

**Omnipoint Facilities Network 2, LLC v Kahn
Assoc., LLC**

2008 NY Slip Op 32118(U)

July 16, 2008

Supreme Court, Suffolk County

Docket Number: 0008281/2008

Judge: Emily Pines

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SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present:**HON. EMILY PINES**

J. S. C.

Original Motion Dates: 04-25-2008, 06-12-2008

Motion Submit Date: 06-18-2008

Motion Sequence No.: 001, MD; 002, MG

X

OMNIPOINT FACILITIES NETWORK 2,
LLC and T-MOBILE USA, INC.,

Plaintiffs,**-against-**

KAHN ASSOCIATES, LLC and GARY
MELIUS,

Defendants.

X

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ORDERED, that the motion (motion sequence number 001) by plaintiffs brought on by Order to Show Cause (PINES, J.) dated March 14, 2008, seeking a Preliminary Injunction is denied; and it is further

ORDERED, that the cross-motion (motion sequence number 002) by defendants, for an Order, *inter alia*, dismissing the first and fourth causes of action as against the individual defendant, Gary Melius, pursuant to CPLR 3211, is granted; and it is further

ORDERED, that a Preliminary Conference is scheduled for September 10, 2008 at 9:30 a.m. before the undersigned.

FACTUAL AND PROCEDURAL HISTORY

This is an action by plaintiffs arising out of an agreement between the parties whereby plaintiff Omnipoint Facilities Network 2, LLC ("Omnipoint"), a wholly owned subsidiary of plaintiff T-Mobile USA, Inc. ("T-Mobile"), was to construct and install certain antennas and equipment on property located at 135 Westgate Drive, Cold Spring Hills, Huntington, New York (the "subject premises"). The subject premises is also known as Oheka Castle Hotel and Estate ("Oheka Castle"). The submissions reflect that

on or about May 26, 2004, Omnipoint and defendant Kahn Associates, LLC (“Kahn”) entered into an option and lease agreement entitled “Rooftop Lease With Option” (the “lease”). Defendant Gary Melius (“Melius”) executed the lease on behalf of Kahn. The lease, which was for a five-year term with two five-year renewal options, provided Omnipoint the right to use the subject premises for the “transmission and reception of radio communication signals and for the construction, installation, operation, maintenance, repair, removal or replacement of related facilities, tower and base, antennas, microwave dishes, equipment shelters and/or cabinets and related activities.” Such use was subject to Omnipoint obtaining approvals from all applicable government agencies, including zoning and land use permits. The lease provided for Omnipoint to pay rent to Kahn in the amount of \$3,000.00 per month, subject to annual four percent (4%) increases. The lease also provided for additional lump sum payments totaling \$100,000.00 payable as follows: \$50,000.00 within thirty (30) days of execution of the lease and the balance of \$50,000.00 within thirty (30) days of Omnipoint’s receipt of government approval for the construction of the antenna facilities.

The lease, as relevant to the action herein, provided that Kahn would not use any portion of the subject premises so as to interfere with the operations of Omnipoint. Similarly, the lease provided that Omnipoint would not use the subject premises in any way which interferes with Kahn’s use of the subject premises. Finally, the lease provides that the prevailing party in any litigation arising under the agreement is entitled to reasonable attorneys’ fees and courts costs.

Plaintiffs commenced this action against defendants by the filing of a Summons and Verified Complaint on or about February 29, 2008. In sum, plaintiffs allege that defendants are preventing them from installing the equipment as required by the lease. Specifically, plaintiffs allege that in or about December of 2005, Omnipoint began construction of the antenna facilities “after receiving the necessary approval from the Huntington Historic Preservation Commission” and that after numerous delays caused by defendants, two of the three sectors, not including the necessary “screening” was completed on or about December of 2006. Complaint at ¶’s 5, 6. Plaintiffs further allege that prior to the construction of the third sector, Melius insisted that Omnipoint change the design and materials of the screening, and essentially, the parties have been unable to agree on the design and construction of the screening. Plaintiffs allege that Melius proposed that defendants pay him to fabricate and install the proposed screening at the estimated cost of \$95,000.00. Complaint at ¶’s 33, 34. Plaintiffs allege that defendants have interfered with Omnipoint’s ability to complete the installation of the antenna facilities and to maintain same.

The complaint sets forth five causes of action. The first cause of action is against all defendants for a permanent injunction, to enjoin any interference by defendants with Omnipoint’s use, occupancy and access to the subject premises. The second cause of action is against Kahn only for specific performance of the contract between the parties. The third cause of action is also against Kahn only for breach of contract and money damages in an amount to be determined at trial. The fourth cause of action is against Melius only and alleges tortious interference with contract. Finally, the fifth cause of action

is against Kahn for costs and attorneys' fees under the lease.

