

Vector Media, LLC v Go N.Y. Tours Inc.

2020 NY Slip Op 34759(U)

October 7, 2020

Supreme Court, New York County

Docket Number: Index No. 653808/2019

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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INDEX NO. 653808/2019

VECTOR MEDIA, LLC

MOTION DATE 09/01/2020

Plaintiff,

006

MOTION SEQ. NO.

- v -

DECISION + ORDER ON MOTION

GO NEW YORK TOURS INC.,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257 were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD .

Upon the foregoing documents and for the reasons set forth on the record (10/7/2020), Go New York Tours Inc. d/b/a Topview Sightseeing's (Go New York) motion to vacate the Preliminary Injunction (the Preliminary Injunction; NYSCEF Doc. No. 54), dated August 9, 2019, pursuant to CPLR § 6314 is denied (see Rosemont Enters., Inc. v Irving, 49 AD2d 445, 448 [1st Dept 1975] [it is within the court's sound discretion to vacate, modify, or impose conditions upon a preliminary injunction]).

COVID-19 and the resulting pandemic do not present impossibility or frustration of purpose to performance of the Amended and Restated Transit Advertising Agreement (the Agreement; NYSCEF Doc. No. 194), entered into on November 28, 2011, by and between Go New York and

Vector Media, LLC (**Vector Media**) or the Preliminary Injunction. Go New York concedes that it can lawfully operate its business notwithstanding with certain restrictions, and as such, cannot claim that performance is objectively impossible (NYSCEF Doc. No. 197; *see Kel Kim Corp. v Cent. Mkts., Inc.*, 70 NY2d 900, 902 [1987] [impossibility excuses a party’s performance only when destruction of the subject matter of the contract or the means of performance makes performance objectively impossible]; *Valenti v Going Grain, Inc.*, 159 AD3d 645, 645 [1st Dept 2018] [“performance of a contract is not excused where impossibility is occasioned by financial difficulty or economic hardship”], citing *407 E. 61st Garage, Inc. v Savoy Fifth Ave. Corp.*, 23 NY2d 275, 281 [1968]; *Erdreich v. Zimmermann*, 190 AD 443 [1st Dept 1920] [performance of contract not rendered impossible by war, but merely suspended until peace declared]).

In addition, to the extent that Go New York claims that its revenue has been reduced by COVID-19, it cannot claim frustration of the Agreement for this reason alone (*see Crown IT Servs. v Koval-Olsen*, 11 AD3d 263, 265 [1st Dept 2004] [doctrine of frustration of purpose only applies where the frustrated purpose is “so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense”]). Significantly, it is of no moment that Go New York’s bus fleet has dropped below the Agreement’s “Vehicle Threshold” amount by virtue of the pandemic because the Agreement specifically contemplates situations where the number of buses fall below the standard threshold and provides for an adjustment in the payment due to Go New York as a result of any change in the bus fleet:

SECTION 1. SCOPE OF WORK AND TERRITORY

...

(d) Changes to Fleet

...

(ii) *Vehicle Threshold*. In the event that the Fleet grows to a point such that forty (40) or more double decker buses all meet the Operation Requirements, the “Vehicle Threshold” will be satisfied for the purposes described in Section 4(b) below. However, if at any point during a given month fewer than forty (40) double decker buses meet the Operation Requirements, the Vehicle Threshold shall no longer be considered satisfied and the monthly payments due for any such month shall be Standard Period MC, unless the number of double decker buses that meet the Operation Requirements is fewer than twenty-two (22) buses, in which case the Growth Period MG shall apply for any such month. ***Should the number of buses that meet the Operation Requirements fall below sixteen (16) double decker buses during any month, the Minimum Guarantee due for any such month shall be the product of \$2,000 and the number of double decker vehicles that met the Operation Requirements for that month.*** As a limited exception to foregoing, if the Vehicle threshold has been satisfied and maintained for the previous three (3) months, then in the months of January and February [Go New York] may operate as few as twenty (20) double decker buses in accordance with the Operation Requirements and be considered to continue satisfying the Vehicle Threshold.

(NYSCEF Doc. No. 194, § 1 (d)(ii) [emphasis added]).

Furthermore, only Vector Media was granted the right to early termination of the Agreement in the event that Go New York’s permits or licenses were revoked or advertising was prohibited by any local, state or federal authority, which is not the case at hand (*id.* at § 13 (a), (b)). The parties did not agree to confer a right of termination upon Go New York.

Finally, to the extent that the tour buses are presently running, Go New York fails to explain why it cannot comply with the Preliminary Injunction and its motion to vacate or modify the Preliminary Injunction is denied.

Accordingly, it is


ORDERED that Go New York's motion to vacate or modify the Preliminary Injunction is denied.

DATE 10/7/2020

CHECK ONE:

GRANTED	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	CASE DISPOSED
DENIED	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	GRANTED IN PART OTHER
APPLICATION: SETTLE	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	ORDER
	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	SUBMIT ORDER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE


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ANDREW BORROK, J.S.C.
 NON-FINAL DISPOSITION