

FSM SUPREME COURT TRIAL DIVISION

FSM TELECOMMUNICATIONS CABLE ) CIVIL ACTION NO. 2021-010  
CORPORATION (the Open Access Entity), )  
 )  
Plaintiff-Counter-Defendant, )  
 )  
vs. )  
 )  
FSM TELECOMMUNICATIONS CORPORATION, )  
 )  
Defendant-Counterclaimant. )  
\_\_\_\_\_ )

THIRD (AND LAST) ORDER GRANTING PARTIAL INJUNCTIVE RELIEF

Larry Wentworth  
Associate Justice

Hearing: May 6-7, 11-14, 17-19, and 24, 2021  
Decided: July 19, 2021

APPEARANCES:

For the Plaintiff: Aaron L. Warren, Esq.  
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For the Defendant: Stephen V. Finnen, Esq.  
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HEADNOTES

Civil Procedure – Injunctions – Irreparable Harm

Generally, the threat of irreparable harm before the litigation’s conclusion is a prerequisite to preliminary injunctive relief, and when money damages or other relief will fully compensate for the threatened interim action, irreparable harm does not exist and a preliminary injunction should be denied, but an exception may be made when a non-movant’s assets may be dissipated before final relief can be granted or where the non-movant threatens to remove its assets from the court’s jurisdiction, such that an award of monetary relief would be meaningless. Another exception is when an award of damages at the end of trial will be inadequate because the damage award may come too late to save the plaintiff’s business because he may go broke while waiting, or he may have to shut down his business but without declaring bankruptcy. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 360, 362-63 (Pon. 2021).

Civil Procedure – Injunctions – Mandatory

When it comes to a mandatory injunction, the burden is even higher on a party that seeks a mandatory preliminary injunction that alters the status quo by commanding some positive act, as opposed to a prohibitory injunction seeking only to maintain the status quo. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 360, 363 (Pon. 2021).

Civil Procedure – Injunctions; Civil Procedure – Injunctions – Mandatory

A preliminary injunction to maintain the status quo may issue when the movant cannot meet the higher burden for a mandatory injunction but can make a lesser showing of irreparable harm if the status quo is not maintained; when it has a good chance of succeeding on the merits; when neither side is further harmed if the status quo is maintained since their statuses as government-owned entities is something of a buffer against insolvency, bankruptcy, or liquidation; and when the public interest favors the continued and uninterrupted operation of both entities. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 360, 363 (Pon. 2021).

Contracts – Unconscionable

The affirmative defenses of unconscionability and economic duress, although good defenses to a breach of contract claim, are not the easiest defenses to prove. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 360, 363 (Pon. 2021).

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COURT'S OPINION

LARRY WENTWORTH, Associate Justice:

After hearing the plaintiff's preliminary injunction motion from May 6-7, 11-14, 17-19, and 24, 2021, the court granted from the bench a preliminary injunction concerning access to the Pohnpei cable landing station, and later reduced that order to writing, and further stated that it intended to rule on the Hantru cable upgrade aspect of the relief sought sometime in the first week of June and then rule on the remainder of the preliminary injunction motion in the following weeks. On June 4, 2021, the court entered its order covering the Hantru upgrade aspect of the motion and granted a further preliminary injunction regarding that aspect of the plaintiff's preliminary injunction motion. This order addresses the remaining aspects of the plaintiff's preliminary injunction motion.

I.

The remainder of the relief sought by the plaintiff, the FSM Telecommunications Cable Corporation, also called the Open Access Entity ("OAE"), can be summarized as a court order or preliminary injunction mandating that the defendant, the FSM Telecommunications Corporation ("Telecom"), comply with the terms of the Deed Granting Indefeasible Rights of Use ("IRU Deed"), executed between the parties on February 2, 2018, until such time as this litigation is resolved. The OAE, in its motion, seeks a preliminary injunction that not only enjoins Telecom from any conduct not in compliance with Telecom's contractual obligations under the IRU Deed, but that also requires Telecom to conform its conduct to Public Law No. 18-52 (the Telecom Act of 2014), and the OAE further asked that the court declare that the IRU Deed is a legally enforceable and binding agreement.

A declaration that the IRU Deed is a binding and enforceable agreement between Telecom and the OAE is, along with money damages and a permanent injunction, also relief that the OAE prays for in its complaint. Telecom has raised affirmative defenses to that claim and makes counterclaims. As such, any definitive declaration on whether the IRU Deed is a binding and enforceable agreement will be left to a later date for resolution.

The OAE also asserts that Telecom should be barred from further developing any fiber-to-the-home projects until Telecom has fully complied with its IRU Deed obligations. However, both sides agree that the IRU Deed does not apply to either party developing or deploying fiber to the home. The court therefore declines to make any preliminary orders concerning fiber-to-the-home projects.

II.

The OAE desires that Telecom be preliminarily enjoined to comply with its obligations under the IRU Deed. The court, in its previous two partial preliminary injunction orders, has considered and rendered decisions on whether Telecom should be enjoined to comply with certain aspects of IRU Deed that did not involve Telecom's financial obligations under the IRU Deed. Although the OAE has worded its motion as one for a mandatory injunction that Telecom be ordered "to comply" with all IRU Deed provisions, the gist of what further preliminary relief the OAE seeks is that, if Telecom were in compliance with the IRU Deed, the OAE would be receiving monthly payments from Telecom for Telecom's use of the OAE's cable rights to Yap, Chuuk, and for the OAE's half of the Hantru spectrum between Pohnpei and Guam.