Defendants served a Verified Answer and Counterclaims dated May 8, 2008. Essentially, defendants deny the allegations of the complaint and assert that the plaintiffs' proposed screening was not in accordance with Town of Huntington approved drawings and plans and not approved by the Huntington Historic Preservation Commission. Defendants further assert, *inter alia*, that Melius is not a proper party, and counterclaim for breach of contract and attorneys' fees and costs.

MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs now move by Order to Show Cause for a preliminary injunction, enjoining defendants from interfering with or frustrating the rights of Omnipoint to access the subject premises and install telecommunications equipment, including screening. In support of the motion, plaintiffs include a copy of the complaint, the lease and a Memorandum of Law. Plaintiffs argue they meet the tri-partite test for issuance of a Preliminary Injunction, to wit, a likelihood of success on the merits, irreparable injury absent the granting of the injunction and a balancing of the equities in their favor. First, plaintiffs assert that they show a strong likelihood of success on the merits because they claim that Kahn has breached the lease by refusing to grant access to Omnipoint to complete the installation of the antenna facilities, disapproving the design and materials of the screening, despite approval by the Town of Huntington and demanding additional payment as a condition to allow the work to continue.

Regarding irreparable injury, plaintiffs claim that if the injunction is not granted, vital Emergency 911 services relied upon by T-Mobile's customers may be impaired or reduced. Additionally, they assert that impairment of the quality of non-emergency telecommunications will result in the loss of customer satisfaction and goodwill caused by a gap in cellular service in this area. Finally, plaintiffs argue that the balancing of the equities weighs in favor of granting the mandatory preliminary injunction. Here, plaintiffs assert that defendants are merely having second thoughts about the lease agreement and are attempting to extract additional money from plaintiffs, who have always been in compliance with the lease and attempted to comply with defendants' requests regarding the screening. On the other hand, they argue, defendants have unreasonably refused to permit them access to the subject premises to allow the completion of the installation of the antenna facilities and maintenance of the existing equipment.

Based on the foregoing, plaintiffs urge the Court to grant a preliminary injunction.

DEFENDANTS' CROSS-MOTION TO DISMISS

Defendants oppose the motion for a preliminary injunction and cross-move pursuant to CPLR 3211 to dismiss the complaint against Melius on the ground that the complaint fails to state a cause of

action against him. Defendants submit a copy of the pleadings, an affirmation by their counsel, an affidavit by Melius, copies of drawing and plans, correspondence from the Town of Huntington and a Memorandum of Law.

Opposition to the Motion for a Preliminary Injunction

In opposition to the Preliminary Injunction, defendants argue that the issuance of a mandatory Preliminary Injunction is not warranted, where, as here, key facts are in dispute and plaintiffs seek the ultimate equitable relief requested in their complaint. Specifically, defendants argue that plaintiffs cannot meet the test for a Preliminary Injunction because they cannot demonstrate a likelihood of success on the merits in that they claim that the screening proposed by plaintiffs was not approved by the Town of Huntington Historic Preservation Commission. In his affidavit, Melius explains that on June 7, 2005, the Town Board of the Town of Huntington granted a certificate of approval to install six (6) antenna, shields and related equipment on the roof of the subject premises “in accordance with plans submitted”. Exhibit B of Defendants’ Cross-Motion. Included in the plans submitted was “radio-frequency screening” to disguise the antennas and such screening had to be approved by the Town of Huntington Historic Preservation Commission as the subject premises was a historic building. Thereafter, on or about October 24, 2007, the Huntington Historic Preservation Commission rejected the proposed screening in writing, a copy of which is annexed to the opposition papers. In that correspondence, Robert C. Hughes, Secretary to the Commission, stated, “The Commission would like the applicant to install what they promised and what is shown in the simulated photograph, i.e., a shield that is an exact replication of the building’s existing appearance.” Thus, defendants argue that plaintiffs cannot demonstrate a likelihood of success on the merits, when, in fact, plaintiffs have breached the contract by not installing the cellular antennas and screening in accordance with the plans submitted to the Huntington Town Board. Regarding the payment of the \$95,000.00, Melius states that when Omnipoint repeatedly refused to present an acceptable sample of screening, he proposed that the money be paid to Kahn and that Kahn would fabricate the screening and ensure it was installed in accordance with the requirements of the Town of Huntington. Thus, defendants argue that plaintiffs cannot demonstrate a likelihood of success on the merits and the motion for a Preliminary Injunction must be denied.

Defendants also allege that plaintiffs cannot demonstrate irreparable injury absent a Preliminary Injunction as they offer merely conclusory statements that they may lose customers and good will and that emergency services will be affected. Additionally, defendants assert that since plaintiffs are also seeking monetary damages for breach of contract, preliminary injunctive relief is not available. Defendants argue that the equities do not favor plaintiff in that they have erroneously represented that the Huntington Historic Preservation Commission approved the screening proposed by Omnipoint.

