

**TCW Gem V. Ltd. v Grupo Iusacell, Celular, S.A.**

2005 NY Slip Op 30419(U)

March 4, 2005

Supreme Court, New York County

Docket Number: 600091/04

Judge: Bernard J. Fried

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **BERNARD J. FRIED**  
J.S.C. Justice

PART 60

0600091/2004

TCW GEM V, LIMITED

VS

GRUPO IUSACELL CELULAR, S.A.

SEQ 04

*D*

INDEX NO.

600091/2004

MOTION DATE

3/4/05

MOTION SEQ. NO.

MOTION CAL. NO.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**

MAR - 8 2005

NEW YORK COUNTY CLERK'S OFFICE

This motion is decided in accordance with the accompanying memorandum decision.

SO ORDERED

Dated: ~~2/3/05~~ 3/4/05

*Bernard J. Fried*  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

BERNARD J. FRIED

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 60

-----X  
TCW GEM V. LIMITED, TCW GEM LIGOS 1 LIMITED,  
GEM LIGOS II LIMITED, TCW GEM CAPITAL & INCOME  
(CAYMAN), LP, TCW GEM II, LIMITED, TCW GEM III,  
LIMITED, TCW GALILEO FUNDS, INC.,  
GRAMERCY EMERGING MARKETS FUND, AND AGAVE  
TELECOM HOLDINGS LLC,

Index No.: 600091/04

Plaintiffs

-against-

GRUPO IUSACELL CELULAR, S.A. DE C.V., SOS  
TELECOMUNICACIONES, S.A. DE C.V.,  
COMUNICACIONES CELULARES DE OCCIDENTE, S.A.  
DE C.V., SISTEMAS TELEFONICOS PORTATILES  
CELULARES, S.A. DE C.V. TELECOMUNICACIONES DEL  
GOLFO, S.A. DE C.V., IUSACELL, S.A. DE C.V., PORTATEL  
DEL SURESTE, S.A. DE C.V. MEXICAN CELLULAR  
INVESTMENT, INC., GMD COMUNICACIONES, S.A. DE  
C.V., HERMES TELECOMUNICACIONES, S.A. DE C.V.,  
PORTATEL COMERCIALIZADORA, S.A. DE C.V.,  
PORTATEL BIENES RAICES, S.A. DE C.V., PORTATEL  
SERVICIOS, S.A. DE C.V. PORTATEL CORPORATIVA, S.A.  
DE C.V., CELLULAR SOLUTIONS DE MEXICO, S.A. DE  
C.V., SISTECEL, S.A. DE C.V., INMOBILIARIA MONTES  
URALES 460, S.A. DE C.V., IUSANET, S.A. DE C.V.,  
GRUPO PORTATEL, S.A. DE C.V.,  
MARATHON ASSET MANAGEMENT, LLC, MARATHON  
SPECIAL OPPORTUNITY FUND, LP,  
MARATHON FUND, LP, AND DOES 1-50,

Defendants.

-----X  
FRIED, J.:

Defendants Marathon Asset Management, LLC, Marathon Special Opportunity Fund,

LP and Marathon Fund, I.P, (collectively "Marathon") move pursuant to CPLR 3211(a)(7), to dismiss all claims asserted against them in the amended complaint.<sup>1</sup>

The amended complaint alleges that in 1997 defendant Grupo Iusacell, S.A. de C.V. and its subsidiary corporations, also named as defendants herein (collectively "Iusacell") entered into certain financing arrangements ("1997 Financing Arrangement"). Defendant Iusacell is a Mexican Company which provides cellular telephone services throughout a large part of Mexico. As part of the 1997 Financing Arrangement, Iusacell issued \$150 million of 10% senior notes due in 2004 ("Notes") pursuant to the terms of an Indenture Agreement dated July 25, 1997 (Indenture Agreement"). The Indenture Agreement provides that the Note Holders are entitled to "equal and ratable" liens (i.e., *pari passu*) with any liens granted in the assets of the Iusacell defendants after July 25, 1997. The exceptions to this "equal and ratable" right are detailed in the Indenture agreement as "Permitted Liens", and includes liens that existed as of July 25, 1997. Plaintiffs, the successors-in-interest to purchasers of approximately \$45 million of the Notes, acquired their Notes between 2001 and 2003. In July 2003, defendant Iusacell defaulted with respect to payments due under the Notes.

Defendant Iusacell also entered into a credit agreement ("bank debt") with certain bank lenders ("bank lenders") as part of the 1997 Financing Arrangement. The bank debt

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1

A brief statement of facts is set forth. For a more detailed statement of facts, see my earlier decisions on the Motion for Preliminary Injunction and the Iusacell defendants' motion to dismiss.

was secured by a first mortgage on all real and personal property of defendant Iusacell. The mortgage was dated July 25, 1997, although it was not notarized and recorded until December 1997. The Marathon defendants are successors-in-interest to some of the bank lenders, and hold less than half of the bank debt. It is alleged that the Marathon Defendants continue to receive payments from defendant Iusacell, and are allegedly in negotiations for a consensual debt restructure.

