, Inc. concluded that abatement of the identified asbestos-containing materials should be performed by an Indiana-licensed asbestos abatement contractor per local, state, and federal rules and regulations. As far as can be determined from the evidence, it appears that it will take 2 to 3

years to complete the clean-up of the site on which ITM operates. It is not known whether significant environmental dangers to the health of the public exist due to the conditions of the site.

16. On December 20, 2017, the City sent written notice to ITM notifying it that the Lease was not being renewed and would expire on March 1, 2018.

17. The Lease expired on March 1, 2018.

18. Article V of the Lease addresses "Removal of Structures at End of Term," stating:

It is further understood and agreed that any existing structures or additions to the Premises constructed or made by [ITM] shall be **considered to be property of [ITM] insofar as same are capable of being removed from the land and shall be removed by [ITM] upon termination of the lease.** Any injury to the land caused by said removal shall be repaired by [ITM]. These structures to include, but not be limited to, buildings, railroad track, all electrical wiring and poles and all railroad cars or similar type vehicles.

See Ex. 9 (emphasis added).

19. In Article III of the Lease, ITM also agreed "to keep and maintain the Leased Premises in a clean, sightly, and healthful condition, and in good repair at its own expense and shall yield the same back to [the City] **upon termination** of the lease in a clean, sightly and healthful condition and in good repair" *Id.*, Article III (emphasis added).

20. ITM requested additional time to vacate. The City agreed to extend the date to vacate to June 1, 2018. Once again, instead of vacating, ITM filed, on May 3, 2018, this instant action. ITM has failed to vacate the Premises. ITM continues to occupy the Premises.

21. ITM did not remove all of its assets from the Premises upon termination of the Lease.

22. ITM did not yield the Premises back to the City in a clean, sightly, and healthful condition and in good repair upon termination of the Lease.

23. Since being notified of the City's desire to terminate the Lease, ITM has either relocated or scrapped approximately 10 train units. Approximately 5 train units have been identified to be scrapped. Approximately seventy-two pieces of equipment have yet to be removed from the Premises or scrapped. Of the 72 pieces that remain, a handful have historical value.

24. Despite the fact that ITM was given notice on December 20, 2017, that its Lease was not being renewed, it does not appear ITM has acted with any sense of urgency in vacating the Premises. Indeed, it appears ITM desires to continue its exit plan using only its few remaining volunteers. Alas, this appears to be the sticking point – ITM wants to vacate the Premises at their pace and in the way they want to do so. In the Lease, ITM bargained for 60 days to vacate the Premises upon Notice, now they wish to extend that time via judicial fiat.

25. McNichols constantly conflated "weeks" and "hours" of work to prepare the train units for relocation. McNichols testified that it would take "40 hours" of work per unit to move by rail. He testified it would take "1 week" of work per unit to move by road. The court later learned it would take ITM a full month to complete "40 hours" of work. In other words, and as conceded by McNichols, it would take *longer* to move the remaining train units by rail than by road. Even

if ITM was able to "hospitalize" half of the train units, ITM would still have 36 units that would need to go through all the proper inspection and testing protocols. Once again each unit would take "40 hours", which, in reality, is one month of work – or, 36 months (3 years) to be ready to relocate the remaining 72 train units. Whereas, by road, according to McNichols' testimony it would take 72 weeks (less than 1 ½ years).

26. ITM has yet to complete an assessment of its inventory to even determine which pieces are to be relocated, scrapped, or sold. ITM does not know what it will do with its equipment, and ITM presented no definitive evidence of where it would go.

27. ITM also claimed that part of its reason for delay in vacating the Premises is that it needs access to the Nickel Plate Line, which is controlled by HHPA. However, HHPA has already contracted with another operator, which gives that operator exclusive access to the Nickel Plate Line from the Hamilton County Courthouse north. Even with that, HHPA has offered to ITM an opportunity to access its lines conditioned upon certain factors. ITM is adamant that it will not comply with the conditions because ITM deems the conditions to be unreasonable and overly burdensome.

