IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR OSCEOLA COUNTY, FLORIDA

MMB PROPERTIES, a Florida general partnership,
Plaintiff,

Case No. 2014-CA-1636

vs.

PLANNED PARENTHOOD OF GREATER ORLANDO, Inc., a Florida not-for-profit corporation,
Defendant.
_______________________________/

ORDER GRANTING PLAINTIFF MMB PROPERTIES'S MOTION FOR TEMPORARY INJUNCTION

Before the Court is Plaintiff MMB PROPERTIES ("MMB")'s Motion for Temporary Injunction filed June 23, 2014. Defendant PLANNED PARENTHOOD OF GREATER ORLANDO, INC. ("PLANNED") filed a Memorandum of Law in Opposition on July 9, 2014. A hearing was held on July 14, 2014.

The Court, having received evidence, considered the argument of counsel, and being otherwise fully advised in the premises, hereby ORDERS and ADJUDGES that Plaintiff's motion is GRANTED. In support of this ruling, the Court further enters the following Findings of Fact and Conclusions of Law.

THE EVIDENCE

1. Two affidavits were provided by the parties. MMB proffered the affidavit of Dr. Johnston Massey, one of its partners, and PLANNED proffered the affidavit of Jenna Tosh, its president and CEO.
2. Dr. Massey and Ms. Tosh testified at hearing. The Court also received testimonial evidence from Dr. Jose Fernandez and Ms. Martha Haynie, PLANNED's Secretary and a member of its Board of Directors.

FINDINGS OF FACT

1. MMB is a Florida general partnership and has owned property located at 601 Oak Commons, Kissimmee, Florida for approximately 18 years (the "MMB Property").
2. PLANNED is an affiliate of Planned Parenthood Federation of America Inc.
3. PLANNED owns or leases three facilities where it offers services to its patients. The facility at issue in this case is located at 610 Oak Commons, Kissimmee, FL (the "PLANNED Property"). PLANNED purchased the PLANNED Property on approximately December 16, 2013.
4. Both the PLANNED Property and the MMB Property are in the Oak Commons Medical Park ("Oak Commons"). Oak Commons properties are subject to community restrictions that are covenants running with the land and are contained in the Declaration of Restrictions found in Osceola County Public Records (the "Declarations"). Oak Commons is located across the street from Osceola Regional Medical Center. PLANNED had constructive and actual notice of those restrictions prior to its purchase of the PLANNED Property.
5. The Declarations contain the following restrictive covenant:

> The property described herein shall not be used for the following activities without the prior written permission of AMERICAN MEDICORP DEVELOPMENT CO., a Delaware corporation, which shall be granted only in its sole and unfettered discretion, unless ancillary and incidental to a physician's practice of medicine:
>
> 1. An Out Patient Surgical Center.
> 2. An Emergency Medical Center.
> 3. A Diagnostic Imaging Center which includes the following radiographic testing: Fluroscopy [sic], Plane Film Radiography, Computerized Tomography (CT), Ultrasound, Radiation Therapy, Mamography [sic] and

Breast Diagnostics, Nuclear Medicine Testing and Magnetic Reasonance [sic] Imagine (MRI).

6. The Declarations also state, "In addition, no activity or use shall be permitted on or with respect to any part of the Property that is obnoxious to or out of harmony with other developments on the Property."

7. The parties stipulated that MMB, as an owner of property within Oak Commons, has standing to enforce the Declaration of Restrictions. This stipulation is due to Article V, § 6 of the Declarations, which provides that any violation(s) of the Declarations are enforceable against any person by any owner.

8. The Court further notes that enforcement is expressly permitted "by proceedings at law or in equity ... either to restrain or prevent such violation or proposed violation by an injunction, either prohibitive or mandatory."

9. PLANNED is a well-known entity that provides abortion services. Ms. Tosh testified that PLANNED intends to begin providing surgical abortions at the PLANNED Property by August 2014.

10. Ms. Tosh also testified that PLANNED intends to provide certain diagnostic procedures, such as sonograms, at the PLANNED Property.

11. In furtherance of these intentions, PLANNED inquired of the local zoning authority whether zoning was proper for both a medical clinic and outpatient surgical services. In fact, the application specifically states that PLANNED intends to operate an "Out Patient Surgical Center," which is the identical language used prohibitively in the Declarations.

12. PLANNED has also applied for and obtained an abortion clinic license to perform abortions at the PLANNED Property.

13. Dr. Massey and Dr. Fernandez credibly testified that surgical abortions are indeed surgical procedures. They testified that surgical abortions include preoperative care, anesthesia, invasive modalities, the removal of human fluids and tissue, and postoperative recovery.