Telecom ceased making those payments after March, 2020. The reason Telecom gave then for stopping these payments was that it anticipated substantial lost revenue due to the covid-19 pandemic that necessitated the FSM's emergency closure of its borders because then Telecom would no longer receive the "roaming charges" from overseas visitors' use of their mobile phones while in the FSM. Those charges were a significant portion of Telecom's overall revenue stream. Although Telecom's "roaming charges" revenue has, as expected, evaporated, Telecom's overall revenue from other sources unexpectedly increased substantially.

The Yap and Chuuk cables were installed with no-cost funding that the OAE had obtained from the World Bank. The earlier-built Hantru spur to Pohnpei was constructed with funding Telecom obtained through a loan from the Rural Utilities Service ("RUS"), a U.S. federal government agency. Half of the Hantru spectrum was later transferred to the OAE, and the only compensation to Telecom for the transfer was the OAE's unfulfilled promise to shoulder half of the ongoing repayment costs for the RUS loan. RUS later forgave that loan so that now nothing more is owed on the loan and no more payments are due. (Telecom continues to make payments on an earlier RUS infrastructure loan.)

III.

Both the OAE and Telecom put on evidence that future decisions in this litigation could place them in financial straits.

The OAE's evidence tended to show that if Telecom did not abide by its financial obligations under the IRU Deed, the OAE would become unable to meet its obligations. Since Telecom is currently the only telecommunications provider using the OAE cable facilities, Telecom's monthly payments were the OAE's primary revenue source.

Telecom's evidence tended to show that continued payments to the OAE could, without any payments or credits from the OAE, push Telecom into insolvency or bankruptcy. Telecom, although it has stopped making payments to the OAE, is still "booking" those payments on its balance sheet as though it has been paying. Those sums are presumably retained in Telecom's reserves. And the OAE submits monthly invoices to Telecom. That is the status quo.

Telecom contends that the OAE cannot show that it is irreparably harmed by Telecom's withholding its payments from the OAE because any harm that can be remedied solely by money damages is not, as evidenced by FSM case law, irreparable. The OAE argues that it is only asking for a mandatory preliminary injunction that Telecom comply with all of the IRU Deed provisions, which include the monthly money payments.

Generally, the threat of irreparable harm before the litigation's conclusion is a prerequisite to preliminary injunctive relief, and when money damages or other relief will fully compensate for the threatened interim action, irreparable harm does not exist and a preliminary injunction should be denied. Nena v. Saimon, 19 FSM R. 317, 328-29 (App. 2014); FSM Petroleum Corp. v. Etomara, 21 FSM R. 123,

126 (Chk. 2017); Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 546, 550-51 (Pon. 2016).

An exception may be made “where a non-movant’s assets may be dissipated before final relief can be granted or where the non-movant threatens to remove its assets from the court’s jurisdiction, such that an award of monetary relief would be meaningless.” Firemen’s Ins. Co. of Newark v. Keating, 753 F. Supp. 1146, 1153 (S.D.N.Y. 1990). Neither of those situations is the case here. Another exception is when an award of damages at the end of trial will be inadequate because “[t]he damage award may come too late to save the plaintiff’s business. He may go broke while waiting, or he may have to shut down his business but without declaring bankruptcy.” Roland Machinery Co. v. Dresser Indus., Inc., 749 F.2d 380, 386 (7th Cir. 1984). The OAE contends that its current situation falls within this exception.

When it comes to a mandatory injunction, “[t]he burden is even higher on a party . . . that seeks ‘a mandatory preliminary injunction that alters the status quo by commanding some positive act, as opposed to a prohibitory injunction seeking only to maintain the status quo.’” Cacchillo v. Insmad, Inc., 638 F.3d 401, 406 (2d Cir. 2011) (quoting Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd., 598 F.3d 30, 35 n.4 (2d Cir. 2010)).

The OAE cannot meet the higher burden for a mandatory injunction. In this case, both parties are government-owned entities. The OAE is wholly owned by the national government and Telecom is mostly owned by the national government. Because of their particular natures, the court cannot, at this time, find that either party is in imminent danger of immediate insolvency or that the OAE will go broke while waiting.

Nevertheless, based on the foregoing findings and the findings in the two previous orders concerning the OAE’s preliminary injunction motion, the court will order the status quo preserved with a prohibitory injunction. The OAE can make the lesser showing of irreparable harm if the status quo is not maintained, and it has a good chance of succeeding on the merits. Telecom’s affirmative defenses of unconscionability and economic duress, although good defenses to a breach of contract claim, are not the easiest defenses to prove. Neither side is further harmed if the status quo is maintained, as stated below, since their statuses as government-owned entities is something of a buffer against insolvency, bankruptcy, or liquidation. And the public interest favors the continued and uninterrupted operation of both entities.

#### IV.

NOW THEREFORE IT IS HEREBY ORDERED that the defendant, FSM Telecommunications Corporation, its officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with it who receive actual notice of this order by personal service or otherwise shall continue to “book” its monthly payments, as set by the Deed Granting Indefeasible Rights of Use (“IRU Deed”), and keep those funds in its retained reserves (or retained earnings) so that those funds, or whatever part of them the court orders, are readily available for payment to the OAE, upon the resolution of this case. The OAE may continue to invoice Telecom.

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