28. Jim Lesiak ("Lesiak") testified concerning the timing of relocating ITM's equipment. Lesiak is one of the handful of contractors who is experienced and qualified in moving large train equipment. According to Lesiak, *all* of the train equipment at the Premises could be moved out by truck via roads in

approximately 150 to 200 days. Moreover, if only five to six pieces of equipment were to be relocated – those McNichols believed had historical significance – they could have been moved within a couple weeks. The estimated cost for removal ranges from approximately \$180,000 for the removal of five to six pieces of equipment, to \$2.5 million to \$3 million for all seventy-two pieces of equipment.

29. Even if ITM wanted to scrap additional units, ITM has not done an asbestos assessment of all the remaining units. An assessment, which has yet to be done, will still need to be done, before any additional scrapping of unwanted train units can occur. Pursuant to a Limited Site Access Agreement between the City and the ELAM Group, the ELAM Group was provided access to perform its environmental work under specific terms agreed to by those parties. See Ex. 8.

30. Any factual finding that should be considered a legal conclusion is incorporated by reference as a Conclusion of Law.

CONCLUSIONS OF LAW

It is from the foregoing facts that the Court considers and makes conclusions regarding the City's and HHPA's motions to dismiss and requests to deny ITM's request to impose a preliminary injunction upon the Defendants.

I. Should the Complaint be dismissed Under Trial Rule 12(B)(6) or Trial Rule 41(B)?

1. Trial Rule 12(B)(6) allows a party to seek dismissal of a complaint where the plaintiff "[f]ail[s] to state a claim upon which relief can be granted" Ind. T.R. 12(B)(6). "A motion to dismiss under Rule 12(B)(6) tests the legal sufficiency of a complaint: that is, whether the allegations in the complaint

establish any set of circumstances under which a plaintiff would be entitled to relief." *Trail v. Boys & Girls Clubs of Nw. Indiana*, 845 N.E.2d 130, 134–35 (Ind. 2006).

2. In determining whether a motion to dismiss under T.R. 12(B)(6) should be granted, a court should accept as true the facts alleged in the complaint, and should draw every reasonable inference in favor of the non-moving party. A court, however, "need not accept as true allegations that are contradicted by other allegations or exhibits attached to or incorporated in the pleading." *Id.* "Indeed, 'a plaintiff may plead himself out of court by attaching documents to the complaint that indicate that he or she is not entitled to judgment.'" *Irish v. Woods*, 864 N.E.2d 1117, 1120 (Ind. Ct. App. 2007) (internal citations omitted).

3. ITM has asked this Court to use its equitable powers to enjoin the enforcement of the Lease and judicially mandate that the City give ITM an additional 18-36 months to vacate the Premises.³ (See Complaint, Sections E & F.) ITM also has asked this Court to use its equitable powers to mandate HHPA to permit ITM to access and use its rail system for as long as ITM needs to vacate the Premises.

4. Here, accepting as true all of the allegations pled by ITM, and drawing all permissible inferences in favor of ITM from those facts, the court concludes ITM's Complaint fails to identify a viable cause of action against either the City or HHPA. By way of example, ITM has not filed a lawsuit for breach of

³ However, in its "[ITM's] Proposed Findings of Fact" submitted to the Court, ITM asks for only 200 days to vacate the Premises.

contract or a recognizable tort claim. ITM's request has no basis in the law or equity. "It is not the province of courts of equity to make or supplement private contracts." *Bowerman v. First Merchants Nat'l Bank of Lafayette*, 7 N.E.2d 198, 205 (Ind. 1937). "[W]hatever rights [ITM] may have must be governed by the terms of the contract and from the contract alone, and not by application of any equitable principles." *Smith v. Sparks Milling Co.*, 39 N.E.2d 125, 133 (Ind. 1942). Indeed, equity "require[s] parties to comply with and carry out the terms of their contract..." *Id.* "While one seeking equity must do equity, the equity which must be done is that which should have been done. . . . Nothing more is required of either party. Where it is possible to do so, equity will place the parties in the position intended by their original contract." *Becker v. MacDonald*, 488 N.E.2d 729, 733 (Ind. Ct. App. 1986), *on reh'g*, 491 N.E.2d 210 (Ind. Ct. App. 1986).