14. In contrast, Ms. Tosh testified that surgical abortions are not "surgical" apparently because they do not involve *incisions*. Specifically, her affidavit states:

    > Despite widespread use of the label "surgical," surgical abortion does not also involve what is typically thought of as surgery. Instead, surgical abortion uses instruments to evacuate the contents of the uterus. No incision is made into the woman's skin or other bodily membrane. Surgical abortions are almost always performed in an outpatient setting, most often at a clinic.

    Ms. Tosh's live testimony was similar. The Court notes that Ms. Tosh's education does not include any formal medical training and cannot escape the fact that Ms. Tosh's own words repeatedly employ the phrase "surgical abortions."

15. The Court finds that MMB has a substantial likelihood of proving that the abortions PLANNED intends to perform at the PLANNED Property are outpatient surgical procedures.

16. PLANNED offered no evidence refuting MMB's evidence that sonograms are a form of diagnostic imaging. The Court finds that MMB has a substantial likelihood of proving that the sonograms PLANNED intends to perform at the PLANNED Property are diagnostic imaging.

17. PLANNED has also expressed an intent to provide the "Morning After Pill," which was described at hearing as "emergency contraception." All witnesses who testified regarding the Morning After Pill, including Ms. Tosh, agreed that its efficacy is limited to 48 hours after a woman engages in unprotected intercourse.

18. The Court does not find that MMB has a substantial likelihood of proving that administration of the Morning After Pill constitutes an emergency medical procedure, for the purpose of this Injunction.

19. MMB became aware of PLANNED's intent to perform abortions because protestors began appearing in Oak Commons in approximately March 2014. Dr. Massey's patients have expressed that they are upset by the commotion and sometimes have difficulty accessing his property, in part because the protestors have used MMB's parking lot. In one instance, because of a bomb threat, the street leading to the MMB Property was blocked for several hours. Protestors have continued to appear as of the date of the hearing.

20. The Court does not find that MMB has a substantial likelihood of proving that the abortions PLANNED intends to perform at the PLANNED Property are "obnoxious to or out of harmony with other developments" in Oak Commons, for the purpose of this injunction.

21. The Court finds that PLANNED is not a "physician's practice" as that term is defined in the Declarations. It is instead a § 501(c)(3) tax-exempt nonprofit organization.

22. In support of this finding, Ms. Tosh testified that PLANNED has just recently hired a physician as a medical director. The medical director currently works one day a week in Jacksonville for another affiliate of Planned Parenthood Federation of America and spends some time each week at PLANNED's other two Orlando-area locations. PLANNED also contracts with three other physicians to provide services as needed.

23. Additionally, many of PLANNED's services fall well beyond the traditional ambit of a "physician's practice of medicine." PLANNED is heavily involved with various

educational, advocacy, and community outreach activities in furtherance of its mission as a non-profit corporation.

24. Therefore, the Declarations' exception of use that is "ancillary and incidental to a physician's practice of medicine" does not apply because PLANNED's services do not qualify as a "physician's practice of medicine."

25. Furthermore, even if the uses contemplated at the PLANNED Property were part a physician's practice of medicine, which this Court does not find, PLANNED's intended violative uses are neither "ancillary" nor "incidental" sufficient to bring them within the exception. Instead, Ms. Tosh testified that abortions are a "substantial" service provided by PLANNED. Ms. Haynie accordingly testified that abortions were "central" to PLANNED's services. Certainly, a "substantial" and "central" service can never be considered "ancillary" and "incidental" to an entity's activities. This is despite Ms. Tosh's affidavit that surgical abortions are expected to comprise less than 1% of PLANNED's services. The Court finds that this asserted statistic is offered out of context in light of the totality of the evidence.

26. PLANNED offered testimony that other entities in Oak Commons have performed what might be considered outpatient surgical procedures in the past. However, as will be explained in the Conclusions of Law below, the Court finds this evidence is legally irrelevant.

27. The Court finds that MMB has a substantial likelihood of succeeding on the merits of the underlying Complaint.

28. Concerning the bond, Ms. Haynie was the only witness that testified as to PLANNED's financial data. The only relevant figure was Ms. Haynie's testimony that PLANNED

would be expected to generate $720,000 in revenue over an 18 month period. She testified that 18 months was chosen because that is how long she estimated it would take to find, purchase, and build-out a new facility. On cross-examination, Ms. Haynie was not able to provide any figures relating to operating expenses or revenues derived from surgical abortions.

