SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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MASSAPEQUA WATER DISTRICT,

Plaintiff,

-against-

NEW YORK SMSA LIMITED PARTNERSHIP, CINGULAR WIRELESS LLC now known as AT&T MOBILITY LLC and OMNIPOINT COMMUNICATIONS, INC.,

Defendants.

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MICHELE M. WOODARD, J.S.C.
TRIAL/IAS Part 16
Index No.:013984/07
Motion Seq. Nos.: 01,02,03 & 04

DECISION AND ORDER

Papers Read on this Decision

Plaintiff's Order to Show Cause	01
Defendant New York SMSA Notice of Cross-Motion	02
Defendant New Cingular Wireless Notice of Cross-Motion	03
Defendant Omnipoint Notice of Cross-Motion	04
Defendant New Cingular Wireless Reply Affirmation	xx
Defendant Omnipoint Reply Brief	xx
Plaintiff's Affidavit	xx
Defendant New York SMSA d/b/a Verizon's Reply Papers	xx
Defendant New York SMSA d/b/a Verizon's Affirmation of Leslie J. Snyder, Esq.	xx
Defendant New York SMSA d/b/a Verizon's Verified Answer	xx
Defendant New York SMSA d/b/a Verizon's Affidavit of Service	xx
Plaintiff's Reply Affirmation of Michael F. Ingham	xx
Plaintiff's Memorandum of Law	xx
Plaintiff's Affidavit of Joseph J. Todaro	xx
Plaintiff's Sur-Reply	xx
Defendant Omnipoint's Memorandum of Law	xx
Defendant New York SMSA's Affidavit of Service	xx

The Plaintiff Massapequa Water District, moves by Order to Show Cause for an order pursuant to CPLR §6301 directing the Defendants New York SMSA Limited Partnership, *et. al.*, to remove forthwith, all of their existing equipment and attachments from the May Place Tank site on or before September 15, 2007.

The Defendant New Cingular Wireless, PC, LLC cross moves for an order pursuant to CPLR §6301 enjoining the Plaintiff from interfering with its provision of wireless telecommunication services from the subject premises.

Defendant Omnipoint Communications, Inc., cross moves for an order pursuant to CPLR §6301 enjoining the Plaintiff from interfering with its provision of wireless telecommunication services.

Defendant New York SMSA Limited Partnership, Inc cross moves for: (1) for a declaratory judgment to the effect that the Plaintiff is not entitled to the remove its telecommunications equipment from the May Place Tower; and (2) an injunction restraining the Plaintiff from interfering with its ability to operate the subject wireless telecommunications cell site and/or compelling the Plaintiff to cooperate in good faith by, *inter alia*, authorizing a temporary cell cite while tower repairs progress.

Between 1992 and 1999, the Plaintiff Village of Massapequa Park Water District [the "District"] entered into licensing agreements with the three Defendant cellular providers, pursuant to which the providers – Cingular, Verizon and Omnipoint – were permitted to attach transmitting equipment to the District's one million gallon water tower, known as the "May Place" tank facility (Ingrahm Aff., ¶¶ 16-17; Snyder Aff., ¶ 14; Cmplt.,¶¶ 15-21).

According to the District, the 40-year old "May Place" water tower now requires

rehabilitation and repair, necessitating – the Plaintiff claims – the complete removal of all cellular equipment from the legs of the tower for a period of at least 250 days.

Prior to the planned rehabilitation, the District sent written notices to the Defendant cell providers informing them that their equipment would have to be removed (Ingrahm Aff., Exh., "H").

The cell providers opposed the District's removal request, asserting, *inter alia*, that the removal of their equipment for a period of some 250 days would be highly disruptive and unacceptable, as well as allegedly violative of their respective license agreements – none of which expressly addresses the long-term removal of their transmitting equipment.

According to the providers, during negotiations which ensued concerning the dispute, the District rejected several allegedly viable alternatives, including: (1) a "phased" or staged rehabilitation procedure obviating prolonged equipment removal and/or service disruption; (2) the on-site placement of separate, "cells-on-wheels" ("COWS"); and/or (3) the installation of a temporary, ballast-mounted "monopole" tower for all providers, which would be situated on the southwest corner of the enclosed May Place site (Huber Aff., ¶¶ 27-28; MacDonald Reply Aff., ¶¶ 7-32; Quaglietta Aff., ¶ 31*see*, September 20, 2007 Ingham letter). The District contends that it considered the foregoing alternatives and none was feasible (Ingrahm Aff., ¶¶ 34-35).

