

Cooper Sq. Realty, Inc. v Building Link, LLC

2010 NY Slip Op 30197(U)

January 27, 2010

Supreme Court, New York County

Docket Number: 603457/09

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE
Justice

PART 10

Cooper Square Realty Inc.

INDEX NO. 603457/09

MOTION DATE _____

Building Link LLC

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for PLR 4/301

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

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED
JAN 28 2010
NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

*PC Scheduled for
2/18/10 @ 9:30 am
in Part 10*

JAN 27 2010

Dated: _____

J. GISCHE
HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

-----X
Cooper Square Realty, Inc.,

Plaintiff (s),

-against-

Building Link, LLC,

Defendant (s).

-----X

DECISION/ ORDER

Index No.: 603457-09

Seq. No.: 001

PRESENT:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers

Pltf's OSC w/MSD affirm, MJ, TP, DK affids, exhs	1
Def's opp w/JK, PT affids, exhs	2
Pltf's reply w/DK affid, BCK affirm (sep back)	4
11/17/09 order	5
Steno Minutes 11/25/09	6

FILED
JAN 28 2010
NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, the decision and order of the court is as follows:

Gische J.;

Plaintiff Cooper Square Realty, Inc. ("Cooper Square") alleges that defendant Building Link, LLC ("Building Link"¹) has violated sections 349 [a] and [h] of the General Business Law which pertain to deceptive business practices aimed at consumers.

By order to show cause presented November 18, 2009, Cooper Square sought a temporary restraining order ("TRO") against Building Link, restraining it from

¹BuildingLink, LLC is s/h/a "Building Link." The court will continue to use the name of the defendants as it appears in the complaint and caption.

disseminating unsolicited emails to tenant board members of those buildings managed by Cooper Square. That TRO was denied after argument (Uniform Rules of Trial Courts § 202.7 [f]).

The issue of whether Cooper Square is entitled to a preliminary injunction (CPLR 6301) remains before the court to decide. The court's decision is as follows:

Arguments

Cooper Square is a residential property manager. It manages some 300 residential buildings in New York City, many of them coops. Typically, Cooper Square has a management agreement with the coop to provide a variety of services, including keeping records of billings to and payments by the tenant owners. As an example of one of its typical management agreements, Cooper Square has provided an excerpt of its management agreement with the owner of 45 West 67th Street, New York, New York. In relevant part it provides as follows:

"Not later than the fifteenth day of each month [Cooper Square shall] render or cause or cause to be rendered regular monthly statements, supported by disbursement vouchers, to the Owner, detailing the amounts collected during the previous month and disbursements made on behalf of and for the account of the Owner. A copy of each such monthly statement shall be sent by the Agent to each member of the Board of Managers of the Owner..."

Cooper Square has an internet based program called "Cooper Square Connect." Cooper Square Connect relies upon a software program called "B.J. Murray," provided by another vendor. Using Cooper Square Connect, a tenant-owner and board members can obtain daily updates of tenant information. Cooper Square's management agreement only obligates Cooper Square to provide monthly updates of

accounts. Therefore, Cooper Square provides this enhanced information (daily updates of rent payments, late charges, etc.) on its Cooper Square Connect "portal" at an additional cost.

While Cooper Square does not argue that the information it inputs into the software program is proprietary, Cooper Square does argue that the only way a tenant-owner or board member can access daily updated information about rent payments, etc., in a building managed by Cooper Square is presently through Cooper Square Connect. This is because Cooper Square Connect is updated with the information gathered - - and only available to - - Cooper Square, the managing agent of those particular buildings. Cooper Square emphasizes that it is under no obligation to provide that information to third parties and the data is the result of Cooper Square employees gathering and inputting such information each day. Cooper Square argues that Building Link has been sending out false emails stating that Building Link can provide the same service Cooper Square Connects provides (daily updated tenant information) when, in fact, Building Link cannot because it does not have access to any of the information that Cooper Square does. Although the information is about tenants and tenant-owners in the buildings Cooper Square has been hired to manage, Cooper Square argues that the inputted data is not the property of the any of the boards either because the data is only available because Cooper Square gathers it, processes it, and then uploads it to Cooper Square Connect.

Below is an example of the email Building Link sent to a tenant board member of 45 West 67th Street:

"Dear 45 West 67th Street:

We are pleased to announce that BuildingLink now has the ability to integrate with BJ Murray, the accounting system used by Cooper Square. This accounting integration system involves a process where Cooper Square transfers an Excel or CSV file containing updated resident and owner information to BuildingLink's FTP server.

