

Talk Smart Alliance, Inc. v West Coast Distrib., Inc.
2007 NY Slip Op 31135(U)
May 8, 2007
Supreme Court, Richmond County
Docket Number: 0101098/2007
Judge: Philip G. Minardo
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

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TALK SMART ALLIANCE, INC.,
Plaintiff,

DCM PART 6
Present:
Hon. Philip G. Minardo

-against-

WEST COAST DISTRIBUTION, INC.,
Defendant.

Decision and Order
Index No. 101098/07
Motion No. 761-001

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The following papers numbered 1 to 4 were used on this motion the 16th day of March, 2007:

Papers	Numbered
Order to Show Cause with Supporting Papers and Exhibits (dated March 13, 2007)	1
Affirmation in Opposition with Exhibits(dated March 29, 2007)	2
Affirmation in Reply with Exhibits (dated April 12, 2007).....	3
Affidavit of Haithem Elsaad (undated)	4

Upon the foregoing papers, plaintiff’s motion for a preliminary injunction is denied.

This is an action for legal and equitable relief arising from defendant’s alleged breach of contract. Plaintiff Talk Smart Alliance, Inc (“Talk Smart”) is a distributor of prepaid calling cards, which it purchased from Call Com, Inc (“Call Com”). Call Com purchased the cards from defendant West Coast Distribution, Inc. (“West Coast”), a wholesale distributor of the cards and the telecommunications carrier that provided the underlying telephone service for each card sold by Call Com to Talk Smart.

According to plaintiff’s president, Walid Alkhatiib, the agreement between Talk Smart and Call Com provided for a specific “rate deck” setting forth the cards’ minutes per country, taxes and maintenance charges. Alkhatib also alleges that it was agreed that payment for the cards would be due approximately twenty-five days from initial use.

Plaintiff further alleges that it ultimately sold almost all of the cards that it had purchased from Call Com to another distributor of prepaid telephone calling cards, Kelly Wholesale, LLC.

Neither Call Com nor Kelly Wholesale are parties to this action.

The business relationship between Talk Smart and Call Com eventually deteriorated, and in November 2006, Talk Smart approached West Coast directly. At that point, Talk Smart concedes that it owed Call Com approximately \$250,000 in future payments, although it claims that this amount was subject to credits for deactivations and disruptions in service.

At the time, Call Com owed West Coast \$357,776.00. After a series of negotiations, West Coast allegedly agreed to accept payment from Talk Smart of the net amount Talk Smart owed to Call Com (\$250,000.00, less claimed credits for prior deactivations and returns of certain cards) and to look to Call Com for the balance of the amount.

Talk Smart and West Coast thereupon entered into an agreement similar to the prior arrangement between Talk Smart and Call Com. Talk Smart also paid West Coast approximately \$240,000.00 in December 2006. According to Alkhatiib, this reduced Talk Smart's obligation to West Coast to a "zero balance."

Plaintiff now asserts that defendant has failed to comply with the terms of their agreement. Specifically, it alleges that West Coast has either deactivated or unilaterally changed the rate deck on thousands of cards, and has demanded payment from Talk Smart of additional monies, including the balance owed to it by Call Com. Plaintiff states that it has made timely payment to West Coast of approximately \$120,000 for use of the cards, and that it has remained current in its account with West Coast despite the latter's breach of its obligations.

Plaintiff further alleges that West Coast intends to deactivate additional cards that have already been sold to unsuspecting consumers and that these actions will cause irreparable harm to Talk Smart. It alleges that because West Coast is its sole source of prepaid calling cards, the sudden termination of service and deactivation of cards will, in effect, cause Talk Smart to cease

operations and lose its business and any associated goodwill in the industry.

In opposition to the motion for a preliminary injunction, West Coast alleges that (1) plaintiff has not established a likelihood of success on the merits because there are material questions of fact concerning the rights and obligations of the parties; (2) the underlying claims are compensable by monetary damages and therefore plaintiff does not stand to suffer irreparable harm; and (3) a preliminary injunction would result in severely inequitable hardship for the defendants.

More specifically, West Coast alleges that in December 2006, it attempted to mediate the dispute between Talk Smart and Call Com, and that, as a result, a time-sensitive agreement was reached wherein West Coast was to receive the full amount owed to it or it would deactivate the cards invoiced to Call Com. According to Mohammed Taraji, West Coast's president, the final reconciliation of the overdue account was to be the responsibility of both Call Com and Talk Smart, and West Coast agreed not to deactivate any cards so long as the outstanding balance was paid by a January 2007 deadline.

Moreover, Tarij asserts that its agreement with Talk Smart did not contain a set rate deck, and that Talk Smart was, or should have been, aware that the prepaid telephone calling card industry permits variance in rate decks depending on the call traffic to respective countries.

Finally, West Coast maintains that it has never deactivated any Talk Smart cards and that it continued to do business with Talk Smart beyond the payment deadline.

A party seeking the drastic remedy of a preliminary injunction must establish a clear right to that relief (*Sterling Fifth Assocs v. Carpentille Corp*, 5 AD3d 328, 330 [1st Dept 2004]). That is, in order to obtain a preliminary injunction, plaintiff is required to show a likelihood of success on the merits, irreparable injury absent a granting of injunctive relief and a balancing of

the equities in its favor (*Aetna Ins Co v. Cappasso*, 75 NY2d 860 [1990]). A failure of proof as to any of the requisite elements is fatal to the requested relief.

It is the movant that bears the burden of proof, which generally requires a "strong showing in affidavits and other proof supplying evidentiary detail" (David D. Siegel, *NY Practice*, 499 (3d ed., West 1999)). This burden requires that a plaintiff demonstrate its likelihood of success on the merits and irreparable injury by means of detailed, competent evidence, not merely conclusory assertions (*see TMP Worldwide Inc. v. Franzino*, 269 AD2d 332 [1st Dept 2000]).

Here, even assuming arguendo that plaintiff has made a sufficient showing of a likelihood of success on the merits and that a balancing of the equities lies in its favor, whether it is entitled to preliminary injunctive relief against defendant turns on the question of irreparable harm. Lost profits and business, however difficult to compute they may be, are clearly compensable with money damages. Therefore, the existence of an adequate and readily determinable legal remedy, *i.e.*, money damages capable of calculation, bars the issuance of a preliminary injunction in this case (*see e.g., Matos v. City of New York*, 21 AD3d 936 [2d Dept 2005]). For that reason alone, the preliminary injunction must be denied (*Sterling Fifth Assocs v. Carpentille Corp*, 5 AD3d at 329).

Accordingly, it is

ORDERED that the motion for a preliminary injunction is denied.

ENTER

Dated: May 8, 2007

/s/ Philip G. Minardo
J.S.C.