5. ITM referenced I.C. §§ 32-31-7-7 and 32-31-5-6 as a basis for the Court's "jurisdiction." (Complaint, ¶14.) But those statutes apply only to *residential* leases. See I.C. §§ 32-31-7-1 and 32-31-5-1 (explaining that both chapters apply "only to a *rental agreement*" (and only certain rental agreements at that))⁴; and then see I.C. § 32-31-3-7 (defining a "rental agreement" to mean an agreement "concerning the use and occupancy of a *rental unit*"); and then see I.C. § 32-31-3-8 (defining a "rental unit" to be a structure "that is used as a *home, residence, or sleeping unit*" by a household, and related grounds promised for "the use of a

⁴ The definitions in I.C. 32-31-3 apply in both I.C. 32-31-5 and I.C. 32-31-7. See I.C. § 32-31-5-2 and I.C. § 32-31-7-2.

residential tenant"); and see I.C. § 32-31-5-3. Because this case does not involve a residential rental unit, those statutes do not apply by their own terms.

6. In sum, ITM has not asserted any legal cause of action, and its request for equitable relief is inappropriate because the terms of the Lease control. The Plaintiff is not asserting that either Defendant is breaching a contract or agreement nor that either is violating any local ordinance, rule, or law. Rule 12(B)(6) of the Indiana Rules of Trial Procedure requires dismissal where a plaintiff "[f]ail[s] to state a claim upon which relief can be granted." Therefore, because ITM does not have a legal claim to support this action, its Complaint must be dismissed.

7. Alternatively, Rule 41(B) states in pertinent part:

After the plaintiff or party with the burden of proof upon an issue, in an action tried by the court without a jury, has completed the presentation of his evidence thereon, the opposing party, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the weight of the evidence and the law there has been shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. . . .

Ind. T.R. 41(B).

8. While an order of dismissal is appropriate under Trial Rule 12(B)(6) when it is apparent from the face of complaint that the plaintiff is precluded from recovery, "Trial Rule 41(B) addresses a particular dispositive motion a defendant may file after the plaintiff has concluded its presentation of evidence and only in

cases tried by the court without a jury." See *LTL Truck Serv., LLC v. Safeguard, Inc.*, 817 N.E.2d 664, 669 (Ind. Ct. App. 2004).

9. Here, the Court finds that the City's and HHPA's Rule 41(B) motions also have merit and should be granted. Thus, even if ITM had stated a cognizable claim to pass must under Rule 12(B)(6) (and it has not), ITM's claims must still be dismissed under Trial Rule 41(B) because "upon the weight of the evidence and the law there has been shown no right to relief."

II. Is ITM Entitled to a Preliminary Injunction?

10. "A preliminary injunction is an **extraordinary remedy** to be granted in **rare instances**." *Fumo v. Med. Grp. of Mich. City, Inc.*, 590 N.E.2d 1103, 1108 (Ind. Ct. App. 1992) (emphasis added). "Injunctive relief has been referred to as the strong arm of the court and Indiana courts have long required that one who seeks injunctive relief should show that he is entitled to it." *Lambert v. State, By & Through Dep't of Highways*, 468 N.E.2d 1384, 1390 (Ind. Ct. App. 1984).