The data being placed on FTP server is typically a CSV file containing:

- The names and apartment numbers of all owners or renters as well as optional additional information such as their account numbers.
- Their move-in date, move out date, lease begin date, monthly common charges, current outstanding common charges, common charges past due, amount of last payment.
- The receipt date of last payment. . .

The advantage is that this will allow for an automatic adding/enrolling or deactivating of occupants and unit profiles in BuildingLink.

Additionally, BuildingLink can display a "My Account Tab" on the Resident Home Page that will show residents their common charges or rent statements. If Cooper Square has a relationship with any online payment processor . . . BuildingLink can easily integrate access to that payment processor via the resident portal "My Account" tab as well..."

Cooper Square argues the email is deceptive and contains a false statement, which is that Building Link can "integrate" with B.J. Murray and provide updated tenant-owner information on a daily basis. Cooper Square argues that there is presently no software that would allow Building Link to get the information about tenant billing, payments, etc. directly, and Building Link can do so only if it obtains it from Cooper Square.

Cooper Square argues that it has shown a likelihood of success on its deceptive practice claim under GBL § 349 *et seq* because the mailings are targeted to board members, they are technologically unsophisticated, the decisions of these board members affect thousands of tenant/shareholders and, therefore, consumer oriented.

Cooper Square further argues that it will suffer irreparable harm because it cannot be made whole by being awarded monetary damages. Plaintiff also maintains that the balance of equities is in its favor because Building Link is competing with Cooper Square and using the name "Cooper Square" in its email, giving the impression that Building Link can deliver the same service and information Cooper Square does, although Building Link cannot.

Building Link denies that it has made any false statements, but stands by its emails. Building Link points out that it *can* integrate with B.J. Murray and it *can* provide daily update. Defendant contends this is a purely business dispute and it is up to their target audiences whether they want to continue using Cooper Square or try out a competitor. Building Link argues that GBL § 349 is inapplicable to the facts of this case because the parties are businesses, there are no consumers directly affected or involved, there is no consumer oriented aspect to the parties' dispute, and Cooper Square is simply unhappy with having a competitor vie for the same market.

Each side has provided affidavits of internet technology ("IT") professionals who address whether Building Link is or is not compatible with B.J. Murray. Building Link has provided printouts showing actual screen shots of its Integration Engine analyzing B.J. Murray data, but plaintiff contends the Building Link portal cannot integrate with

B.J. Murray's software.

Applicable Law

The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor (see CPLR § 6301; Noby Next Door, LLC v. Fine Arts Housing, Inc., 4 NY3d 839 [2005]; Aetna Insurance Co., Inc. v. Capasso, 75 NY2d 860 [1990]; W.T. Grant Co. v. Srogi, 52 NY2d 496 [1981]). Although the party seeking a preliminary injunction does not have to provide conclusive proof of its right to such relief, and a preliminary injunction can, in the court's discretion, even be issued where there are disputed facts (Terrell v. Terrell, 279 A.D.2d 301 [1st Dept 2001]), generally a preliminary injunction will be denied unless the relief is necessitated and justified from the undisputed facts (O'Hara v. Corporate Audit Co., 161 AD2d 309 [1st Dept 1990]).

In this context, "irreparable injury" means a continuing harm resulting in substantial prejudice caused by the acts sought to be restrained if permitted to continue *pendente lite*, and if granted, tailored to fit the circumstances so as to preserve the *status quo* to the extent possible (generally, Second on Second Café, Inc. v. Hing Sing Trading, Inc., 66 AD3d 255 [1st Dept 2009]).

Discussion

GBL § 349 provides that "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful." It is an intentionally broad statute, applying "to virtually all economic activity" (Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314, 324 [2002]). To

establish a violation of GBL § 349 the conduct complained of must be consumer oriented and have a broad impact on consumers at large as compared to a private contract dispute that is unique or particular to one of the parties to the lawsuit (New York University v. Continental Ins. Co., 87 N.Y.2d 308, 324 [1995]; Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y.2d 20, 25 [1995]). Typically, a statutory violation involves a consumer who has fallen victim to a misrepresentation made by a seller of consumer goods. The remedy is the greater of actual damages or \$50.00 (GBL § 350[e]). Consistently the term "consumer" is associated with an individual or natural person who purchases goods, services or property primarily for personal, family or household use (Sheth v. New York Life Insurance Co., 273 AD2d 72 [1st Dept 2000]).

While Cooper Square may provide property management services to many residential buildings containing thousands of residential tenants, Cooper Square has not shown that Building Link's activities are consumer oriented, within the meaning of the consumer protection laws, or that the activity that Cooper Square seeks to enjoy is within the zone of interest to be protected by GBL § 349 (Besser v. Miller 12 A.D.3d 1118 [4th Dept 2004]). The statute's application is limited to those situations when the conduct of the defendant is aimed at individual consumers. The sample email provided by Cooper Square shows that it is targeted not to individual residents of those buildings, but persons on the boards of these buildings who make business decisions on behalf of the coop (see, Levandusky v. One Fifth Avenue Apartment Corp., 75 NY2d 530 [1990]; 40 West 67th Street v. Pullman, 100 NY2d 147 [2003]).

Therefore, Cooper Square direct has failed to show a likelihood of success on the merits because a viable claim under GBL § 349(a) requires that the challenged conduct is consumer-oriented and have a broader impact on consumers at large (see, Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A., 85 NY2d 20 [1995]; Sheth v New York Life Ins. Co., *supra*).

Cooper Square has also failed to show that this is not a private dispute or a dispute between competing businesses (Cruz v. NYNEX Information Resources, 263 AD2d [1st Dept 2000]). This is apparent from paragraph 6 of the complaint:

"The plaintiff Cooper Square already has in place its own software called Cooper Square Connect which it provides to owner-tenants of its managed buildings providing actual updated tenant-owner account information. The defendant is . . . soliciting the tenant boards to replace the Cooper Square Connect software with its software called Building Link using the aforementioned false and deceptive statement in aid thereof."

Disputes that are unique to the parties do not fall within the ambit of GBL § 349 (Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A., 85 NY2d at 26).

Even were the court persuaded that the emails plaintiff complains about are consumer oriented, Cooper Square has not established that the message is false, misleading or deceptive. Reading the email in its entirety shows that it is a proposal or "pitch" for business. Clearly, Building Link is trying to make inroads in an area dominated by Cooper Square because of its property management agreement. Though Cooper Square is under no obligation to provide to third parties the information

it collects while managing these properties, and Cooper Square charges a fee for that information, theoretically a recipient of the Building Link email interested in using Building Link could take the necessary steps to establish a relationship with Building Link instead of Cooper Square. Thus, as the email suggests, Building Link apparently has "the ability to integrate with B.J. Murray, the accounting system used by Cooper Square . . ." B.J. Murray is simply accounting software.

Cooper Square has also failed to satisfy the other requirements for a preliminary injunction, which are irreparable harm and damages. In this context, "irreparable injury" means a continuing harm resulting in substantial prejudice caused by the acts sought to be restrained (*generally*, Second on Second Café, Inc. v. Hing Sing Trading, Inc., 66 AD3d 255 [1st Dept 2009]). Cooper Square argues at length about how Building Link cannot deliver on its promise to integrate with the B.J. Murray software. That argument seriously undercuts any claim by Cooper Square of irreparable injury. If Building Link (as Cooper Square argues) cannot deliver what this promises, this will become immediately apparent to anyone switching over from plaintiff to defendant, Cooper Square's direct competitor in this market. Taking this one step further, Cooper Square has not shown why it cannot be compensated for any harm through monetary damages.

The purpose of a preliminary injunction is to maintain the *status quo*, pending the final disposition of an action. Cooper Square has not shown that a preliminary injunction is necessary and justified from the undisputed facts (*O'Hara v. Corporate Audit Co.*, 161 AD2d 309 [1st Dept 1990]). At best, Cooper Square has established

that some board members have received emails from Building Link. Cooper Square makes no claim that it has lost any business or that any of the buildings using Cooper Square connect have switched over to Building Link. Thus, plaintiff has not demonstrated the *status quo* is imperiled in any way or that a preliminary injunction is necessary to maintain it.

Conclusion

Having failed to meet the requirements for a preliminary injunction, enjoining defendant Building Link from sending unsolicited emails to tenant board members, plaintiff Cooper Square Realty, Inc.'s motion for such relief is denied in its entirety for the reasons stated. Stays, if any, are vacated forthwith.


Since issue has been joined, this case is hereby scheduled for a **Preliminary Conference on February 18, 2010 at 9:30 a.m.** in Part 10, Room 232, 60 Centre Street. No further notices will be sent.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
January 27, 2010

So Ordered:



Hon. Judith J. Gische, J.S.C.

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JAN 28 2010
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