CONCLUSIONS OF LAW

1. The Court first notes that PLANNED has argued that MMB must prove its right to a temporary injunction by a "clear and convincing" evidentiary standard. The Court instead holds, from law identified by PLANNED no less, that MMB must only "demonstrate a prima facie, clear legal right to the relief requested." *Colonial Bank, N.A. v. Taylor Morrison Servs., Inc.*, 10 So. 3d 653, 656 (Fla. 5th DCA 2009).

2. Generally, in order to obtain a temporary injunction, a party must "establish a clear legal right, an inadequate remedy at law and that irreparable harm will arise absent injunctive relief." *Hollywood Towers Condo. Ass'n, Inc. v. Hampton*, 40 So. 3d 784, 786 (Fla. 4th DCA 2010).

3. However, it is well established that injunctive relief is available to remedy the violation of a restrictive covenant running with the land "without a showing that the violation has caused an irreparable injury – that is, an injury for which there is no adequate remedy at law." *Autozone Stores, Inc. v. Ne. Plaza Venture, LLC*, 934 So. 2d 670, 673-74 (Fla. 2d DCA 2006); *see also Chick-fil-A, Inc. v. CFT Dev., LLC*, 652 F.Supp.2d 1252, 1263 (M.D. Fla. 2009) ("Chick-fil-A has appropriately alleged and proved that the proposed Panda Express restaurant would violate the Mt. Dora Covenant. Therefore, Chick-fil-A need not provide independent proof of irreparable harm and the absence of a remedy at

law.").

4. MMB has met the *Autozone* test. As stipulated by the parties, The Declarations establish MMB's clear legal right to enforcement. Because the Motion for Temporary Injunction concerns the violations of a restrictive covenant running with the land, MMB does not need to show either irreparable injury or that it has no adequate remedy at law.
5. The Court finds that the Declarations are unambiguous. The Court will therefore give them their "plain and ordinary meaning. *Winn-Dixie Stores, Inc. v. 99 Cent Stuff-Trail Plaza, LLC*, 811 So. 2d 719, 722 (Fla. 3d DCA 2002).
6. PLANNED has testified that it intends to engage in activities that would unambiguously violate the restrictive covenants. Its intended violations are not ancillary and incidental to a physician's practice of medicine – they are a central component of PLANNED's corporate activity.
7. Moreover, "[r]estrictive covenants serve a valid public purpose in enabling purchases of property to control the development and use of property in the surrounding environment." *Wood v. Dozier*, 464 So. 2d 1168, 1170 (Fla. 1985). That public purpose is served in this case by limiting the sort of medical services that can be offered in facilities which are located directly across the street from a hospital.
8. *Wood* also specifically holds that the purchasers of property "subject to restrictive covenants cannot expect to have the covenants invalidated simply because the covenants have been previously violated and not enforced against others." *Id.* It is for this reason the Court finds PLANNED's evidence of other possible violations in Oak Commons irrelevant.
9. Instead, PLANNED should have sought "to have the deed restriction removed before

purchasing the property." *Id.* PLANNED purchased the PLANNED Property with knowledge of the restrictions and proceeded at its own peril. *See also Chick-fil-A*, 652 F.Supp.2d at 1263 ("Whatever hardship may accrue to Defendants by virtue of a permanent injunction could easily have been avoided.").

10. The Court must also address the various constitutional challenges raised by PLANNED due to the abortive services it intends to provide. But it is elementary constitutional law that "the protections of the Fourteenth Amendment do not extend to private conduct abridging individual rights." *NCAA v. Tarkanian*, 488 U.S. 179, 190 (1988) (citations omitted). No state action has been alleged, and the Court finds that no state action is at issue. The constitutional right to abortion, whatever its limits may be, simply does not apply to this dispute. And to be sure, "although the government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation." *Harris v. McRae*, 448 U.S. 297, 316 (1980) (emphasis added).

11. To the point, all of PLANNED's decisional authorities dealing with abortions examined what was unequivocally state action. *See, e.g., Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328 (5th Cir. Unit B 1981); *W. Side Women's Servs., Inc. v. City of Cleveland, Ohio*, 573 F.Supp. 504 (N.D. Ohio 1983).

12. In an attempt to circumvent this problem, PLANNED offers *Shelley v. Kraemer*, 334 U.S. 1 (1948), and *Barrows v. Jackson*, 346 U.S. 249 (1953). *Barrows* is itself a *Shelley* progeny case. The Court is not persuaded.

