

**T1 GS Cell Site Mgmt. LLC v 201 Jerusalem Ave.  
Massapequa, LLC**

2011 NY Slip Op 32633(U)

September 29, 2011

Sup Ct, Nassau County

Docket Number: 9969-11

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

-----x  
**T1 GS CELL SITE MANAGEMENT LLC, f/k/a T1  
UNISON SITE MANAGEMENT LLC,**

**Plaintiff,**

**TRIAL/IAS PART: 20  
NASSAU COUNTY**

**Index No: 9969-11  
Motion Seq. Nos. 1 and 2  
Submission Date: 9/27/11**

**-against-**

**201 JERUSALEM AVE. MASSAPEQUA, LLC, and  
MASSAPEQUA MANOR, INC. d/b/a MANOR EAST  
CATERERS,**

**Defendants.**

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**The following papers have been read on these Orders to Show Cause:**

- Order to Show Cause.....X**
- Emergency Affirmation and Exhibits.....X**
- Affirmation in Support and Exhibits.....X**
- Affidavit of N. Hussein and Exhibit.....X**
- Affidavit of M. Kasten and Exhibits.....X**
- Affidavit of B. Downs.....X**
- Memorandum of Law in Support.....X**
- Correspondence dated September 26, 2011 and Attachments.....X**
  
- Order to Show Cause.....X**
- Affidavit in Support.....X**
- Affirmation in Support and Exhibits.....X**
- Affidavits of Service.....X**

This matter is before the court on 1) the Order to Show Cause filed by Plaintiff T1 GS Cell Site v. 201 Jerusalem ("Plaintiff") on July 7, 2011 ("First Order to Show Cause"), and 2) the Order to Show Cause filed by Plaintiff on August 8, 2011 ("Second Order to Show Cause"), both of which were submitted on September 27, 2011. For the reasons set forth below, the Court

1) grants Plaintiff's First Order to Show Cause to the extent that the Court directs that the Temporary Restraining Order issued by the Court on July 14, 2011 shall remain in effect, pending further court order; and 2) refers Plaintiff's Second Order to Show Cause to a hearing. The Court denies, as moot, the branch of Plaintiff's Second Order to Show Cause seeking injunctive relief, in light of the Court's decision on the First Order to Show Cause. The Court declines to require Plaintiff to post a bond as a condition of this injunctive relief, in light of language in the easement agreement between the parties expressly waiving the requirement of a bond under these circumstances.

### BACKGROUND

#### A. Relief Requested

In the first Order to Show Cause, Plaintiff requests an Order, pursuant to CPLR §§ 6301 and 6311-13, 1) directing Defendants to allow Plaintiff and/or authorized third parties, including AT&T and its contractor Bechtel Communications, Inc. ("Bechtel") and T-Mobile, access to the property ("Property") located at 201 Jerusalem Avenue, Massapequa, New York 11758, in addition to ingress and egress over the Property and such other uses, acts or actions on the Property, as permitted by the easement agreement ("Easement Agreement") between the parties dated October 12, 2006; 2) preliminarily and permanently enjoining Defendants<sup>1</sup> or anyone acting on behalf of, under the control of or in concert with the Defendants during the pendency of this action from restricting, conditioning or in any way interfering with the Plaintiff's and/or authorized third parties, including AT&T and T-Mobile, access to the Property, in addition to ingress and egress over the Property and such other uses, acts or actions on the Property, as permitted by the Easement Agreement.

In the Second Order to Show Cause, Plaintiff moves for an Order 1) pursuant to CPLR § 5104 and N.Y. Jud. Law §§ 753 and 756, a) holding Defendants and its principals and/or owners, including Mr. John DeJohn, in contempt of the Court's July 7, 2011 temporary restraining order ("TRO"), pursuant to which Defendants are temporarily restrained and enjoined from restricting, conditioning or in any way interfering with access to the Property in addition to ingress and egress over the Property by Plaintiff and/or any authorized third parties, including,

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<sup>1</sup> Plaintiff's application includes a request to "preliminarily and permanently" enjoin Defendants from certain conduct "during the pendency of this action." The Court will assume that, notwithstanding the use of the word "permanently," Plaintiff's application is for injunctive relief during the pendency of this action.

