

**AP & J Bldg. Maintenance v Newsday, Inc.**

2010 NY Slip Op 30346(U)

January 13, 2010

Supreme Court, Suffolk County

Docket Number: 0002950/2005

Judge: Joseph C. Pastorella

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 34 - SUFFOLK COUNTY

**PRESENT:**

Hon. JOSEPH C. PASTORESSA  
Supreme Court

MOTION DATE 11-23-09  
ADJ. DATE 12-7-09  
Mot. Seq. # 002 - MG

-----X	
AP & J BUILDING MAINTENANCE,	:
	:
Plaintiff,	:
	:
- against -	:
	:
NEWSDAY, INC. and DSA COMMUNITY	:
PUBLISHING, LLC.,	:
	:
Defendants.	:
-----X	

Upon the following papers numbered 1 to 19 read on this motion; Notice of Motion/ Order to Show Cause and supporting papers (002) 1 - 11; Notice of Cross Motion and supporting papers; Answering Affidavits and supporting papers 12-13; Replying Affidavits and supporting papers 14-15; Other Newsday Mem/Law & Reply Mem/Law 16-17, 18-19; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion (002) by the defendant, Newsday, Inc., pursuant to CPLR 3212 for an order severing the claims asserted against Newsday, Inc. and granting Newsday summary judgment dismissing the complaint as asserted by plaintiff, AP&J Building Maintenance, is granted and the first, second and third causes of action asserted against Newsday are dismissed with prejudice and severed, and the action is continued as asserted against DSA Community Publishing, LLC, subject to the automatic stay.

In motion (001) the defendant was granted leave to renew its motion for summary judgment upon submission of proper papers within thirty days of the date of the order of September 27, 2009 and has timely served the instant motion. Eric Hecker, Esq. sets forth in his affirmation that Newsday LLC, is the successor in interest to Newsday, Inc. He further apprises this court that DSA Publishing LLC has filed a bankruptcy petition under Chapter 11 of Title 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (Kevin J. Carey, J), under Index No. 08-13141-KJC. Pursuant to the Bankruptcy Code, section 362(a), all litigation is stayed automatically as to the defendant DSA. However, motion (001) did not seek to sever DSA and proceed with the summary judgment on

behalf of Newsday, but Newsday LLC has done so at this time.

The plaintiff, AP&J Building Maintenance, Corp. (AP&J) alleges in the complaint that on or about March 4, 2000 that it entered into an agreement in writing with the defendant Newsday Inc. (Newsday) for cleaning and maintenance services for a term of one year with automatic renewal for a further term of one year unless sooner terminated by the parties, and that such agreement was successively renewed on March 4, 2001, March 4, 2002, March 4, 2003 and March 4, 2004, binding until March 4, 2005 unless sooner terminated. The plaintiff claims in the first cause of action that this agreement was wrongfully terminated by Newsday and it seeks a judgment declaring that Newsday failed to give the plaintiff ninety days notice of termination. In the second cause of action the plaintiff seeks specific performance. It further seeks monetary damages in the third cause of action. The fourth, fifth and sixth causes of action are asserted against the defendant DSA asserting that on or about March 31, 2000 the plaintiff and the defendant DSA entered into an agreement in writing for cleaning and maintenance services for a term of one year, with an automatic renewal for one year, which agreement was successively renewed on March 4, 2001, March 4, 2002, March 4, 2003 and March 4, 2004, binding until March 4, 2005 unless sooner terminated and seeks a judgment declaring it was entitled to a minimum of ninety days notice of termination, an order against DSA for specific performance; and monetary damages.

The defendant Newsday seeks summary judgment severing and dismissing the first cause of action for declaratory judgment that the plaintiff was entitled to a minimum of ninety days notice of termination pursuant to paragraph 3(a) of the Newsday agreement; the second cause of action for specific performance, and the third causes of action for damages in the amount of \$131,061.00 as asserted against it in the complaint.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499 [2<sup>nd</sup> Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014 [2<sup>nd</sup> Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]).

In support of the instant application, Newsday has submitted, inter alia, an attorney's affirmation; a copy of the summons and complaint with a copy of the April 1, 2000 agreement annexed, answer; copy of the transcript of the examination before trial of Michael Crowley dated October 16, 2008; a copy of plaintiff's response to interrogatories; a copy of the 1998 agreement; copy of a letter dated April 12, 2002; a copy of income tax returns; a copy of the Notice of Filing of Voluntary Petition Under Chapter 11 of the Bankruptcy Code by Defendant DSA Community Publishing, LLC; and the affidavit and a reply affidavit of Stephen R. Zimmerman.

In opposing this motion, the plaintiff has submitted the affidavit of Michael Crowley.

Michael Crowley testified at his examination before trial to the effect that he and his brother-in-law, David Hammill, formed AP&J Building Maintenance Corp. (AP&J) in 1992 for the purpose of performing janitorial services. He was president of the company until it was formally dissolved in 2004 after he lost the Newsday account. Neither he nor Hammill had any prior building maintenance experience prior to that date. Newsday was secured as their first account in about 1992. They actually had two accounts with Newsday: Newsday and DSA. He explained that Newsday had a lot of different field offices and different cleaners and over time AP&J overtime acquired all of the different offices.