In addition to the foregoing arguments, defendants assert that the motion for a preliminary injunction must be denied because if granted, plaintiffs would receive the ultimate relief to which they would be entitled to in a final judgment. They argue that Omnipoint is seeking to disturb the status quo

by obtaining a mandatory injunction where the Huntington Historic Preservation Commission rejected the screening proposed by Omnipoint. Finally, defendants urge this Court to recognize that a Preliminary Injunction should not be granted because the facts are in sharp dispute.

Cross-Motion to Dismiss Claims against Melius

Defendants cross-move to dismiss the first and fourth causes of action asserted against Melius for permanent injunctive relief and tortious interference with contract. Defendants interpose several arguments. Initially, they argue that even if the Court assumes defendants breached the lease, a tortious interference claim cannot be asserted against a party to the contract. Additionally, defendants argue that Melius cannot be held personally liable for allegedly inducing Kahn to breach the lease and the complaint merely alleges a breach of contract by Kahn and Melius is not subject to personal liability merely because he signed the lease in his capacity as a member of Kahn. Lastly, defendants argue that the cause of action against Melius personally must be dismissed since plaintiffs seek identical recovery against Kahn for breach of contract. That is, plaintiffs cannot assert a tort cause of action based upon the same underlying facts as a contract claim. Thus, defendants seek to dismiss the first and fourth causes of action asserted against Melius individually.

Plaintiffs submit opposition to the cross-motion and a reply to the opposition to the motion for a Preliminary Injunction. Plaintiffs argue that they have stated a cause of action against Melius individually in that the complaint alleges that Melius demanded a personal payment of \$95,000.00 and that he was not acting in good faith and committed an independent tort from the breach of contract. Regarding the preliminary injunction, plaintiffs argue that such relief may be granted even if it represents the ultimate relief sought in the case. Additionally, plaintiffs argue that the documentary evidence submitted by defendants on the issue of the lack of approval by the Huntington Historic Preservation Commission does not constitute admissible proof. On the merits of the documents however, plaintiffs argue the October 24, 2007 correspondence is consistent with their position that the Commission had approved the screening and defendants have failed to allow Omnipoint to install same. Plaintiffs argue that there are no key facts in sharp dispute precluding the Court from granting the preliminary injunction and Omnipoint merely wishes to finish installing the antenna facilities and utilize such facilities to supply telecommunications services. Thus, they urge the Court to grant the Preliminary Injunction.

Finally, defendants submit a reply memorandum of law and reiterate their arguments that plaintiffs cannot assert causes of action against Melius individually.

PRELIMINARY INJUNCTION

The law is well settled that to prevail on a motion for a Preliminary Injunction, the moving party

must establish that (1) there is a likelihood of success on the merits of the action; (2) it will suffer irreparable injury if the Preliminary Injunction is not granted; and (3) the balance of the equities is in its favor. *Ricca v. Ouzounian*, 51 A.D.3d 997, 859 N.Y.S.2d 238 (2d Dept. 2008); *Skaggs-Walsh, Inc., v. Chmiel*, 224 A.D.2d 680, 638 N.Y.S.2d 698 (2d Dept. 1996). *CPLR §6301*. Moreover, “a mandatory preliminary 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 A.D.3d 936, 801 N.Y.S.2d 610 (2d Dept. 2005) (internal citations omitted). *See also, SHS Baisley, LLC v. RES Land, Inc.*, 18 A.D.3d 727, 795 N.Y.S.2d 690 (2d Dept. 2005).

To demonstrate a likelihood of success on the merits, the moving party must establish a clear right to relief which is plain from the undisputed facts and where the facts are in sharp dispute, a preliminary injunction should not be granted. *Related Properties, Inc., v. Town of Harrison*, 22 A.D.3d 587, 802 N.Y.S.2d 221 (2d Dept. 2005). Additionally, where a litigant can be fully compensated by an award of money damages, a Preliminary Injunction will not issue. *Dana Distributors, Inc., v. Crown Imports, LLC*, 48 A.D.3d 613, 853 N.Y.S.2d 111 (2d Dept. 2008). *Matos, supra*.