without limitation, AT&T and its contractor Bechtel, and T-Mobile, for the purpose of maintenance and upgrade work, and such other uses, acts or actions on the Property as permitted by the Easement Agreement; b) issuing a warrant or contempt order, which would not be purged until Defendants allow Plaintiff access to the Property in addition to ingress and egress over the Property by Plaintiff and/or authorized third parties, including, without limitation, AT&T and its contractor Bechtel, and T-Mobile, for the purpose of maintenance and upgrade work, and such other uses, acts or actions on the Property as permitted by the Easement Agreement; and c) issuing coercive and compensatory sanctions against Defendants payable to Plaintiff, for \$1,000 for every day Defendants continue to deny access to the Property, and for costs, including reasonable attorney's fees, incurred by Plaintiff in pursuing this action; and 2) issuing a preliminary injunction enjoining Defendants from restricting, conditioning or in any way interfering with access to the Property in addition to ingress and egress over the Property by Plaintiff and/or any authorized third parties, including, without limitation, AT&T and its contractor Bechtel, and T-Mobile, for the purpose of maintenance and upgrade work, and such other uses, acts or actions on the Property as permitted by the Easement Agreement.

Defendants have not appeared in this action, and have submitted no response to Plaintiff's Orders to Show Cause.

#### B. The Parties' Background

The Verified Complaint ("Complaint") (Ex. A to Bonner Aff. in Supp.) alleges that Plaintiff is in the business of leasing properties to telecommunications properties for those companies' use to provide cellular telephone service. In this action, Plaintiff is seeking to enforce its Easement Agreement with Defendant 201 Jerusalem Ave. Massapequa LLC ("Site Owner") which, together with Defendant Massapequa Manor Inc. d/b/a Manor East Caterers ("Manor East"), owns and manages a catering hall at the Property. The Easement Agreement (Ex. B to Bonner Emerg Aff. in Supp.) authorizes Plaintiff and authorized third parties, such as AT&T and T-Mobile, access to certain Easements located on the Property. The Easement Agreement also allows Plaintiff and its authorized third parties the right to ingress and egress over the Property for certain uses, acts or actions on the Property. Defendants have allegedly, "without cause or explanation" (Compl. at ¶ 6) denied Plaintiff and authorized third parties access to the Property, in violation of the Easement Agreement. The Complaint contains three (3) causes of action: 1) breach of contract, 2) request for a preliminary and permanent injunction and 3) request for a declaratory judgment regarding the rights and duties of the parties with

respect to the Easement Agreement. Plaintiffs have provided Affidavits of Service reflecting the service of the Order to Show Cause and supporting papers on Defendants.

In his Affidavit in Support, Bertram Downes (“Downes”), who is employed by Ejaad Telecom, Inc. (“Ejaad”), a subcontractor to Bechtel, affirms that he is a field technician who has worked in that capacity for approximately five (5) years. Downes explains that Bechtel provides certain services with respect to AT&T communications facilities in the State of New York, including a Cell Site located at the Property (“Job Site”).

Downes affirms that he went to the Property on February 24 and July 11, 2011 to perform certain maintenance and upgrade work (“Work”). The Work involved the replacement of certain telephone utility lines supporting AT&T’s equipment. The utility lines are located inside a conduit running from an enclosure on the outdoor portion of the Job Site to the Verizon telecommunications unit located in the Property’s basement. The Work was being performed pursuant to AT&T’s request that Bechtel remove outdated cable wiring running through the conduit and replace it with a single Ethernet cable, along with supporting white cloth and DC power. The Work was to be performed on equipment owned and previously installed by AT&T, would not involve trenching or digging, and would not disturb or damage the Property. Other than entering the basement to access the conduit and Verizon telecommunications unit, the Work was to occur solely on those portions of the Job Site subleased by AT&T. The purpose of the Work was to increase AT&T’s bandwidth, data transmission and emergency 911 services, and it was expected to improve the quality and speed of AT&T’s voice, data and emergency 911 services.

Downes arrived at the Property on February 24, 2011 at approximately 7:30 a.m. He and a co-worker waited to gain access to the basement of the Property to perform the Work. At approximately 9:00 a.m., an individual told them to wait for the Property’s owner (“Owner”) to permit Downes and his co-worker access to the basement. At approximately 11:00 a.m., an individual named John, who identified himself as the Owner’s uncle, arrived. John, who claimed to have spoken with the Owner via telephone, advised Downes that, at the direction of the Owner, Downes and his co-worker were to leave the Job Site and Property immediately. John did not provide a reason for this direction. Downes spoke with representatives of Bechtel who directed him to cease the Work and leave the Property. As Downes and his co-worker prepared to leave, they were again warned to leave the Job Site or they would be “physically removed” (Downes Aff. in Supp. at ¶ 12). Downes left the Property at approximately 1:00 p.m.