After the parties' negotiations stalled, the District commenced the within plenary action for, among other things, a declaratory judgment directing the Defendants to remove their equipment from the tower.

The District has simultaneously moved pre-answer for, *inter alia*, a preliminary injunction affirmatively directing the providers to remove their equipment from the tower by a date certain.

The cell providers have opposed the District's application and now cross move for preliminary injunctive relief precluding the District from altering the *status quo* by attempting to remove their equipment.

The District's application is **denied**. The Defendants' cross motions are granted to the extent indicated below.

It is settled that to obtain a preliminary injunction, a movant must establish (1) a likelihood of success on the merits, (2) irreparable injury absent granting of the preliminary injunction, and (3) a balancing of the equities in the movant's favor (*Aetna Ins. Co. v. Capasso*, 75 NY2d 860 [1990]; *Doe v. Axelrod*, 73 NY2d 748 [1988]; *Dana Distributors, Inc. v. Crown Imports, LLC*,___AD3d___, 2008 WL 458577 [2d Dept 2008]; *Wiener v. Life Style Futon, Inc.*,___AD3d___, 2008 WL 324169 [2d Dept 2008]; *Gundermann & Gundermann Ins. v. Brassill*, 46 AD3d 615).

The movant's showing must also "demonstrate a clear right to relief which is plain from the undisputed facts" (*Related Properties, Inc. v. Town Bd. of Town/Village of Harrison*, 22 AD3d 587, 590 [2d Dept 2005] *see, Abinanti v. Pascale*, 41 AD3d 395, [2d Dept 2007]; *Peterson v. Corbin*, 275 AD2d 35, [2d Dept 2000]).

Since a preliminary injunction – which primary function is to maintain the status quo – prevents "litigants from taking actions that they are otherwise legally entitled to take in advance of an adjudication on the merits, they should be issued cautiously and in accordance with appropriate procedural safeguards" (*Uniformed Firefighters Ass'n of Greater New York v. City of New York*, 79 NY2d 236, 241 [1992];*Coinmach Corp. v. Alley Pond Owners Corp.*, 25 AD3d 642, [2d Dept 2006] *see, City of Long Beach v. Sterling American Capital, LLC*, 40 AD3d 902 [2d Dept 2007]).

The decision to grant or deny a preliminary injunction rests in the sound discretion of the Supreme Court (*Doe v. Axelrod, supra*, at 750; *Weinreb Management, LLC v. KBD Management, Inc.*, 22 AD3d 571 [2d Dept 2005]).

In construing the terms of a contract, the judicial function is to give effect to the parties' intentions (*see, Welsbach Elec. Corp. v. MasTec North America, Inc.*, 7 NY3d 624, 629 [2006]; *Greenfield v. Philles Records, Inc.*, 98 NY2d 562, 569 [2002]; *R/S Associates v. New York Job Development Authority*, 98 NY2d 29, 32 [2002]; *W.W.W. Assocs. v. Giancontieri*, 77 NY2d 157, 162 [1990]).

Notably, "courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing" (*Reiss v. Financial Performance Corp.*, 97 NY2d 195, 198-199 [2001] *see also*, *Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]).

In general, "[a] contract should not be interpreted to produce a result that is absurd" (*In re Lipper Holdings, LLC*, 1 AD3d 170, 171), commercially unreasonable or contrary to the reasonable expectations of the parties (*SportsChannel Associates v. Sterling Mets, L.P.*, 25 AD3d 314 [1 Dept 2006]; *Bestform, Inc. v. Herman*, 23 AD3d 253, [1 Dept 2005]).

On the other hand, "parties are free to make their contracts" and courts are "reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include" (*Rowe v. Great Atlantic & Pac. Tea Co., Inc.*, 46 NY2d 62, 72 [1978]; *Welsbach Elec. Corp. v. MasTec North America, Inc., supra; Kaygreen Realty Co. v. Goldman*, 231 AD2d 682 [2 Dept 1996]; *CBS, Inc. v. P.A. Bldg. Co.*, 200 AD2d 527 [1 Dept 1994] *see also, Bailey v. Fish & Neave*, 8 NY3d 523, 528 [2007]).

Upon applying the foregoing principles to the facts presented, the Court concludes that District has failed to demonstrate its entitlement to the affirmative injunctive relief it seeks.

It is undisputed that none of the relevant licensing agreement addresses the issue of equipment removal or the parties' respective rights where rehabilitation work contemplates long-term service disruption of the scope and magnitude at issue here. Indeed, the District itself has conceded that the agreements are ambiguous with respect to the parties' rights and obligations relating to the removal of cellular equipment (Pltff's Brief at 15).

