

**Tri-State Commercial Builders, Inc. v Executive
Computer World, Inc.**

2007 NY Slip Op 34312(U)

December 28, 2007

Supreme Court, Suffolk County

Docket Number: 0018460/2007

Judge: Joseph Farneti

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SHORT FORM ORDER

INDEX NO. 18460/2007

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

 TRI-STATE COMMERCIAL BUILDERS, INC.,

Plaintiff,

-against-

EXECUTIVE COMPUTER WORLD, INC.,
 d/b/a EXECUTIVE COMPUTER SERVICES
 WORLD and MICHAEL FOLAN,

Defendants.

ORIG. RETURN DATE: JUNE 28, 2007
 FINAL SUBMISSION DATE: AUGUST 2, 2007
 MTN. SEQ. #: 001
 MOTION: MD

PLTF'S/PET'S ATTORNEY:
 RUSSELL & FIG
 982 MONTAUK HIGHWAY - SUITE 4
 BAYPORT, NEW YORK 11705
 631-567-4500

DEFT'S/RESP ATTORNEY:
 LILLIE LAW, LLC
 269 SOUTHPORT STREET
 RONKONKOMA, NEW YORK 11779
 631-580-0437

Upon the following papers numbered 1 to 7 read on this motion _____
FOR A PRELIMINARY INJUNCTION AND OTHER RELIEF

Order to Show Cause and supporting papers 1-3; Affirmation in Opposition and supporting papers 4, 5; Affirmation in Response and supporting papers 6, 7; it is,

ORDERED that this motion by plaintiff for an Order: (1) directing defendants to immediately renew the internet domain name known as tscbny.com, or in the alternative, directing defendants to provide plaintiff with all documentation and information necessary in order to do so; (2) prohibiting defendants from shutting down or in any way interrupting the service or current state of the domain known as tscbny.com; (3) directing defendants to provide plaintiff with access to the domain known as tscbny.com, as well as all documentation and information relevant thereto, including account numbers and passwords; and (4) directing defendants to immediately transfer ownership of the domain known as tscbny.com to plaintiff, is hereby **DENIED** in its entirety for the reasons set forth hereinafter.

Plaintiff commenced this action asserting, among other things, causes of action for breach of contract and conversion. Plaintiff alleges that on or

about June 29, 2005, the parties entered into an agreement in which defendant was to provide a domain name for plaintiff on the internet. Plaintiff informs the Court that on even date, defendant did indeed provide plaintiff with the domain name known as tscbny.com, and that on September 14, 2005, plaintiff paid defendant for the services provided. On or about May 31, 2007, plaintiff alleges that defendant notified plaintiff that a domain renewal fee of \$380.19 was required to renew the domain for a five year period. However, on or about June 2, 2007, plaintiff alleges that defendant informed plaintiff that the domain would not be renewed unless plaintiff satisfied a prior invoice, dated January 31, 2006, in the amount of \$6,191.06. Plaintiff claims that it had no record of this invoice and requested back-up documentation. Plaintiff claims that on or about June 4, 2007, it gave defendant a check for the renewal fee in the amount of \$380.19, but that defendant returned the check and indicated that it would not accept the check until the January 31, 2006 invoice was paid. Plaintiff further alleges that it discovered the domain name was registered through a company known as "Domains By Proxy, Inc.," but that plaintiff would not be able to renew the domain name without certain information from defendant, including the account number and password.

JENNIFER CARONNA, a manager of plaintiff, alleges that on or about June 6, 2007, she attempted to contact defendant to pay the January 31, 2006 invoice pending receipt of back-up documentation, as well as the renewal fee. Plaintiff has annexed a copy of a facsimile from Ms. Caronna to defendant MICHAEL FOLAN, dated June 6, 2007, in which she states that she has checks in the amounts of \$380.00 and \$6,200.00 to give to defendant "in order for our website to not be interrupted." Ms. Caronna alleges that Mr. Folan would not speak to her on that date. Despite the statements in the aforementioned facsimile, Ms. Caronna now alleges that plaintiff is willing to pay only that portion of the January 31, 2006 invoice for which plaintiff receives back-up documentation.