11. "To obtain a preliminary injunction, the moving party has the burden of showing by a preponderance of the evidence that: (1) the movant's remedies at law are inadequate, thus causing irreparable harm pending resolution of the substantive action; (2) the movant has at least a reasonable likelihood of success at trial by establishing a *prima facie* case; (3) the threatened injury to the movant outweighs the potential harm to the non-movant resulting from the granting of the injunction; and (4) the public interest would not be disserved." *PrimeCare Home Health v. Angels of Mercy Home Health Care, L.L.C.*, 824 N.E.2d 376, 380

(Ind. Ct. App. 2005). If the movant fails to prove even one of these requirements, the motion must be denied. See *id.* ITM falls short on these requirements.

Reasonable likelihood of success on the merits?

12. At the outset, ITM's request for injunctive relief fails because, as set forth above, ITM has not asserted a cognizable cause of action. ITM has no reasonable likelihood of success at trial – because its lawsuit is untethered from any legal theory. While ITM did have a Lease with the City, ITM is not claiming the Lease was breached. ITM did have a contract with HHPA, but that contract expired in 2006. Regarding the complaint against the City, under Article III of the Lease, ITM agreed to ***“yield the [Premises] back to [the City] upon termination of the lease in a clean, sightly and healthful condition and in good repair”*** See Ex. 9, Article III (emphasis supplied). ITM admits that it failed to meet this contractual obligation. Moreover, under the Lease, the “buildings, railroad track, all electrical wiring and poles and all railroad cars or similar type vehicles” are considered the property of ITM insofar as they are capable of being removed by ITM “upon termination of the lease.” ITM has no claim under the law to justify injunctive relief. See *Bowerman*, 7 N.E.2d at 205 (“It is not the province of courts of equity to make or supplement private contracts.”).

13. Moreover, ITM has asked the Court to extend the expired Lease through a preliminary injunction, but Indiana law expressly disallows such relief. See *Kuntz v. EVI, LLC*, 999 N.E.2d 425, 432 (Ind. Ct. App. 2013) (holding that a court may not utilize a preliminary injunction to judicially modify or extend the plain

terms of a contract). Accordingly, because ITM does not have a legal claim to support this action, its request for injunctive relief must fail.

14. Because ITM's request for a preliminary injunction fails on the first prong of the analysis, this Court need not address the other elements. Regardless, as set forth below, those elements also confirm that injunctive relief is unwarranted here.

Threatened injury outweighs the potential harm?

15. With regard to the third preliminary injunction factor, the harm to the City and HHPA from the requested injunction outweighs any harm that ITM would experience if its request for injunctive relief is denied.

16. In assessing whether a party will be harmed, Indiana courts have looked to the result an injunction will have on the property rights, contract rights, or constitutional rights of the respective parties. See *Lambert*, 468 N.E.2d at 1390. Here, ITM has no valid right—in property, contract, or the Constitution—to continue to occupy the premises nor use the rail line. Rather, because the City is seeking to evict ITM from the Premises, ITM is appropriately considered a trespasser. See *Houston v. Booher*, 647 N.E.2d 16, 19 (Ind. Ct. App. 1995) ("When a lessee under a lease for a definite term holds over after the expiration of that term, the lessor has the option of treating the lessee as a tenant or a trespasser.").

17. In contrast, an injunction to prevent the City from evicting ITM and regaining possession of the Premises would do violence to the City's property, contract, and statutory rights. The City owns the Premises, and as such, is the party

entitled to possess, use, and enjoy the property. See *Rhoades v. State*, 70 N.E.2d 27, 29 (Ind. 1946) ("The chief incidents of ownership of property are the rights of possession, of use and enjoyment, and of disposition.").

18. Where, as it is here, a City seeks to regain control of a piece of its public park that has fallen into disrepair and poses a potential environmental hazard, to prevent the City from doing so outweighs the risks ITM suffers by accepting the consequences of its inaction or non-expeditious vacation of the Premises.

19. As to HHPA, ITM seeks injunctive relief in the form of an order requiring HHPA to allow ITM access to the rail line for purposes of moving its rolling stock. The evidence presented, however, demonstrates that even if ITM is not allowed access to the rail line ITM can still move its rolling stock by loading it onto a truck and ship it out on the road. There is of course a cost associated with this method of moving the rolling stock.