On July 11, 2011, Downes went to the Property at approximately 8:00 a.m. He was joined by a representative of AT&T who intended to perform separate work at the Property. At approximately 9:45 a.m., Downes attempted to gain access to the interior of the building on the Property. After entering through the front door, he advised three employees working there of his need to gain access to the basement, and presented a copy of the TRO. The employees advised Downes that they “would get in trouble” (Downes Aff. in Supp. at ¶ 17) if they permitted Downes to enter the basement, and provided Downes with a telephone number of the Owner. Downes left the Property and attempted to contact the Owner for approximately one hour. He eventually reached an individual who declined to identify himself, said that he “did not care about the Order” which he believed was related to a pending lawsuit, and said that he would call the police if Downes remained on the Property. Downes subsequently directed his field team to leave the Property, and the Work remains incomplete.

At a conference before the Court on August 30, 2011, counsel for Plaintiff advised the Court that Defendants recently permitted Plaintiff access to a portion of the Property and that Plaintiff was able to complete necessary maintenance and upgrade work. Plaintiff’s counsel expressed his concern, however, that Plaintiff would be prevented in the future from entering the Property to perform necessary repairs and maintenance, and submitted that injunctive relief is still appropriate, notwithstanding Plaintiff’s having recently been granted access to the Property.

In his Affidavit in Support, Robert G. Goldman (“Goldman”), a Manager of Field Operations for AT&T explains the composition and workings of wireless networks. He affirms that, due to the growing demand for smartphones and the growth of non-voice data application for mobile phones, *e.g.* texting, AT&T is seeking to expand the capacity of its networks. In addition, AT&T’s wireless network is used by government personnel for purposes including emergency 911 communications and first responder and rescue services (collectively “Emergency Calls”). Through the cell site (“Cell Site”) located at the Job Site and Property, AT&T provides high speed wireless telecommunications services, service for Emergency Calls, and other communications services to its customers in a high-traffic area. The location of the Cell Site allows AT&T to maximize wireless communications coverage in Nassau County.

When capacity at the Cell Site is reduced, the technology that supports AT&T’s 3G Network is unable to process wireless voice or data traffic. When the 3G Network cannot function, calls are diverted to the 2G Network, resulting in an overtaxing of the equipment and the increased likelihood of equipment failure. Goldman affirms that, based on his 16 years of

experience in field operations and with wireless and wireline communications equipment, the 2G Network may be affected if Plaintiff is not granted access to the Job Site to make necessary repairs. If the 2G Network becomes inoperative, Emergency Calls will be affected.

Counsel for AT&T has provided an Affirmation in Support of Plaintiff's application in which she submits that, without the necessary maintenance and upgrades at the Job Site, AT&T and its customers will be irreparably harmed. Plaintiff and AT&T provide correspondence reflecting their efforts to resolve this matter short of litigation (*see, e.g.,* Ex. D to Bonner Emerg. Aff. in Supp.; Ex. B to Ford Aff. in Supp.).

Plaintiff has also provided a submission in response to the Court's prior request for legal authority supporting Plaintiff's request that, in light of language in the Easement Agreement waiving the requirement of a bond, the Court not impose a bond as a condition of injunctive relief. Paragraph 16(a) of the Easement Agreement provides that "[i]n the event that any dispute or claim arises that could impair the use or possession of the Facilities by Unison or its Customers, Unison shall have the right to seek injunctive relief, without the necessity of posting a bond." Plaintiff has cited two trial court cases, *Private One of N.Y., LLC v. JMRL Sales & Serv., Inc.*, 21 Misc. 3d 1106(A) (Sup. Ct. Kings Cty. 2008) and *Awwad v. Capital Region Otolaryngology Head & Neck Group, LLC*, 18 Misc. 3d 1111(A) (Sup. Ct. Albany Cty. 2007), in which the Court dispensed with the requirement of an undertaking in light of language in the parties' agreement expressly waiving that requirement.

### C. The Parties' Positions

Plaintiff submits that it has demonstrated its right to the requested injunctive relief by 1) demonstrating a likelihood of success on the merits by establishing that the Defendants have breached the Easement Agreement by refusing to provide Plaintiff, and authorized third parties, access to the Property to perform necessary maintenance and repairs; 2) establishing irreparable harm without injunctive relief by demonstrating that a) communications, including Emergency Calls, will be adversely affected if the maintenance and repairs are not performed; and b) Plaintiff's business reputation will suffer if it is unable to provide communications access to its customers; and 3) establishing that a balancing of the equities favors Plaintiff, as Defendants will not suffer economically or otherwise from being required to comply with the Agreement, and Plaintiff's customers, and the public, will suffer without the requested relief.