From 1993 through 1998, he worked for Newsday without a contract. Over the years, AP&J entered into various contracts or agreements with Newsday and DSA, prepared by Newsday and DSA. He stated that if he didn't sign the contract he wouldn't get the work. He testified that he generally understood the 1998 and 2000 contracts when he signed them, but he had concerns over terms and terminations as one sets forth a thirty-day cure and the other one gives no time for a cure and he can be terminated for any reason; then he stated thirty-days notice and no reason. Generally, in the cleaning business, the company gives a three-day cure, a five-day cure, a thirty-day cure, and if there is a problem it is corrected and it goes away. It was his concern that Newsday would have the right to terminate the contract upon thirty days written notice regardless of whether he had been given a right to cure. His other concern was that he could not sell the account. The contract was presented to him by William Norton of Newsday with whom he shared a good relationship.

By way of a letter dated April 12, 2002, Newsday informed him that it was putting out to bid all of its building maintenance work as it was recommended by Thomas Horoszewski who took over for William Norton. It was Mr. Crowley's belief that DSA should not terminate unless Newsday had first given written notice of a deficiency and an opportunity to AP&J to cure, and that Newsday did not have the right to terminate him for no reason. He believed he had the right to cure in three days. Nor did he believe that Newsday could give a ninety-day notice terminating him for no reason. He did not recall any specific complaints Newsday may have had about the work provided by AP&J. On February 26, 2004, letters were sent to him by Federal Express advising that AP&J was being terminated effective April 1, 2004. AP&J was paid in full through March 31, 2004 and was not permitted to work the month of March. When he received the termination notice, he called Thomas Horoszewski who advised him that if AP&J did not give him the keys by Monday, AP&J could not have its equipment. He was further told Newsday did not want him in the building. He was not told why he was being terminated. He had an understanding through William Norton that Dennis Springer, one of "convicted ones" concerning the circulation scandal that occurred at Newsday, had a personal relationship with Cyclone Cleaning which

he wanted to get in and which company replaced AP&J. He further stated that Bob Brennan, another "convicted one" who was vice president of circulation, authorized AP& J being thrown out.

Stephen R. Zimmerman set forth in his affidavit to the effect that since 2001 he has been the Director of Engineering Services of Newsday LLC, the current owner and publisher of the *Newsday* newspaper. In 2004, he was responsible for managing Newsday's relationship with AP&J Building Maintenance Corp., reporting directly to Frank Toner, the signatory of the contract at issue in this action. During the proceeding months and years, Newsday received numerous complaints from various sources about the quality of AP&J's work, and attempted to work with them to rectify the problems, but the work did not improve, so in February 2004, Newsday made the decision to terminate the AP&J contract with thirty-four days notice, effective April 1, 2004. It was his understanding that Newsday was permitted to terminate the contract for no reason upon thirty-days notice. He further avers that Frank Toner and John Burke, both signatories to the contract, are no longer employed by Newsday.

By way of letter dated March 14, 2000 to Michael Crowley from Frank Toner, an agreement was set forth between Crowley (AP&J) and Newsday for AP&J to furnish material and equipment and to perform labor and services as set forth in the agreement. Paragraph 3. provides as follows: "Terms and Termination. (a) The term of this Agreement shall be for one year, commencing on the first day that Contractor performed services for Newsday in 1997, and shall automatically renew for successive one year periods thereafter. Either party may terminate this Agreement at any time upon ninety (90) days prior written notice. (b) Newsday shall have the right to terminate this Agreement by written notice, effective immediately, in the event that Contractor fails to either discharge any obligation or remedy any default under this Agreement for a period of more than three (3) days after Newsday has given Contractor written notice specifying such failure or default. Newsday shall have the right to terminate this Agreement, without cause, upon thirty (30) days prior written notice to Contractor."

Based upon the review of the Agreement, three ways have been set forth in which the contract could be terminated as a matter of law. The first is by either party upon ninety days notice. The second way to terminate, effective immediately, is upon default or failure to discharge an obligation by AP&J, and upon written notice by Newsday and the failure to cure such default or discharge within a three day period. The third way to terminate is without cause upon thirty days written notice.

Based upon the foregoing, it is determined that Newsday has demonstrated prima facie entitlement to summary judgment dismissing the first, second and third causes of action in that Newsday has established that it terminated AP&J without cause upon thirty days written notice. The plaintiff has failed to raise a factual issue to preclude summary judgment. Although the plaintiff sets forth it was his understanding that he was entitled to three days to cure any default or failure to discharge an obligation, the Agreement provides that was only to permit termination effective immediately if there was a failure to cure. The plaintiff testified to the effect that he did not recall any specific complaints about the work and services provided by AP&J, though there may have been a problem here or there, but he had a good relationship with them and there were very few complaints. Therefore, he has failed to raise a factual issue concerning whether he was entitled to written notice with a three day period to cure. The plaintiff has failed to raise a factual issue to demonstrate he was not provided with thirty days written notice based upon the contractual provision for termination for no cause.

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Accordingly, motion (002) by Newsday is granted and the complaint is dismissed with prejudice as asserted against Newsday in the first, second and third causes of action. The remainder of the action against DSA Community Publishing LLC is severed and continued, subject to the automatic stay imposed pursuant to the Bankruptcy pending proceeding.

Dated: January 13, 2010

  
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**HON. JOSEPH C. PASTORESSA**

\_\_\_ FINAL DISPOSITION  X  NON-FINAL DISPOSITION