More specifically, and with respect to those agreements, the Cingular and Verizon licenses merely require the District provide notification when scheduled maintenance and/or painting, sandblasting or other work will require "*the protection of* * * * *Licensees* [Cingular's] equipment" (Cingular Agreement, ¶ 25; Verizon Agreement, ¶ 25 [emphasis added]); however, there is no provision in either contract which authorizes the District to unilaterally require the Defendants to remove their equipment from the tower.

The Omnipoint agreement does not refer to contingencies in the event of repair or rehabilitation work allegedly requiring long-term removal of the cell equipment from the tower – although it does provide, *inter alia*, that Omnipoint is entitled to unimpeded access to the site (Agreement, ¶ 2[d]); that the District would maintain the property so as to not "unnecessarily interfere" with Omnipoint's use of the premises and/or its rights under the Agreement (Agreement, ¶ 1]); and that Omnipoint's equipment could be removed at *"Licensee's [Omnipoint's] option* at any time during the [lease] Term * * *" (Agreement, ¶ 2[a])(Omnipoint Cross Mot., Exh., "1").

Although the Verizon agreement contains a provision which addresses, *inter alia*, proposed "alternation[s]," to the tower, it nevertheless provides that any alleged alternation shall be * * *

subordinate to Licensee's rights [under the agreement] and further states that "Licensor [the District] shall do nothing which would interfere with the quiet use and enjoyment of the licensed premises, including the antennas by Licensee in connection with its mobile communications operations * * *" (Snyder Aff., Exh. "B" ¶ 11).

Apart from the foregoing, it is significant that the District is seeking injunctive relief which would dramatically alter the status quo by compelling the Defendants to affirmatively remove their equipment – a request which also constitutes the "ultimate" relief sought in its complaint (*see, Monarch Condominium v. Raskin*, 37 AD3d 288, [1 Dept 2007] (Cmplt., at 9; "wherefore" clause, ¶¶ 1-3) [Pltff's OCS., Exh., "D").

It is well settled that "absent extraordinary circumstances, a preliminary injunction will not issue where to do so would grant the movant the ultimate relief to which he or she would be entitled in a final judgment" (*SHS Baisley, LLC v. Res Land, Inc.*, 18 AD3d 727 [2d Dept 2005] *see also, Northern Funding, LLC v. 244 Madison Realty Corp.*, 41 AD3d 182 [1 Dept 2007]; *Monarch Condominium v. Raskin, supra*; *St. Paul Fire and Mar. Ins. Co. v. York Claims Serv.*, 308 AD2d 347 [1 Dept 2007]; *MacIntyre v. Metropolitan Life Ins. Co.*, 221 AD2d 602 [2 Dept 1995]).

Similarly, an "injunction, which is used to compel the performance of an act * * * is an extraordinary and drastic remedy which is rarely granted and then only under unusual circumstances where such relief is essential to maintain the status quo pending trial of the action" (*Matos v. City of New York*, 21 AD3d 936 [2d Dept 2005]; *SHS Baisley, LLC v. Res Land, Inc.*, 18 AD3d 727 [2d Dept 2005]; *Rosa Hair Stylists v. Jaber Food Corp.*, 218 AD2d 793 [2d Dept 1995] *see, Village of Westhampton Beach v. Cayea*, 38 AD3d 760 [2d Dept 2007]).

The record also fails to support the conclusion that the equities would balance in the

District's favor, *i.e.*, the District has not shown "that the absence of a preliminary injunction would cause it greater injury than the imposition of the injunction would inflict upon the Defendant[s]" (*Copart of Connecticut, Inc. v. Long Island Auto Realty, LLC*, 42 AD3d 420 [2d Dept 2007] *see also*, *Sinensky v. Weiner,* 44 AD3d 646 [2d Dept 2007]; *Laro Maintenance Corp. v Culkin*, 255 AD2d 560 [2d Dept 1998]).

The District's reliance on extrinsic evidence of a Long Island industry custom and practice relative to cell sites, at most raises a question of fact and does not support the issuance of affirmative, injunctive relief at this juncture of the proceeding (*e.g.*, *Allied Environmental Group, Inc. v. Samson Const. Co. Inc.*, 36 AD3d 521 [1 Dept 2007])(Pltff's Brief at 15).

Further, the record undermines any viable claim of an undue exigency or irreparable injury since the report issued by the District's own consulting engineers recommends that the "next rehabilitation be scheduled *between the years 2009-2011"* (Report at 14)[emphasis added].