20. Even assuming that there was an increased cost in removing the rolling stock via the roadways as opposed to across the rail line, and further assuming there was a viable claim against HHPA presented by ITM, ITM has not demonstrated that its remedies at law are inadequate. ITM would still be able to relocate its rolling stock via the roadways if the injunction was not granted. More significantly, any damages ITM would arguably sustain from the increased costs of relocating via the roadways could be recovered by ITM with an award against HHPA, assuming ITM had a viable cause of action and prevailed at trial.

21. Any damages ITM would arguably sustain, should a preliminary injunction not be granted, would merely be a potential increase in ITM's relocation expenses, ITM will at most suffer an economic injury if an injunction is not issued.

22. As a result, this factor also weighs in favor of denying ITM's request for injunctive relief.

The public interest?

23. Of the factors, the public interest factor leans most closely in ITM's favor. As an historical museum providing education, entertainment, and historical perspective to the general public, it is in the public interest to have ITM maintain its assets and vacate in a manner that will not cause damage to it. "Generally, the effect of an injunction upon the public interest must be weighed with the relative potential harms to the parties." *Thornton-Tomasetti Engineers v. Indianapolis-Marion Cnty. Pub. Library*, 851 N.E.2d 1269, 1279 (Ind. Ct. App. 2006). "When an injunction is sought that would adversely affect the public interest, we may withhold relief until a final determination of the rights of the parties, although postponement may be burdensome." *Id.* (finding that if plaintiff was successful in seeking injunction, library redevelopment project may very well have been delayed for almost three months, causing a substantial cost to the public and disserving public interest). Indeed, "[i]n cases where the public interest may be adversely affected courts are and . . . should be much more reluctant to grant

preliminary mandatory relief than if only private interests are involved." *Wells v. Auberry*, 429 N.E.2d 679, 684 (Ind. Ct. App. 1982).

24. As with the preceding factor, the requested injunction by ITM against the City and HHPA would also harm the public interest as it would impede upon the City's and HHPA's property and contract rights, as well as the City's statutory authority to "use, improve, develop, insure, protect, maintain, lease, and dispose of its interests in property," I.C. § 36-1-4-6, and "regulate conduct, or use or possession of property, that might endanger the public health, safety, or welfare." I.C. § 36-8-2-4. Further, given the environmental concerns which developed under ITM's tenure, the public interest also lies in the Premises being returned to a clean and sightly venue as soon as possible – if ITM maintains control of the Premises, the clean-up would not occur for months.

25. Stated differently, it is in the public interest to give the City and HHPA, both as the property owner/managers, as a governmental entity responsible to the public with regulatory authority over the public health, safety, and welfare; or, with responsibility to the rail lines, immediate control over the property. On the other side of the spectrum, it is not in the public interest to instead allow ITM to maintain control over the property and dictate its own terms and timeline for moving out and addressing environmental issues.

26. In sum, the Lease expired, and neither the law nor public policy allow the Court to use its equitable powers to extend it.

III. The City is Entitled to an Order of Possession Evicting ITM from the Premises.

27. The City's request for a final eviction order is also pending before the Court. A landowner's right to exclude others with the support of the law is "perhaps the most fundamental of all property interests." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005). "Ejectment is a proper remedy to be used by a landlord to recover possession of the leased premises from his tenant after the expiration of the term" *Adams v. Holcomb*, 77 N.E.2d 891, 893 (Ind. 1948).

28. The analysis regarding the City's right to the Premises in this ejection action is straightforward, as the Indiana Code, Sections 32-30-2 *et seq.* and 32-30-3 *et seq.*, provides the framework for an eviction of a commercial lease. "A person having a valid subsisting interest in real property and a right to possession of the real property may recover the real property and take possession by an action brought against the tenant in possession" I.C. § 32-30-2-1.