13. *Shelley* is a seminal Civil Rights Era case which held that a court's enforcement of a private restrictive covenant that was racially discriminatory constituted state action under the Fourteenth Amendment. *Shelley*, 334 U.S. at 18-19. The Eleventh Circuit has

expressly and narrowly limited the reach of *Shelley* to the racial context. *See Davis v. Prudential Secs., Inc.*, 59 F.3d 1186, 1191-92 (11th Cir. 1995) ("The holding of *Shelley*, however, has not been extended beyond the context of race discrimination."); *United Egg Producers v. Standard Brands, Inc.*, 44 F.3d 940, 943 (11th Cir. 1995) (declining to extend *Shelley* to the First Amendment and observing that "if, for constitutional purposes, every private right were transformed into governmental action by the mere fact of court enforcement of it, the distinction between private and governmental action would be obliterated" (citation omitted)).

14. One federal district court stated well when considering a zoning case, which therefore *did* involve state action, "A commercial enterprise cannot disregard the land use regulations of a valid zoning ordinance merely because its customers may be exercising a fundamental right. Plaintiffs do not contend that [the intended abortion clinic] is free to locate wherever it may please." *Bossier City Medical Suite, Inc., v. City of Bossier City*, 483 F. Supp 633, 648 (W.D. La 1980).

15. Similarly, without implicating state action, PLANNED cannot use real property in a manner violative of valid restrictive covenants merely because its customers may be exercising a fundamental right.

16. As a result of the foregoing, the Court will therefore enjoin PLANNED from violating the Declarations at the PLANNED Property pending a full trial of this matter on the merits, including without limitation the enjoinment of the performance of surgical abortions, and the provision of sonographic or other diagnostic imaging services.

THE BOND

1. Rule 1.610(b) requires that a bond be posted that would pay PLANNED for the "costs and damages sustained by [PLANNED] if [PLANNED] is wrongfully enjoined."
2. The appropriate measure of a bond is generally linked to the lost profits resulting from the injunction. *E.g.*, *MetalMax Cutting Tools, Inc. v. Mil-Tec USA, Inc.*, 794 So. 2d 609, 611 (Fla. 2d DCA 2001).
3. PLANNED is a § 501(c)(3) entity and therefore does not generate "profits" in the traditional sense. The Court therefore finds that the appropriate measure of damages here would be expected revenue generated by PLANNED less operating expenses during the expected life of the lawsuit.
4. The only relevant evidence that would bear on the amount is Ms. Haynie's estimation that PLANNED would generate $720,000 in revenue over an 18 month period. The Court estimates that only 10% of this amount would reasonably be expected to be surplus "profit," or $72,000. However, the Court anticipates that this case will be fully resolved within 12 months, thus lowering the bond amount by 1/3, to $48,000.
5. Finally, the Court notes that Ms. Tosh has testified that surgical abortions will amount to less than 1% of PLANNED's services despite their centrality to PLANNED's mission. The injunction issued herein enjoins more than just surgical abortions; however, the Court finds that PLANNED can continue offering many (if not most) of its other services during the injunction, including screening for sexually transmitted diseases, education, community outreach activities, etc. In light of this reality, the lost "profits" directly arising out of the injunction can reasonably be expected to be roughly half of the total "profits" otherwise expected to be generated without the injunction. The Court will

therefore set the bond at $24,000.

IT IS THEREFORE ORDERED that, from the date and time of the entry of this Order and until further order of this Court, PLANNED PARENTHOOD OF GREATER ORLANDO, INC., and any officers, agents, servants, employees, agents, servants, successors and assigns, and attorneys of PLANNED PARENTHOOD OF GREATER ORLANDO, INC. are prohibited from directly or indirectly violating the Declaration of Restrictions at 610 Oak Commons, Kissimmee, Florida, including but not limited to the performance of surgical abortions and the provision of sonographic or other diagnostic imaging services.

IT IS FURTHER ORDERED that this order shall not be effective until Plaintiff has filed with the Clerk of the above-entitled Court, a bond in the amount of $24,000 in conformity with the law, conditioned for the payment of costs and damages sustained by PLANNED PARENTHOOD OF GREATER ORLANDO, INC. if wrongfully enjoined.

Upon the filing of the bond required by this Order, the Clerk shall certify a copy of this Order for service on PLANNED PARENTHOOD OF GREATER ORLANDO, INC.

Jurisdiction is retained to enter further Orders as necessary.

DONE AND ORDERED in chambers, in Kissimmee, OSCEOLA County, Florida, this 23 day of July, 2014.

Circuit Judge

COPIES FURNISHED TO:

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