The attenuated sovereign immunity theory advanced by the Plaintiff does not support its entitlement to a preliminary injunction (*see*, Pltff's Brief at 2-5).

Conversely, the Defendant cell providers have established their entitlement to a preliminary injunction which would merely maintain the status quo pending the ultimate determination of District's claims.

Specifically, the Defendants have adequately demonstrated: (1) a probability of success on the merits by virtue of their respective licensing agreements; (2) the likelihood of irreparable injury in light of the substantial and prolonged service interruption and negative consequences which would ensue upon outright removal of their equipment from the Tower *(Forest Close Ass'n, Inc. v. Richards*, 45 AD3d 527 [2d Dept 2007]); and (3) a balancing of equities in their favor inasmuch as

disruptive impact flowing from the cessation of cell service at the site stands in contrast to the minimally negative affect upon the District if the status quo is preserved at this juncture (*see, Washington Deluxe Bus, Inc. v. Sharmash Bus Corp.*,___AD3d___, 2008 WL 191623 [2nd Dept. 2008]).

The Court agrees that the key issue for the purposes of resolving the parties' motions for injunctive relief, is the meaning of the governing licensing agreements, namely; whether, they authorize the removal of the Defendants' equipment under the circumstances presented – not whether the hotly disputed, alternatives measures discussed by the parties during settlement negotiations are technically or legally viable at this point.

However, the Court notes that there is nothing in the record indicating that the Defendants have "submitted an undertaking with their motion for a preliminary injunction" (*Griffin v. 70 Portman Road Realty, Inc.*, ___AD3d___, 2008 WL 257468 [2nd Dept. 2008]).

"While fixing the amount of an undertaking when granting a motion for a preliminary injunction is a matter within the sound discretion of the court, CPLR §6312 (b) clearly and unequivocally requires the party seeking an injunction to give an undertaking" (*Griffin v. 70 Portman Road Realty, Inc., supra*; *Buckley v. Ritchie Knop, Inc.*, 40 AD3d 794 [2d Dept 2007]; *Gerstner v. Katz, supra see also, Access Medical Group, P.C. v. Straus Family Capital Group, LLC*, 44 AD3d 975 [2d Dept 2007]).

Lastly, the District requests additional relief to the effect that the Verizon licensing agreement was properly terminated as of August 28, 2007 (Cmplt., ¶¶ 30-32). The Court disagrees.

Insofar as relevant, the Verizon Agreement provides for: (1) an initial five year term, together with options for three additional five-year terms (Agreement ¶ 4); and (2) further provides

that – where authorized – either party could terminate the license by providing notice thereof within at least six months prior to the end of a lease term (License, ¶ 5).

More particularly, paragraph five states that:

"If at the end of the initial License term or any extension thereof this License Agreement has not been terminated by either party by giving to the other written notice of an intention to terminate it at least six (6) months prior to the end of such term, the License Agreement shall continue in full force and effect upon the same terms and conditions for a further term of one (1) year and for annual terms thereafter until terminated by either party by giving to the other written notice of its intention to terminate at least six months prior to the end of such annual term. * * *."

According to the District, it served a termination notice on February 14, 2007 – which notice was then allegedly retransmitted on two additional occasions, *i.e.*, on February 21, and February 27, 2007 (Cmplt., ¶¶ 33-24; OSC Exh., "C").

It is undisputed, however, that prior to the District's transmission of the purported lease termination notices, Verizon had already exercised its option right under the agreement to renew the license for another five-year term (Snyder Reply Aff., Exh., "B").

Initially, there is nothing in the lease which would permit the District to treat the Verizon option renewal as an "offer" or a "request" which could then be unilaterally rejected – as set forth in the District's February 14, 2007-letter (District OSC, Exh., "H").

In any event, and while the agreement is far from a model of clarity, the Court concurs with Verizon that construing paragraph 5 so as to permit the District to unilaterally terminate the license after a timely exercise of the option has taken place, would be inconsistent with the logic of the renewal provision and defeat its purpose as a viable and operative component of the underlying

agreement (Snyder Reply Aff., ¶¶ 20-30; Verizon Reply Mem. of Law, at 4-8)(*see, Sozio v. Exhibitgroup/Giltspur*, 309 AD2d 1290 [4 Dept 2003] *cf., Superb General Contracting Co. v. City of New York*, 39 AD3d 204 [1 Dept 2007]).