29. Here, after hearing the evidence at the May 30 and May 31 hearing (which consolidated the preliminary hearing with the final hearing on possession), the Court is tasked with determining "which party is entitled to possession, use, and enjoyment of the property." I.C. § 32-30-3-5(a). That determination is simple and not up for debate. The City owns the Premises, and as such, is the party entitled to possess, use, and enjoy the property. See *Rhoades*, 70 N.E.2d at 29 ("The chief incidents of ownership of property are the rights of possession, of use and enjoyment, and of disposition."). The Lease has expired, and ITM has no valid right to continue to occupy the premises. Indeed, because the City is seeking to

evict ITM from the Premises, ITM is considered a trespasser. See *Houston*, 647 N.E.2d at 19.

30. According to the Lease, ITM was to remove all of its structures and equipment and return the property clean and sightly upon termination – March 1, 2018 – or risk abandonment and responsibility for the City's cost of clean-up.

31. It seems as though ITM wants to use language in the Lease which requires it to return the Premises in a clean and sightly manner as a way to force the City to allow it to remain on the Premises until it can comply with the provision of the Lease. Being in breach of a contract, does not permit the breaching party to enjoy the contract provisions until the breach can be fixed. It is the City's right to demand the Premises to be returned in a clean and sightly manner in the time period in which the parties bargained (60 days after Notice). It is not ITM's right to demand to remain on the Premises until they can return the Premises to the City in a clean and sightly manner. It is the latter, which ITM seems to be arguing. There is no basis in the law for this argument. Thus, the Court finds that the City is entitled to immediate possession of the Premises and ITM is ordered to immediately vacate the Premises.

32. Any legal conclusion that should be considered a factual finding is incorporated by reference as a Finding of Fact.

ORDER

The Court, having examined the pleadings and the evidence, finds that: (1) the the City's and HHPA's motions to dismiss ITM's Complaint in Cause No. 29C01-

1805-PL-003969 are GRANTED; (2) the City's/HHPA's Rule 41(B) motions in Cause No. 29C01-1805-PL-003969 are GRANTED; (3) ITM's request for a preliminary injunction is DENIED; and (4) the City's request for immediate possession of the Premises and eviction of ITM is GRANTED.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

A. ITM, and any and all persons claiming from, by, through, or under it, is/are hereby ordered to immediately vacate the Premises;

B. Any existing structures, additions, equipment, or property on the Premises will be deemed abandoned if not removed by ITM by **July 12, 2018**;

C. After July 12, 2018, the City shall be and hereby is granted immediate possession of the Premises and is hereby empowered and authorized to change the locks, otherwise take control of the Premises, to the extent it has not done so already, and perform all actions set forth in the Lease;

D. ITM and any and all persons claiming from, by, through or under it, is hereby enjoined from committing waste upon the Premises and from doing any act which may impair the value of the City's property or the Premises;

E. After July 12, 2018, to all extents necessary, the Sheriff of Hamilton County is hereby empowered, ordered, and directed to dispossess and remove ITM, and all other occupants and/or property from the Premises at the expense of ITM and place the City, or its designee, in immediate possession of the Premises and make due report to this Court of the action herein should such action be necessary;

F. A duly certified copy of this Order of Ejectment and Recovery of Possession issued under the hand and seal of the Clerk of this Court of Hamilton County shall be sufficient authority for the Sheriff of Hamilton County to execute on same without further order from this Court; and

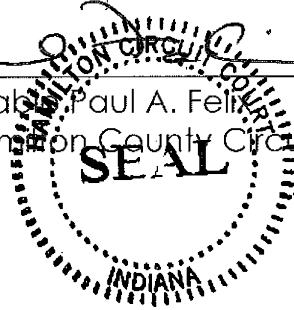
G. Nothing in this Order shall limit the City's ability to obtain additional relief, remedies, and damages as may be appropriate under the Lease, applicable law, or the remaining claims under the City's complaint.

SO ORDERED.

Date:

June 28, 2018


The Honorable Paul A. Felix
Judge, Hamilton County Circuit Court



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