

The Boy Who Cried Wolf

Granting preliminary injunctions in Illinois.

The Boy Who Cried Wolf: A Look Into Preliminary Injunction Law in Illinois

By Donald Hyun Kiolbassa & Emily Holmes

Real Property (October 2024)

THE PRELIMINARY INJUNCTION is an important arrow in the quiver of the powers of the judiciary. A preliminary injunction gives the judge the power to stop a party from an action while the parties are waiting on a final judgment.

A party should request a preliminary injunction when there is a risk that the other party can do ongoing harm during the litigation process. It is a shield to mitigate further damages.

However, sometimes this shield can be turned into a sword. A court should not grant a preliminary injunction lightly. A court must exercise patience and restraint when deciding whether a preliminary injunction is the right power because you never know when discretion can turn into abuse.

The case of *O'Malley v. Adams*, 2024 IL App (5th) 240094, is similar to the story of the boy who cried wolf. It shows us what happens when a court breaks from *stare decisis* and abuses its discretion by granting an overly broad preliminary injunction.

The facts surrounding the decision of *O'Malley* (law.isba.org/4fpLZWx) are complicated and exhausting. The litigation was



ongoing for more than nine years.

Originally, starting as an adverse-possession case, this decision covers the limited scope of preliminary injunction law in Illinois.

The facts of the case are as follows: The plaintiff, O'Malley Trust, filed a claim for adverse possession against Prather Trust, the defendant. The plaintiff owned 100 percent of the surface rights of a farm, but the plaintiff and defendant each owned 50 percent shares of the underlying mineral rights of the farm. The plaintiff argued that they should own 100 percent of the mineral rights of the farm.

The defendant cried wolf

The defendant filed an answer on the adverse-possession complaint and ended up winning a summary judgment. However, the defendant then filed counterclaims against the plaintiff for selling the mineral rights (in which the defendant owned a 50 percent interest) without the defendant's consent.

The defendant cried wolf again

Unrelated to this action, the plaintiff attempted to sell its 100 percent interest in the surface rights of the farm, which the defendant



WHATEVER YOUR PRACTICE AREA, THERE'S AN ISBA SECTION NEWSLETTER FOR YOU.

SIGN UP AT
WWW.ISBA.ORG/SECTIONS

The is a slightly condensed version of an article that originally appeared in the October 2024 issue of Real Property, the newsletter of the ISBA Section on Real Estate Law. The original article is available to all members at law.isba.org/3NNz9po.

had no interest in.

Although the defendant had no ownership interest in the surface rights, the defendant requested that the court provide a preliminary injunction freezing the proceeds of the sale.

The defendant argued that its counterclaim in the mineral-rights case gave it a “claim” under the Fraudulent Transfer Act. The trial court agreed and granted a preliminary injunction on the proceeds of the surface rights in which the defendant had no ownership interest.

The plaintiff now appeals the trial court’s decision.

The Fifth District of the Illinois Appellate Court began by illustrating Illinois preliminary injunction law. The Fifth District maintained:

A preliminary injunction is an extraordinary provisional remedy that is granted to preserve the status quo until the case can be decided on the merits. *Callis, Papa, Jackstadt & Halloran, P.C. v. Norfolk & Western Ry. Co.*, 195 Ill.2d 356, 365 (2001).

...

To establish entitlement to preliminary injunctive relief, the party seeking the injunction must demonstrate (1) a clearly ascertainable right in need of protection, (2) irreparable harm to that right without the injunction, (3) the lack of an adequate remedy at law, and (4) a substantial likelihood of success on the merits. *Callis*, 195 Ill.2d at 36566.

To determine if the defendant met the

prima facie requirements of preliminary injunction, the Fifth District needed to look to the underlying reason for the injunction. The defendant argued under the Fraudulent Transfer Act that the defendant had a claim to the proceeds from the sale of the surface rights of the farmland.

The Fifth District turned its attention to the Act:

The Act was enacted to enable a creditor to defeat a debtor’s transfer of assets to which the creditor was entitled. See 740 ILCS 160/5, 6 (West 2022); *Northwestern Memorial Hospital v. Sharif*, 2014 IL App (1st) 133008, ¶ 16.

In Illinois, the Act recognizes two categories of fraudulent transfers: fraud in fact and fraud in law. *Sharif*, 2014 IL App (1st) 133008, ¶ 18; *Apollo Real Estate Investment Fund, IV, L.P. v. Gelber*, 403 Ill. App. 3d 179, 193 (2010). To prevail on a claim based upon fraud in fact, a party must show that a transfer was made with an actual intent to hinder, delay, or defraud the creditors. *Apollo* at 193. To prevail on a claim based upon fraud in law, a party must show that a transfer was made for inadequate consideration and that the debtor retained insufficient assets to meet its obligation. *Sharif*, 2014 IL App (1st) 133008, ¶ 18.

The defendant cried wolf a third time

The Fifth District rejected the defendant’s argument that it deserved a preliminary injunction reversing the trial

court (*i.e.*, dissolving the preliminary injunctions granted).

In a very anticlimactic opinion, the Court did not attack the defendant’s argument. Instead, the Court found that the trial court abused its discretion by failing to provide evidence that the decisions were made by a clearly ascertainable right in need of protection, irreparable harm to that right without the injunction, the lack of an adequate remedy at law, and a substantial likelihood of success on the merits.

This is the right turn in a decision made by the Fifth District. A preliminary injunction is a necessary tool for a judge. However, it should not be granted lightly. A preliminary injunction should only be granted narrowly to protect a party, not to punish another party. A court creates a slippery slope when it recklessly grants a preliminary injunction.

In this case, the defendant was using the preliminary injunction as a sword to disrupt the plaintiff’s life. They had no ownership interest in the property being sold.

If courts do not exercise caution in granting a preliminary injunction, we will have parties crying “WOLF!” In this case, we are lucky that by the third time the defendant cried “WOLF!” the Illinois Appellate Court did not come running to its aid. **EB**