Notably, courts will generally "endeavor to give the construction most equitable to both parties instead of the construction which will give one of them an unfair and unreasonable advantage over the other" (*Fleischman v. Furgueson*, 223 N.Y. 235 [1918]). Moreover, "[e]ffect and meaning must be given to every term of the contract" (*Village of Hamburg v. American Ref-Fuel Co. of Niagara, L.P.*, 284 AD2d 85 [4 Dept 2007] *see, Palermo v. Palermo*, 34 AD3d 548 [2d Dept 2006]), and reasonable effort must be made to harmonize all of its terms (*Ronnen v. Ajax Elec. Motor Corp.*, 88 NY2d 582, 589 [1996]; *Two Guys from Harrison-N.Y., Inc. v. S.F.R. Realty Associates*, 63 NY2d 396, 403 [1984]; *National Conversion Corp. v. Cedar Bldg. Corp.*, 23 NY2d 621, 625 [1969]; *Reda v. Eastman Kodak Company*, 233 AD2d 914 [4 Dept 1996]).

In accord with the foregoing principles, a more persuasive and harmonizing construction of the competing termination and option provisions (Agreement, ¶¶ 4-5), is that the agreement could be terminated upon proper notice, after the expiration of a pending lease term – provided that the lease has not already been further extended pursuant to a contractually authorized renewal.

Further, and when so viewed, the language referring to successive, "one year" terms would then become operative in the event the license has not been renewed – after which the agreement would then continue for successive, one-year periods until properly terminated by either party.

Here, however, Verizon has already renewed the agreement for another five-year term. The District has not demonstrated that, as a matter of law, the relevant contract language permits it to unilaterally terminate the agreement in such a circumstance (*Pepco Const. of New York, Inc. v. CNA*

Ins. Co., 15 AD3d 464 [2d Dept 2005]).

In any event, the intended interplay and import of the termination and option provisions are susceptible to differing interpretations, thereby precluding summary resolution of the parties' rights at this early juncture of the action (*e.g.*, *NFL Enterprises LLC v. Comcast Cable Communications, LLC*, ___AD3d___, 2008 WL 496157 [1st Dept. 2008] *cf.*, *Chimart Assoc. v. Paul*, 66 NY2d 570 [1986]).

It is settled that, "when a term or clause is ambiguous and the determination of the parties' intent depends upon the credibility of extrinsic evidence or a choice among inferences to be drawn from extrinsic evidence, then the issue is one of fact" (*Amusement Bus. Underwriters v American Intl. Group*, 66 NY2d 878, 880 [1985]; *Hartford Acc. & Indem. Co. v.* Wesolowski, 33 NY2d 169, 172 [1973]; *LoFrisco v. Winston & Strawn LLP*, 42 AD3d 304 [1 Dept 2007]; *Pepco Const. of New York, Inc. v. CNA Ins., supra,* at 465).

Accordingly, that branch of the District's motion which is for a declaration that the Verizon license has been terminated, must be **denied**.

Lastly, in rendering its decision, the Court has not considered the District's second, self-entitled reply affidavit dated January 16, 2008 – which is effectively an unauthorized sur reply, and which advances theories not raised by the District in its previous submissions (*e.g.*, Ingham [Jan 16] Aff., ¶¶ 5-12)(*see,* CPLR §214 *Graffeo v. Paciello*, 46 AD3d 613 [2d Dept 2007]; *Flores v. Stankiewicz*, 35 AD3d 804 [2d Dept 2006]; *Rengifo v. City of New York,* 7 AD3d 773 [*2d Dept 2004]olk County Water Authority*, 306 AD2d 229 [2d Dept 2003]

The Court has considered the parties' remaining contentions and concludes that none warrants an award of relief at this juncture beyond that granted above.

Accordingly, it is,

ORDERED that the motion by the Plaintiff Massapequa Water District (Mot. Seq. 01) for, *inter alia*, an order pursuant to CPLR §301 directing the Defendants New York SMSA Limited Partnership, *et. al.*, to remove forthwith, all of their existing equipment and attachments from the May Place Tank site, is **denied**, and it is further,

ORDERED that the Defendants' motions (Sequence Numbers 02, 03 and 04) for preliminary injunctive relief enjoining the Plaintiff from interfering with the status quo by removing their cellular equipment from the May Place Tower and/or interfering with their provision of cellular service from the subject site, are **granted**, and it is further,

ORDERED the parties are directed to appear for a Conference before the undersigned to discuss the issue of the Undertaking on April 24, 2008 at 9:30 am. It is further

ORDERED, that immediately following the aforementioned conference, a Preliminary Conference will be held in DCM.

This constitutes the Decision and Order of the Court.

DATED: March 6, 2008
Mineola, N.Y.

ENTER:

HON. MICHELE M. WOODARD
J.S.C.

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