The bank debt was amended on April 15, 1999, and on March 29, 2001, it was amended and restated. In April 2002 defendant Iusacell entered into an additional mortgage agreement ("Portatel Mortgage"). In connection with these amendments and the Portatel Mortgage, defendant Iusacell provided senior lien status to the lenders and junior lien status to the Note Holders.

The amended complaint contends that the mortgage to the bank lenders, dated July 25, 1997, was not an "existing" mortgage under Mexican law as of July 25, 1997, since it was not notarized and recorded until December 1997. Thus, plaintiffs contend that the Indenture Agreement requires them to have been provided equal and ratable liens to the bank lenders.

In the amended complaint, plaintiffs assert two causes of action against the Marathon defendants, arising from their alleged improper acceptance and assertion of "unfettered security interests/liens in the assets of Iusacell" and from the Marathon defendants alleged

improper receipt of interest payments from Iusacell, absent equal payments to plaintiffs.

On a motion to dismiss, it is basic that the pleadings are to be liberally construed, (CPLR 3026), and I am required to “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (E.g., Leon v. Martinez, 84 N.Y.2d 83, 87 [1994]). In passing on defendants’ motion to dismiss, I am mindful of these principles.<sup>2</sup>

The fourth cause of action for unjust enrichment, alleges that the Marathon defendants “have been unjustly enriched by their having knowingly received senior and unfettered security interests/liens in the assets of Iusacell ..., which security interests/liens also should have been granted to Plaintiffs on an equal and ratable basis”. It further alleges, that the Marathon defendants have been unjustly enriched by continuing to receive from Iusacell interest payments on their debt, while plaintiffs have not received the equal payments that they are entitled to. Plaintiffs allege that they have suffered damage as a result of Marathons’ conduct.

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2

It should be noted, that I denied plaintiffs’ Motion for a Preliminary Injunction because I concluded, *inter alia*, that plaintiffs have not carried their burden of proving the likelihood of success on the merits of the claim that they are entitled to equal and ratable liens, that was in the context of that motion. For purposes of this Motion to Dismiss I must take plaintiffs allegations as true.

To plead an action for restitution based on unjust enrichment, plaintiff must allege that: (1) the defendant received money or property belonging to the plaintiff, (i.e. defendants were enriched) (2) the defendant benefitted from receipt of the money or property (at plaintiffs' expense), and (3) under principles of equity and good conscience, the defendant should not be permitted to retain the money or property. (E.g., Matter of Estate of Witbeck, 245 A.D.2d 848, 850 [3<sup>rd</sup> Dept., 1997].

Accepting plaintiffs allegations as true, for purposes of this motion, then the mortgage that was recorded in December 1997 did not create a "Permitted Lien" since the lien did not exist as of July 25, 1997.<sup>3</sup> Therefore, plaintiffs were entitled to a lien equal and ratable to that of Marathon's. Marathon argues it is entitled to an unfettered priority lien and the continued interest payments from Iusacell, pursuant to a contract that plaintiffs were not a party to, thus, it is contended that plaintiffs can not maintain a cause of action for unjust enrichment, citing 900 Unlimited, Inc. v. MCI Telecomm. Corp., 215 A.D.2d 227 (1 Dept., 1995). Marathon further argues that plaintiffs have failed to state a cause of action for unjust enrichment, since it is not alleged that they conferred a benefit on the defendant, rather it is alleged that the Iusacell defendants conferred the benefit onto the Marathon defendants.

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3

While the question of the "existing" date of the mortgage will need to be determined later in this action under Mexican law, at this juncture, it is not possible to authoritatively resolve this issue, especially in light of the competing views on the application of Mexican law. (See my earlier decision on plaintiffs' Motion for a Preliminary Injunction). However, for purposes of this motion, I will accept, as I am required, plaintiffs' position.

However, it is clear that plaintiffs' allegations are that Marathon's contractual rights could only entitle them to what was available to be contracted, and taking the transactions as a whole, they could not receive unfettered priority liens, rather, the liens were required to be shared with plaintiffs equally and ratably. It is also clear that "a plaintiff's recovery based on unjust enrichment may be proper where the defendant has acquired funds from a third party by the sale of rights possessed by the plaintiff." (Cf. Universal City Studios, Inc. v. Nintendo Co. Ltd., 615 F.Supp. 838, 856 [S.D.N.Y.,1985] aff'd, 797 F.2d 70 [2d Cir.] cert.den., 479 US 957 [1986]). Plaintiffs allege that Marathon's receipt of unfettered liens was, in effect, Marathon's improper receipt of plaintiffs' property. Thus, the first two elements are satisfied, i.e. plaintiffs have properly pled that Marathon's alleged acceptance and continued assertion of an unfettered priority lien and acceptance of interest payments, enriched them at plaintiffs' expense.