Defendants have not appeared in this action, and have filed no opposition or other response to Plaintiff's motions.

## RULING OF THE COURT

### A. Standards for Preliminary Injunction

A preliminary injunction is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and upon the relevant facts set forth in the moving papers. *William M. Blake Agency, Inc. v. Leon*, 283 A.D.2d 423, 424 (2d Dept. 2001); *Peterson v. Corbin*, 275 A.D.2d 35, 36 (2d Dept. 2000). Injunctive relief will lie where a movant demonstrates a likelihood of success on the merits, a danger of irreparable harm unless the injunction is granted and a balance of the equities in his or her favor. *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860 (1990); *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 517 (1981); *Merscorp, Inc. v. Romaine*, 295 A.D.2d 431 (2d Dept. 2002); *Neos v. Lacey*, 291 A.D.2d 434 (2d Dept. 2002). The decision whether to grant a preliminary injunction rests in the sound discretion of the Supreme Court. *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988); *Automated Waste Disposal, Inc. v. Mid-Hudson Waste, Inc.*, 50 A.D.3d 1073 (2d Dept. 2008); *City of Long Beach v. Sterling American Capital, LLC*, 40 A.D.3d 902, 903 (2d Dept. 2007); *Ruiz v. Meloney*, 26 A.D.3d 485 (2d Dept. 2006).

### B. Contempt

It is well settled that the following must be established in order for the Court to find a person in contempt: 1) A lawful order of the Court, 2) an unequivocal mandate in that order, 3) knowing disobedience of that order by the alleged contemnor, and 4) prejudice to the right of a party to the litigation. *E.g., McCormick v. Axelrod*, 59 N.Y.2d 574, 583 (1983); *McCain v. Dinkins*, 84 N.Y.2d 216, 226 (1994) (civil contempt sanction is “designed to compensate the injured private party for the loss of or interference with the benefits of the [Court’s] mandate”). *See also Collins v. Telcoa International Corp.*, 927 N.Y.S.2d 151 (2d Dept. 2011) (party seeking adjudication of civil contempt must establish willful and deliberate violation of lawful court order expressing clear and unequivocal mandate).

### C. Application of these Principles to the Instant Action

The Court grants Plaintiff’s First Order to Show Cause to the extent that the Court directs that the TRO shall remain in effect, pending further court order. Plaintiff has demonstrated a likelihood of success on the merits by establishing Defendants’ breach of the Easement Agreement by its failure to provide Plaintiff and authorized third parties access to the Property to conduct necessary maintenance and repairs. The Court also concludes that Plaintiff

will suffer irreparable injury without injunctive relief, and a balancing of the equities favors Plaintiff, in light of the possibility that communications, including Emergency Calls, will be adversely affected without the requested injunctive relief.

The Court declines to require the posting of a bond, in light of the relevant language in the Easement Agreement, and in consideration of Defendants' failure to appear or respond to Plaintiff's applications.

The Court refers Plaintiff's Second Order to Show Cause to a hearing, based on the Court's conclusion that it cannot determine, on the record before it, that Defendants' failure to provide Plaintiff access to the Property constituted contempt. A hearing is required to determine, *e.g.*, whether Defendants' refusal to permit Plaintiff access to the property was willful. The Court denies, as moot, the branch of the Second Order to Show Cause seeking injunctive relief, in light of the Court's ruling with respect to the First Order to Show Cause.

All matters not decided herein are hereby denied.

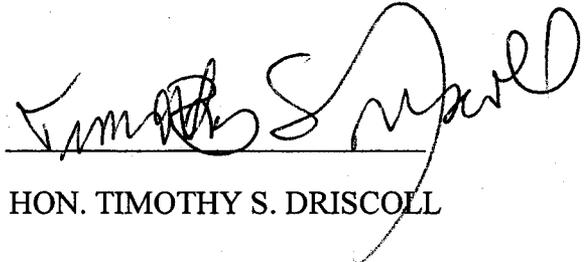
This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear before the Court on November 1, 2011 at 9:30 a.m. for a Preliminary Conference.

ENTER

DATED: Mineola, NY

September 29, 2011



HON. TIMOTHY S. DRISCOLL

J.S.C.

**ENTERED**  
OCT 05 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE