

**Charter Communications, Inc. v Local Union No. 3,
Intl. Bhd. of Elec. Workers**

2018 NY Slip Op 31713(U)

March 26, 2018

Supreme Court, New York County

Docket Number: 159036/2017

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED

PART 2

Justice

-----X

CHARTER COMMUNICATIONS, INC.,
Plaintiff,

INDEX NO. 159036/2017

- v -

LOCAL UNION NO. 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, LANCE VAN ARSDALE, in his capacity as Assistant Business Manager, Maintenance Division of Local No. 3, DEREK JORDAN, in his capacity as Business Representative of Local No. 3, SEAN FITZPATRICK, in his capacity as Business Representative of Local No. 3, and "JOHN DOES" (names being fictitious, all of whom are unknown to plaintiff, all of persons being members of or acting in concert with IBEW Local No. 3),

MOTION SEQ. NO. 002, 004

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 83, 85, 86, 87

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 004) 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135

were read on this motion to/for DISCOVERY

Upon the foregoing documents, it is ordered that the motions are decided as follows.

In this action by plaintiff Charter Communications, Inc. ("Charter") sounding, inter alia, in nuisance, assault, and trespass, and seeking damages against defendants Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO ("Local 3"), Lance Van Arsdale, in his capacity as Assistant Business Manager, Maintenance Division of Local No. 3, Derek Jordan, in his capacity as Business Representative of Local No. 3, Sean Fitzpatrick, in his capacity as Business Representative of Local No. 3, and "John Does" (names being fictitious, all of whom are

unknown to plaintiff, all of persons being members of or acting in concert with IBEW Local No. 3) (collectively “defendants”), defendants move, pursuant, inter alia, to CPLR 3211(a)(7), to dismiss the complaint for failure to state a cause of action (Mot. Seq. 002). Charter opposes the motion to dismiss and moves, pursuant to CPLR 3211 (d) to compel expedited discovery from defendants (Mot. Seq. 004). After oral argument, and after a review of the motion papers and the relevant statutes and case law, **defendants’ motion is granted and Charter’s motion is denied.**

FACTUAL AND PROCEDURAL BACKGROUND:

Charter, formerly Time Warner Cable, is a corporation which provides cable television, internet and voice services to residential, commercial and governmental subscribers. Doc. 25, at par. 5.¹ In the New York area, Charter provides such services under the brand name Spectrum. Id. The company employs approximately 1,700 cable technicians in a bargaining unit represented by defendant Local 3, a labor union. Doc. 25, at par. 8. On or about February 6, 2017, Charter and Local 3 began collective bargaining negotiations. Id., at par. 13. On March 28, 2017, Local 3 commenced a strike, and certain employees of Charter began a work stoppage. Id., at par. 16. Charter alleged that, since the strike began, its equipment has been “sabotage[d]” on numerous occasions and that Local 3 and its leadership have encouraged and condoned such acts. Id., at pars. 19-48.

Charter commenced this action against defendants Local 3, Lance Van Arsdale, in his capacity as Assistant Business Manager, Maintenance Division of Local 3, Derek Jordan, in his capacity as Business Representative of Local 3, Sean Fitzpatrick, in his capacity as Business Representative of Local 3, and certain “John Does” who allegedly were members of or acted in

¹ Unless otherwise noted, all references are to the documents filed with NYSCEF in connection with the captioned action.

concert with Local 3, by filing a summons and verified complaint on October 10, 2017. Doc. 1. In its amended complaint, filed October 13, 2017, Charter alleged, inter alia, that it was entitled to injunctive relief due to Local 3's "unlawful and destructive campaign of sabotage against Charter's equipment." Doc. 25, at par. 1.² Charter's amended complaint set forth details regarding the alleged incidents of vandalism and sabotage. It also alleged, inter alia, that Local 3 pickets:

engaged in unlawful acts against Charter and its property and employees – including but not limited to blockading and preventing ingress to and egress from Charter facilities; interfering with and preventing the free movement of Charter vehicles on the public streets; threats of physical violence against Charter employees and their families, deliberate damage to Charter vehicles; and interfering with and threatening contractors hired by Charter . . .

Id., at par. 58.

Charter asserted causes of action against defendants sounding in private nuisance, public nuisance, assault, and trespass to chattels. Doc. 25. Charter also alleged a separate cause of action seeking a permanent injunction against defendants pursuant to Labor Law § 807. Doc. 25.

On October 11, 2017, Charter moved, by order to show cause (OSC) (Mot. Seq. 001), pursuant to CPLR 6313 and Labor Law § 807, seeking a temporary restraining order (TRO) and preliminary injunction enjoining defendants from a) trespassing or picketing within any Charter facility; b) approaching within 25 feet of any Charter facility, vehicle or other property; c) directing abusive or threatening language or gestures toward any person at or in the vicinity of any Charter facility, vehicle, or other property; d) delaying, obstructing, or otherwise interfering with the entry of people and/or vehicles into Charter facilities; and e) obstructing, harassing, intimidating, assaulting, threatening or interfering with any Charter employee or an employee of an entity doing

² John Quigley, Regional Vice-President, Field Operations for Charter, purported to verify the complaint and amended complaint. Doc. 1, at p. 31; Doc. 25, at p. 34. However, Quigley's signature was not notarized.

business with Charter. Doc. 2. In support of the OSC, Charter submitted, inter alia, affidavits of Charter employees who attested to allegedly illegal conduct by Local 3 picketers including, among other things, blocking ingress and egress to Charter facilities and verbal abuse of Charter employees. Docs. 7, 9-14, 16, 19. On October 12, 2017, this Court signed the OSC but declined to grant Charter a TRO on the ground that, pursuant to Labor Law § 807, such relief could not be granted without a hearing. Tr. of Proceedings of 10/12/17, at p. 28-29. This Court then conducted a hearing pursuant to Labor Law § 807 on October 23, 25, 26 and 27, 2017 to determine whether Charter was entitled to injunctive relief.

Following the hearing, on November 2, 2017, defendants filed the instant motion (Mot. Seq. 002) seeking to dismiss the captioned action based, inter alia, on CPLR 3211 (a)(7) for failure to state a cause of action. Doc. 66.

On December 8, 2017, Charter moved, by order to show cause, for expedited discovery pursuant to CPLR 3211 (d) and to stay a determination of defendants' motion to dismiss pending its receipt of the discovery sought. Mot. Seq. 003.

By order dated December 21, 2017 and entered December 27, 2017, this Court denied Charter's application for injunctive relief (Mot. Seq. 001) after considering the hearing testimony in detail. Doc. 97. Charter filed a Notice of Appeal from the order on January 25, 2018. Doc. 102.

Charter's motion seeking a stay and expedited discovery was denied, with leave to renew upon proper papers, by order entered February 8, 2018. Doc. 107.

On February 15, 2018, this Court (Edmead, J.) signed a second order to show cause by Charter seeking expedited discovery pursuant to CPLR 3211 (d) and to stay a determination of defendants' motion to dismiss pending its receipt of the discovery sought. Mot. Seq. 004.

For the reasons set forth below, defendants' motion to dismiss the amended complaint (Mot. Seq. 002) is granted and Charter's motion seeking expedited discovery (Mot. Seq. 004) is denied.

LEGAL CONCLUSIONS:

Defendants' Motion to Dismiss the Complaint

As noted previously, Charter asserts causes of action sounding in private nuisance, public nuisance, assault, and trespass to chattels. Doc. 25. Charter also alleged a separate cause of action against defendants seeking a permanent injunction against them pursuant to Labor Law § 807. Doc. 25.

The Court of Appeals has held that suits against unions, which are unincorporated associations, "for breaches of agreements or for tortious wrongs" are limited to "cases where the individual liability of every single member can be alleged and proven." *Martin v Curran*, 303 NY 276, 282 (1951). Here, dismissal of the tort claims against Local 3 is warranted because Charter failed to plead that each individual union member authorized or ratified the allegedly unlawful conduct by defendants. *Duane Reade, Inc. v Local 338 Retail, Wholesale, Dep't Store Union*, 17 AD3d 277, 278 (1st Dept 2005), *lv denied* 5 NY3d 797 (2005), *citing, inter alia, Martin, supra; see also Saleme v Toussaint*, 25 AD3d 411 (1st Dept 2006).³ Nor can the individual defendants named be held liable "for acts committed in their capacity as union representatives, even if those acts were not authorized by the union membership." *Duane Reade*, 17 AD3d, at 278, *citing, inter*

³ Charter alleges that certain acts were taken by Local 3's Business Manager Christopher Erikson, Assistant Business Manager Lance Van Arsdale, and Assistant Business Manager, Maintenance Division, Sean Fitzpatrick, but does not allege that each and every member of Local 3 authorized or ratified the wrongdoing alleged. Doc. 25, at pars. 7, 52-54. Although Charter alleges that "[d]efendants and their members and followers have ratified such wrongful conduct . . ." (Doc. 25, at par. 109) it does not specifically claim, as required by *Martin*, that each and every member of the union ratified or authorized the alleged conduct.

alia, Martin, supra.

Although “[t]he *Martin* rule has been criticized as essentially granting unions complete immunity from suit in state court”, New York remains one of very few states “that cling to the common-law requirement that the complaint allege that all of the individual members of the union authorized or ratified the conduct at issue” (citation omitted). *Palladino v CNY Centro, Inc.*, 23 NY3d 140, 148-149 (2014); *see also Hoesten v Best*, 34 AD3d 143, 159 (2006). In *Salemeh v Toussaint supra*, a majority of the Appellate Division, First Department held that any argument that the “stringent pleading and evident[iary] requirements for maintaining an action against an unincorporated association . . . should be relaxed is more appropriately directed to the Legislature.” 25 AD3d at 411-412. Therefore, Charter’s tort claims, *i.e.*, its first through fourth causes of action, are dismissed.

Charter further asserts that defendants erroneously rely on the *Martin* rule to argue that its claim for injunctive relief must be dismissed. In support of this contention, Charter relies on Labor Law § 807 (6), which provides that:

6. No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute (as these terms are herein defined) shall be held responsible or liable in any civil action at law or suit in equity, or in any criminal prosecution, for the unlawful acts of the individual officers, members, or agents, except upon proof by the weight of evidence and without the aid of any presumptions of law or fact, of (a) the doing of such acts by persons who are officers, members or agents of any such association or organization, and (b) actual participation in, or actual authorization of, such acts, or ratification of such acts after actual knowledge thereof by such association or organization.

According to Charter, Labor Law § 807 (6) “expressly permits suits for injunctive relief against *both* a labor “association” and any of its “officer[s] or member[s]” and “thus plainly undermines” defendants’ argument that it failed to meet the pleading requirements set forth in

Martin. Pltf. Memo of Law in Opp at p. 28. However, the Appellate Division has held that the *Martin* rule applies to claims for injunctive relief as well as to those for money damages. See *Cablevision Sys. Corp. v Communications Workers of Am. Dist. 1*, 131 AD3d 1087, 1088 (2d Dept 2015). Thus, to properly plead this claim, Charter was required to allege that each and every member of Local 3 authorized or ratified the allegedly unlawful conduct claimed. Labor Law § 807 (6). However, since Charter has not set forth such allegations, its fifth cause of this cause of action must be dismissed as well.⁴

Even assuming, *arguendo*, that Charter is not required to plead its Labor Law § 807 claim with the specificity prescribed in *Martin*, other pleading deficiencies exist which warrant the dismissal of this claim.

Many of Charter's allegations do not contain the name(s) of the individual(s) who committed the allegedly unlawful conduct. Specifically, in numerous paragraphs of the complaint, Charter claims that "someone" committed certain wrongful acts (see, e.g., Doc. 25, at pars. 28-30). It also alleges that "the perpetrators of these acts of sabotage were Local 3 members and/or agents." (Doc. 25, at par. 31). However, since Charter's "complaint not only fails to set forth the names of these individuals but fails to set forth how [it] knows they are union members and the reason for its inability to identify them", the complaint is deficient. *Rochdale Village, Inc. v Beverly*, 96 Misc.2d 1080, 1083 (Sup Ct Queens County 1978); see Labor Law § 807 (2).

Charter alleges in its complaint that, although it reported instances of vandalism to the NYPD, the alleged unlawful acts continued "largely unabated." Doc. 25, at pars. 55; 137. Despite alleging that police did nothing when a Local 3 member shouted "insults and threats" on September

⁴ Although Charter argues that neither *Cablevision Sys. Corp.* nor any other cases cited by defendants specifically hold that *Martin's* pleading requirements apply in a claim pursuant to Labor Law § 807, it fails to provide any authority in support of this contention. This Court has not found any authority holding that *Martin's* pleading requirements do not apply to Charter's claim pursuant to Labor Law § 807.

15, 2017, there is no allegation that the member engaged in the type of dangerous activity Labor Law § 807 was designed to enjoin. Doc. 25, at pars. 66; 74-75. Charter further alleges that, on other occasions, the NYPD was delayed in responding to calls, but that, eventually, Charter vehicles were able to leave the parking lot. Doc. 25., at pars. 103; 107. Although Charter maintains that “[i]t is evident that the wrongful conduct perpetrated by [d]efendants will neither cease nor be adequately controlled by law enforcement officials, absent a [c]ourt-ordered injunction” (Doc. 25, at par. 138), it does not allege, as required by Labor Law § 807 (1)(e), that the NYPD has “failed or [is] unable to furnish [it with] adequate protection.” Indeed, as noted above, Charter acknowledged that the NYPD responded to its calls, albeit sometimes late, and that NYPD detectives arrested an individual who allegedly vandalized Charter’s property. Doc. 25, at pars. 37-38.

Further, although Charter alleges, among other things, that it would sustain irreparable harm in the event it is not granted injunctive relief against defendants (see Labor Law 807[1][b]), its contentions in this regard are conclusory.⁵ Doc. 25, at pars. 57; p. 31.

During the course of prior proceedings in this matter, Charter represented to this Court that it had put the New York City Police Department (NYPD) on notice of this action so as to provide it with an opportunity to respond to Charter’s allegations that it (the NYPD) was unable to effectively address the alleged unlawful conduct by defendants (see Labor Law § 807 [1] [e]; 807 [2]). However, none of the affidavits of service filed on NYSCEF in this matter reflect that the NYPD was served with any of the pleadings or motions. Docs. 44-45; 57-58; 78-79; 82; 86; 100; 132; 134. Although this point was not raised by defendants, this Court notes that Charter’s

⁵ This Court has already determined, after a hearing, that Charter failed to establish that it would sustain irreparable harm in the absence of injunctive relief. See Doc. 97, at p. 16-17.

failure to serve the NYPD with the pleadings and motions in this matter renders the complaint defective and warrants dismissal. *See Rochdale Village, Inc.*, 96 Misc.2d at 1083.

This Court further notes that the amended complaint (Doc. 25) is not properly verified as required by Labor Law § 807 (2). *See Amalgamated Transit Union, Local 1202 v Greyhound Lines, Inc.*, 157 AD3d 167, 169 (1st Dept 1990). Although John Quigley, Regional Vice-President, Field Operations for Charter purported to verify the amended complaint, his signature lacks notarization. In the event the verification was executed out of state, it would also require a certificate of conformity. See CPLR 2309 (c). This point, which also was not raised by defendants, further militates in favor of the dismissal of the complaint.

Charter's Motion Seeking Expedited Discovery

Charter asserts that defendants' motion to dismiss pursuant to CPLR 3211(a)(7) must be denied pursuant to CPLR 3211(d) since there remains outstanding discovery which would allow it to state a claim. However, since the "complaint fails to state a cause of action as a matter of law and no amount of discovery can salvage the claim, it must be dismissed and no discovery is warranted" (citations omitted). *Herzog v Town of Thompson*, 216 AD2d 801, 803-804 (3d Dept 1995).

In any event, this Court would deny Charter's motion in its discretion pursuant to CPLR 3211(d) since Charter "failed to specify how additional discovery [regarding recent alleged sabotage and picketing] would enable [it] to state a sufficient claim with respect to the dismissed allegations" (citations omitted). *Sitomer v Goldweber Epstein, LLP*, 139 AD3d 642, 644 (1st Dept 2016). Indeed, Charter never even served a discovery demand setting forth the discovery it sought.


Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by defendants Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO, Lance Van Arsdale, in his capacity as Assistant Business Manager, Maintenance Division of Local No. 3, Derek Jordan, in his capacity as Business Representative of Local No. 3, Sean Fitzpatrick, in his capacity as Business Representative of Local No. 3, and "John Does" (names being fictitious, all of whom are unknown to plaintiff, all of persons being members of or acting in concert with IBEW Local No. 3) (mot. seq. 002) seeking to dismiss the complaint is granted, the complaint is dismissed, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the motion by plaintiff Charter Communications Inc. (mot. seq. 004) to compel discovery pursuant to CPLR 3211(d) is denied as moot; and it is further

ORDERED that this constitutes the decision and order of the court.

3/26/2018
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input checked="" type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	DO NOT POST	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	