In the case at bar, plaintiffs’ submissions consist of the Verified Complaint¹, the lease, an affirmation by counsel and Memorandum of Law. Upon review of these submissions, the Court finds that plaintiffs have not met their burden of demonstrating a clear right to relief under the law and undisputed facts. *Gagnon Bus Co. v. Vallo Transportation, Ltd.*, 13 A.D.3d 334, 786 N.Y.S.2d 107 (2d Dept. 2004). Rather, although it is undisputed that the parties entered into a lease for the installation of the antenna facilities and ancillary screening, a sharp dispute exists as to whether the proposed screening was approved by the Huntington Historic Preservation Commission. In light of such dispute, the Court finds that plaintiffs have not demonstrated a likelihood of success on the merits. Thus, the Court will not issue a mandatory preliminary injunction, which, would, in effect, grant plaintiffs the ultimate relief they are requesting in this case, to wit, a permanent injunction. *SHS Baisley, supra*. The Court need not reach the remaining elements of the test for a preliminary injunction, although it notes that plaintiffs’ claims for money damages for breach of contract does undercut its arguments regarding irreparable injury. *Dana Distributors, supra*.

Based on the foregoing, the motion for a Preliminary Injunction is denied in its entirety.

¹Contrary to defendants’ arguments, the Verified Complaint may be used in place of an affidavit. *See, New York Practice §329 (Siegel, 4th Ed. 2005). CPLR §105.*

MOTION TO DISMISS

The first and fourth causes of action of the Complaint assert causes of action against Melius for a permanent injunction and for tortious interference with contract. In this case, it is undisputed that Melius signed the lease agreement in his capacity as a member of Kahn and plaintiffs are thus seeking, in effect, to pierce the corporate veil of the limited liability company. The elements of a tortious interference with contract claim are “(1) the existence of a contract between plaintiff and a third party; (2) defendant’s knowledge of the contract; (3) defendant’s intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff”. *M.J. & K. Co., v. Matthew Bender and Co.*, 220 A.D.2d 488, 631 N.Y.S.2d 938 (2d Dept. 1995) (internal citations omitted).

Here, plaintiffs acknowledge in the Complaint that Melius signed the lease in his capacity as “owner” of Kahn and had personal knowledge of the details of the lease including the provision regarding non-interference. Complaint at ¶63. Plaintiffs allege however, that Melius “intentionally and knowingly interfered with the performance of the Lease by inducing or otherwise causing Defendant, Kahn Associates, LLC, not to perform its obligations thereunder.” Complaint at ¶64. Such claim is purportedly supported by its allegation that Melius requested a \$95,000.00 personal payment to resolve the screening issue. Complaint at ¶34.

It is axiomatic that a plaintiff cannot sue a defendant for tortious interference with a contract between the plaintiff and defendant. *A.J. Temple Marble & Tile, Inc., v. Long Island Rail Road*, 256 A.D.2d 526, 682 N.Y.S.2d 422 (2d Dept. 1998); *Murphy v. Capone*, 120 A.D.2d 714, 502 N.Y.S.2d 511 (2d Dept. 1986). Furthermore, a “director of a corporation is not personally liable to one who has contracted with the corporation on the theory of inducing a breach of contract, merely due to the fact that, while acting for the corporation, he has made decisions and taken steps that resulted in the corporation’s promise being broken.” *Murtha v. Yonkers Child Care Assn.*, 45 N.Y.2d 913, 411 N.Y.S.2d 219, 383 N.E.2d 865 (1978) (internal citations omitted). To sustain such a claim, plaintiffs must allege that the acts were outside the scope of their employment or that they personally profited from their acts. *Courageous Syndicate, Inc., v. People-to-People Sports Committee*, 141 A.D.2d 599, 529 N.Y.S.2d 520 (2d 1988).²

Here, plaintiffs merely allege that Melius requested that Omnipoint pay him the costs associated with installing the screening of the antenna facilities. Although plaintiffs claims that such request was really a demand for a personal payment, such conclusory assertion of a wrongful act seeking a personal profit, is insufficient to set forth a claim for tortious interference with contract. *57th Street Arts, LLC*

²See also, *Limited Liability Law §609(a)* which limits liability of member of limited liability company for contractual obligations of the company.

v. Calvary Baptist Church, __A.D.3d __, __N.Y.S.2d __, 2008 WL 2521254 (1st Dept. 2008). Finally, a member of a limited liability company may not be held personally liable on a contract entered into by the company unless he purported to bind himself individually under the contract. *Panasuk v. Viola Park Realty, LLC*, 41 A.D.3d 804, 839 N.Y.S.2d 520 (2d Dept. 2007). In the case at bar, there is no allegation that Melius executed the lease in an individual capacity.

Based on the foregoing, the motion by defendants to dismiss the first and fourth causes of action of the complaint as asserted against defendant Gary Melius is granted. The remaining causes of action are severed and continued against defendant Kahn Associates, LLC.

CONCLUSION

Plaintiffs' motion for a Preliminary Injunction is denied in its entirety. Defendants' cross-motion to dismiss the first and fourth causes of action as against defendant Gary Melius is granted in its entirety.

A preliminary conference is scheduled for September 10, 2008 at 9:30 a.m. before the undersigned.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: July 16, 2008
Riverhead, New York



EMILY PINES
J. S. C.