Plaintiffs further allege that Marathon and their predecessors-in-interest "knew or should have known of the terms and provisions of the Indenture Agreement, including the Indenture Agreement's prohibition against incurring additional indebtedness or the creation of new liens after the [1997] Notes, absent the grant of equal and ratable liens to the holders of the [1997] Notes. Despite this knowledge or constructive knowledge, the lenders and their successors-in-interest, [Marathon], have accepted security interests in Iusacell Celular that are impermissible under Section 4.13 of the Indenture agreement." The alleged knowledge on the part of Marathon and their successors-in-interest, of plaintiffs' right to equal and ratable liens, is sufficient at this juncture, to satisfy the third element, that in

equity and good conscience Marathon should not be allowed to retain the liens and payments without compensating plaintiffs. This is especially true, in light of the fact that the parties involved in this dispute are all commercially sophisticated, and a claim for unjust enrichment must be “a realistic determination based on a broad view of the human setting involved.” (See McGrath v. Hilding 41 N.Y.2d 625, 629 [1977]).

The fifth cause of action for trespass to chattels alleges, that the Marathon defendants “have trespassed upon Plaintiffs’ chattels by knowingly receiving senior and unfettered liens and/or possessory interests in said chattels, which liens and/or possessory interests also should have been granted to Plaintiffs on an equal and ratable basis.” Plaintiffs further allege that Marathon is “intentionally” “intermeddling with” and “dispossessing Plaintiffs of their possessory rights to such chattels.” It is alleged that this conduct is “impairing the condition, quality, or value of the Plaintiffs’ possessory rights to such chattels”, and “[a]s a direct and proximate result of the trespass to chattels by [Marathon], Plaintiffs have been damaged by the lost value of the chattels as well as the lost use of the chattels.”

To state a cause of action for trespass to chattel, plaintiffs must allege that defendants intentionally, and without justification or consent, physically interfered with the use and enjoyment of plaintiffs’ property, and plaintiffs were harmed thereby. (School of Visual Arts v. Kuprewicz, 3 Misc.3d 278, 281 [Sup. Ct., 2003]). This can occur by defendants “dispossessing” plaintiffs of their chattel or by “using or intermeddling” with a chattel in the possession of another. (Register.Com, Inc. v. Verio, Inc., 356 F.3d 393, 437 [2d Cir., 2004]).

To satisfy the intent requirement, a “trespasser ... need not intend or expect the damaging consequences of his intrusion, [but] he must intend the act which amounts to or produces the unlawful invasion, and the intrusion must at least be the immediate or inevitable consequence of what he willfully does, or which he does so negligently as to amount to willfulness.” (Ivancie v. Olmstead, 66 N.Y.2d 349, 352 [1985] [internal citations omitted]).

Defendant contends that plaintiffs have failed to state a cause of action for trespass to chattel because they have not alleged that defendant intermeddled or dispossessed plaintiffs property; nor has plaintiff alleged a right to possession at the time of the trespass. In addition, defendant contends that plaintiff has not pled that Marathon acted with the required intent.

Defendant argues that according to the amended complaint, they received the security interests that allegedly constituted a trespass, in July 1997, April 1999, March 2001 and April 2002. Defendant further contends that according to the amended complaint plaintiffs’ possessory interests in the chattel did not arise until Iusacell defaulted on the loan in July 2003. Thus, the argument runs, that plaintiffs have not pled a possessory interest at the time of the alleged trespass. Defendant further argues that the amended complaint does not allege that an intermeddling with, or dispossession of, plaintiffs’ property occurred, since it only alleges that Marathon was granted security interests pursuant to a contract with Iusacell, which plaintiffs were not a party, and therefore, “the mere receipt of security interests” was not a trespass to plaintiffs’ property.

However, a possessory interest in a first priority security interest can be the subject of a trespass to chattels action - “conversions ‘little brother.’” (See e.g. Bank Brussels Lambert v. Credit Lyonnais, 2000 WL 174955, at pg. 8 and pg. 3 n. 9 [S.D.N.Y., 2000]). And, as stated above, for purposes of this motion, I will assume, as plaintiffs allege, that they possessed a right to share equally and ratably to all liens created after July 25, 1997. Viewed in that light, plaintiffs have stated a claim for trespass, since it is alleged that at the time Iusacell first granted Marathon an “unfettered” priority lien, (December 1997), plaintiffs were entitled to receive a priority lien equal and ratable to Marathon’s. Therefore, the allegation that Marathon’s acceptance of an “unfettered” lien, trespassed on plaintiffs’ possessory rights for the portion of the lien that it was entitled to share equally and ratably, survives this motion to dismiss.

Finally, the amended complaint alleges that Marathon “knew or should have known of the terms and provisions of the Indenture Agreement, including the Indenture’s prohibition against incurring additional indebtedness or the creation of new liens after the issuance of the [1997] Notes, absent the grant of equal and ratable liens to the holders of the [1997] Notes.” This allegation sufficiently satisfies the intent requirement, especially in the context of commercially sophisticated financing arrangements, by imputing knowledge or constructive knowledge on the Marathon defendants.

Accordingly, it is


ORDERED that the Marathon defendants’ motion to dismiss is denied; and it is

further

ORDERED that the Marathon defendants' are directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry.

Dated: 3/4/05

ENTER:

  
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J.S.C.

**BERNARD J. FRIED**  
J.S.C.

**FILED**

**MAR - 8 2005**

**NEW YORK  
COUNTY CLERK'S OFFICE**