

**Hercules Corp. v Linx Communications, Corp.**

2012 NY Slip Op 30203(U)

January 6, 2012

Supreme Court, Nassau County

Docket Number: 8548/2011

Judge: Lawrence K. Marks

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.



Hercules contends that Linx, *inter alia*, provided it with fewer terminals than Hercules ordered, refused to release some of the terminals Linx did obtain, failed to complete the code for the project to Hercules' satisfaction, and that some of the code it did develop is defective and never functioned properly. Compl, ¶¶ 29-35. Disputes also arose over billing and the timing for certain deliverables. *Id.*, ¶¶ 36-39.

Hercules notified Linx that it was terminating the Agreement on April 4, 2011. *Id.*, ¶ 43. Hercules contends that thereafter, on or about May 25, 2011, Linx disabled the Hercules website, effectively disabling the HST system and rendering the previously installed HST terminals nonfunctional. *Id.*, ¶¶ 45-47. Hercules avers that it has received numerous complaints from tenants and managing agents of the affected buildings. *Id.*, ¶ 49.

Hercules brought claims against Linx, alleging: breach of contract (first cause of action); specific performance/declaratory judgment (second cause of action); tortious interference with contract (third cause of action); and a permanent injunction restraining and enjoining Linx and directing Linx to turn over to Hercules all the property created under the Agreement (fourth cause of action). *Id.*, ¶¶ 54-78.

Hercules obtained a temporary restraining order, dated June 10, 2011 ("the TRO"). The TRO directs Linx to enable HST portals, subject to the stipulation of the parties, also dated June 10, 2011. Reich Reply Aff, Exh K.<sup>1</sup> As per that stipulation, Hercules was

---

<sup>1</sup> The TRO also required Hercules to deposit in escrow with its counsel the sum of \$45,153.38. *Id.*

only to use the HST portal with regard to two properties identified in the Complaint, and was prohibited from copying the portal or its code in any manner. *Id.* Thereafter, the parties stipulated to continue the TRO during the briefing of and until a determination of these motions. 6/24/11 So Ordered Stip.

## DISCUSSION

“Preliminary injunctive relief is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and the undisputed facts found in the moving papers.” *Miller v. Price*, 267 A.D.2d 363, 364 (2d Dep’t 1999).

In order to prevail upon a motion for a preliminary injunction, the moving party has the burden of demonstrating, by clear and convincing evidence, (1) the likelihood of success on the merits of the action, (2) that it will suffer irreparable injury absent the issuance of a preliminary injunction, and (3) that the balance of equities is in its favor.

*S.J.J.K. Tennis, Inc. v. Confer Bethpage, LLC*, 81 A.D.3d 629, 629-30 (2d Dep’t 2011).

*See also, Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860, 862 (1990); *Abinanti v. Pascale*, 41 A.D.3d 395, 396 (2d Dep’t 2007).

“The purpose of a preliminary injunction is to maintain the status quo pending determination of the action. The decision to grant or deny a preliminary injunction rests in the sound discretion of the Supreme Court.” *S.J.J.K. Tennis, Inc.*, 81 A.D.3d at 630 (internal citations omitted).

### Hercules's Motion

By its motion, Hercules seeks to have the Court direct Linx to turn over all the development software, code, design and system that Linx developed for the HST system. Mot Br at 1. Alternatively, Hercules requests that the Court convert the TRO, which directs Linx to enable the HST portal for use in the laundry rooms in the two buildings identified in the Complaint, into a preliminary injunction. Reply Br at 2.

Without question, the greatest concern to the Court with regard to the current application is the issue of irreparable injury and attempts to change the status quo. Hercules argues that loss of business reputation, good will and business opportunities constitutes irreparable harm. Mot Br at 3. In support of its contention that, absent a preliminary injunction in its favor, it will suffer irreparable harm, Hercules avers that it will be forced to breach existing leases and forced to forgo entering into other leases it has already negotiated. Reply Br at 3. Hercules contends that this will occur due to its inability to provide owners and residents with a functioning system. *Id.* Hercules, however, has not established how such a future harm is distinct, and irreparable, when compared to the damage it claims it has already suffered.

Hercules also argues that unless it obtains the code to the HST system, Linx may damage or manipulate the code. Reich Reply Aff, ¶ 40. In support of this position, Hercules argues that, since the issuance of the TRO, there were occasions when the HST system or certain HST units ceased to function. *Id.* However, all of these arguments are

greatly undercut by Hercules's position, throughout, that the system has never fully and consistently worked.

Hercules claims that directing Linx to turn over all the development software, code, design and systems developed by Linx for the software platform and website underlying the HST system is necessary to preserve the status quo of the parties, as they litigate their claims and defenses under the Agreement. Mot Br at 3-4. It argues that the TRO currently in place maintains the status quo, and that the TRO does so by permitting Hercules to continue to provide the residents of the two apartment buildings referenced in the Complaint with access to the HST units and the HST system. Reply Br at 2.

