

SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. JOSEPH P. DORSA IAS PART 12
Justice

- - - - - x

LATOS, LATOS & DIPIPPO, P.C.,

Plaintiff, Index No.: 1057/07

- against - Motion Date: 2/28/07

VAN WAGNER TRANSPORTATION ADVERTISING, Motion No.: 19
LLC and VIACOM OUTDOOR,

Defendant.

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The following papers numbered 1 to 17 on this motion:

	<u>Papers Numbered</u>
Plaintiff's Order to Show Cause-Affirmation- Exhibit(s)-Service	1-4
Defendant CBS Outdoor s/h/a Viacom Outdoor's Affirmation in Opposition-Affidavit(s)-Exhibit(s)	5-8
Van Wagner Transportation Advertising, LLC's Notice of Cross-Motion-Affirmation- Affidavit(s)- Service-Exhibit(s)	9-12
Plaintiff's Affirmation in Opposition Affidavit(s)-Exhibit(s)	13-15
Van Wagner Transportation Advertising, LLC's Reply Affirmation-Exhibit(s)	16-17

By order to show cause, plaintiff seeks an order of the Court, granting them a temporary restraining order prohibiting defendants from leasing, selling, transferring, encumbering, removing or in any way, interfering with plaintiff's use of an outdoor advertising billboard, located at Astoria Boulevard C/L and 31st Street F/E in Astoria, pursuant to the agreement between plaintiff and defendant Viacom, dated May 19, 2005.

Defendant CBS Outdoor (formerly known as Viacom, hereinafter referred to as CBS) files an affirmation in opposition.

Defendant Van Wagner Transportation Advertising, LLC (Van Wagner), cross-moves for an order pursuant to CPLR § 2215, and §§ 3211(a)(1) and (7), dismissing the action as to them and files an affirmation in opposition.

Plaintiff files an affirmation in opposition to the cross-motion and a reply to the opposition of CBS. Van Wagner files a reply affirmation in further support of the cross-motion.

The underlying claim is an action by plaintiff, seeking money damages and injunctive relief from defendants. (The Court notes, however, that none of the parties attach the summons and complaint herein in support of the relief sought). Defendant CBS alleges that plaintiff commenced an action filing a complaint on January 11, 2007. Defendant CBS alleges that the first eight actions alleged, seek money damages; the ninth action alleged, defendant claims, is for injunctive relief.

Accordingly, defendant Van Wagner's cross-motion for dismissal pursuant to CPLR §§ 3211(a)(1) and (7) is denied with leave to renew on proper papers.

"To demonstrate entitlement to a preliminary injunction, the movant must demonstrate a probability of success on the merits, danger of irreparable harm in the absence of an injunction, and a balance of the equities in favor of granting the injunction." Olabi v. Mayfield, 8 AD3d 459, 778 NYS2d 311 (2d Dep't. 2004).

On the basis of the facts before this Court, including the contract between plaintiff and defendant, CBS (Viacom), particularly paragraph five of said contract which limits plaintiff's remedies in the event use of billboard in question is "lost" to plaintiff's and CBS' use; the relevant portions of the contract between defendant, Van Wagner, and the New York City Transit Authority which awarded Van Wagner as successful bidder to the contract involving the billboard in question; and, finally the unrefuted claim by defendant, Van Wagner, that they offered plaintiff use of the billboard at a more favorable rate for January, February and March 2007, the alleged crucial period for plaintiff's customer, plaintiff has failed to demonstrate a probability of success on the merits.

Nor has plaintiff alleged sufficient facts to establish irreparable harm, particularly in light of defendant Van Wagner's offer to accommodate plaintiff's customer, which offer, plaintiff refused.

Accordingly, upon all of the foregoing, plaintiff's motion

seeking injunctive relief is denied. Any and all previously issued restraining orders to the extent not already lifted are hereby vacated.

Dated: Jamaica, New York
April 13, 2007

JOSEPH P. DORSA
J.S.C.