In opposition, defendant alleges that defendant retained ownership of the domain name and that plaintiff is merely leasing the rights to use the domain. Defendant claims that such practice is commonplace in this industry. However, plaintiff has submitted an affidavit of BRIEN WADSWORTH, president of BW NETWORKS, INC., a company that provides network administrator services to plaintiff, who avers that based on his experience, a domain name is purchased for a client and registered in the client's name. Mr. Wadsworth further

avers that if a client pays for the domain name, that domain name belongs to the client not the vendor. The Court notes that in this matter, the parties have not submitted a written contract, if one exists, which sets forth the terms of ownership of the domain name.

Notwithstanding this difference of opinion as to ownership, Mr. Folan has represented to the Court that on or about June 22, 2007, he personally renewed the domain name tscbny.com using a credit card of defendant. Moreover, Mr. Folan indicates that defendant has consistently ensured plaintiff that service on the domain would not be interrupted, as this would be “unethical, and unprofessional.” Notably, Mr. Folan alleges that defendant was willing to turn over passwords to plaintiff for the domain to ensure payment of past services rendered.

By *ex parte* Order dated June 21, 2007 (Mayer, J.), the Court granted a temporary restraining order prohibiting defendants from shutting down or in any way interrupting the service or current state of the domain known as tscbny.com pending the return date of the instant application. By stipulation of the parties dated June 28, 2007, the temporary restraining order was extended pending a final determination of the application.

Plaintiff seeks a preliminary injunction prohibiting defendants from shutting down or in any way interrupting the service or current state of the domain known as tscbny.com. Since a preliminary injunction prevents litigants from taking actions that they would otherwise be legally entitled to take in advance of an adjudication on the merits, it is considered a drastic remedy which should be issued cautiously (see *Uniformed Firefighters Assn. of Greater N.Y. v City of New York*, 79 NY2d 236 [1992]; *Gagnon Bus Co., Inc. v Vallo Transp., Ltd.*, 13 AD3d 334 [2004]; *Bonnieview Holdings v Allinger*, 263 AD2d 933 [1999]). Thus, in order to obtain a preliminary injunction pursuant to CPLR 6301, a moving party must demonstrate: (1) a likelihood of success on the merits; (2) an irreparable injury absent the injunction; and (3) a balancing of the equities in its favor (see *Aetna Ins. Co. v Capasso*, 75 NY2d 860 [1990]; *Iron Mtn. Info. Mgt., Inc. v Pullman*, 2007 NY Slip Op 5469 [2d Dept]; *Gerstner v Katz*, 38 AD3d 835 [2007]). To sustain its burden of demonstrating a likelihood of success on the merits, the movant must demonstrate a clear right to relief which is plain from the undisputed facts (see *Gagnon Bus Co., Inc. v Vallo Transp., Ltd.*, 13 AD3d 334, *supra*; *Dental Health Assoc. v Zangeneh*, 267 AD2d 421 [1999]; *Blueberries Gourmet v*

Aris Realty Corp., 255 AD2d 348 [1998]). Where the facts are in sharp dispute, a temporary injunction will not be granted (see *Blueberries Gourmet v Aris Realty Corp.*, 255 AD2d 348, *supra*).

The Court has weighed the elements necessary for the granting of a preliminary injunction, and finds that a preliminary injunction is not warranted herein. The parties' submissions demonstrate that the underlying facts are in dispute with respect to the ownership of the domain name. In addition, the Court finds that plaintiff has not demonstrated an irreparable injury in the absence of an injunction, as Mr. Folan has represented that he renewed the domain personally on or about June 22, 2007. The supporting documentation for the renewal indicates that the domain was renewed for a nine year period. Moreover, as discussed, Mr. Folan indicated that service on the domain would not be interrupted, as he has no intention of shutting down the site. As such, in balancing the equities, the Court finds that the scale tips in favor of not issuing the injunction. Accordingly, that branch of plaintiff's application for a preliminary injunction is **DENIED**.

With respect to the remaining relief requested by plaintiff, plaintiff has not cited any statutory, case law, or other authority for the relief sought, to wit: an Order directing defendants to provide plaintiff with access to the domain, and all documentation and information relevant thereto, including account numbers and passwords, and directing defendants to immediately transfer ownership of the domain to plaintiff. Given the questions of fact regarding the actual owner of the domain name, and the lack of any documentation to eliminate the questions of fact, plaintiff is not entitled to this summary relief. Accordingly, the remaining relief sought by plaintiff is **DENIED**.

The foregoing constitutes the decision and Order of the Court.

Dated: December 28, 2007



HON. JOSEPH FARNETI
Acting Justice Supreme Court