Hercules contends that the preliminary injunction, in contrast, "would continue to maintain the status quo while enabling Hercules to provide the HST System" to *additional residents and additional buildings*. *Id.* (emphasis added). Hercules asserts that, while this would free it to use the system in other buildings, this would impose "absolutely no additional burden on Defendant." *Id.* at 3.

However, in the case at hand, it is granting Hercules's motion for preliminary injunction that would be contrary to preserving the status quo. Linx, in its opposition, claims that Hercules is attempting to secure the benefits of its Agreement with Linx, and is not seeking to preserve the status quo. Opp Br at 1. In this, Linx is correct. As Hercules itself has represented to the Court, the status quo is currently a system that for periods of time, both before and after the issuance of the TRO, has not operated properly

and has had “numerous malfunctions.” Reich Reply Aff, ¶¶ 59-60. Hercules is, therefore, not seeking the code to preserve the status quo, but rather to control and improve the current and future workings of the system. While an understandable goal, that is not the purpose of a preliminary injunction. Indeed, as Linx argues in its opposition, maintaining the status quo, and preventing the dissipation of property that could render the final judgment ineffectual, is the purpose of a preliminary injunction. Opp Br at 1, citing *Ruiz v. Melone*, 26 A.D.3d 485, 486 (2d Dep’t 2006); *Ying Fung Moy v. Hohi Umeki*, 10 A.D.3d 604, 604 (2d Dep’t 2004). As such, Hercules’s motion for preliminary injunction is denied.

The Court also denies Hercules’s alternative request, and declines to covert the TRO into a preliminary injunction. The Court notes that the TRO was based, in no small part, on a stipulation reached between the parties. Should the parties themselves choose to extend the terms of their stipulation, or enter into a different one, they are certainly free to do so. However, the Court will not require the maintenance of the terms set forth in the TRO, now that the parties have had every opportunity to fully submit their arguments to the underlying motion on a schedule they themselves set, and extended twice.

#### Linx’s Cross Motion

Linx cross-moves for a preliminary injunction, prohibiting Hercules from using any software code developed by Linx, as well the HST units, pending final determination of this action. Mot Br at 5.

Linx argues that its third counterclaim seeks just such an injunction and that, by virtue of this counterclaim, it is entitled to cross-move for preliminary injunctive relief. *Id.* at 5-6. Hercules opposes the cross motion, asserting, *inter alia*, that Linx merely states it is entitled to move for the relief it seeks, but fails to cite any legal authority to establish that Linx should be granted a preliminary injunction. Reply Br at 6.

The cross motion is denied. As with Hercules's motion, the relief sought in Linx's motion would change the status quo, and Linx has failed to establish that it would be irreparably harmed if the relief is not granted.<sup>2</sup>

The Court has considered the parties' other arguments, and finds them unavailing.<sup>3</sup>

---

<sup>2</sup> Indeed, Linx did not even raise the issue of irreparable harm in its brief. Opp Br at 5-6. In a supporting affidavit it merely avers that Hercules's statements regarding the HST not functioning will irreparably harm Linx in the marketplace. Smith Aff at 9-10. This is insufficient, as it is wholly unsupported by facts or case law in the memorandum of law. The Court also notes, but does not consider dispositive, Hercules's contention that Linx's claim is undercut by the fact that: (1) Hercules claims it has voiced its concerns only to Linx and counsel; and (2) Linx, although seeking to enjoin Hercules from using the HST system, is not seeking to enjoin Hercules from making statements about it. Reply Br at 7.

<sup>3</sup> For example, Linx argues that, given the "mandatory injunction as sought by Hercules" Hercules is required to demonstrate a "heavy burden" of proving a more clear and substantial entitlement to mandatory, as opposed to prohibitive, injunctive relief. Opp Br at 4-5. Inasmuch as the Court finds that Hercules did not meet the standard for entitlement to preliminary injunctive relief, the Court need not address any distinction in the standards for mandatory preliminary injunctive relief.

Accordingly, it is

ORDERED that the motion of plaintiff Hercules Corp., motion sequence #1, for a preliminary injunction is denied; and it is further

ORDERED that the cross motion of defendant Linx Corporation, Corp, motion sequence #2, for a preliminary injunction is denied; and it is further

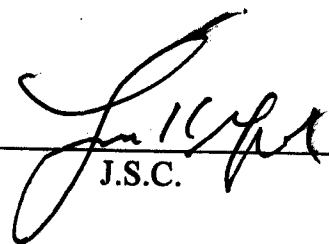
ORDERED that the temporary restraining order, entered on June 10, 2011, and extended by stipulation of the parties, So Ordered on June 24, 2011, is vacated; and it is further

ORDERED that the remainder of the action shall continue.

This constitutes the Decision and Order of the Court.

Dated: January 6 , 2012

ENTER:

  
\_\_\_\_\_  
J.S.C.

**ENTERED**  
JAN 19 2012  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE