SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

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DIANET COMMUNICATIONS, LLC,

107862/08
Mot Seq. 005

Plaintiff,

Decision/Order

-against-

THE CITY OF NEW YORK

Defendant.

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff Dianet Communications, LLC ("Dianet") previously brought an Article 78 petition seeking to annul defendant the City of New York's ("City") franchise award to NextG Networks of New York, Inc. ("NextG") and Lextent Metro Connect, LLC ("Lextent"). Dianet also brought a breach of contract action and an action for breach of implied covenant of good faith and fair dealing against City. City moved to dismiss the Third, Fourth, Fifth and Sixth causes of action (for breach of contract, breach of implied covenant of good faith and fair dealing and for declaratory relief) pursuant to CPLR 3211(a)(1) and (7). By Order of the Honorable Justice Eileen Rakower, dated December 18, 2008, Dianet's Article 78 petition was denied and the court granted City's motion to dismiss as to Dianet's Third, Fifth and Sixth causes of action. City now moves to dismiss Dianet's Fourth Cause of Aciton sounding in Breach of Contract pursuant to CPLR 3212. Dianet does not oppose.[1]

Dianet is a telecommunications company that was awarded a non-exclusive City franchise on July 15, 2004, for a term of fifteen years. The franchise was

[1]City claims that it brought the instant motion on January 27, 2009 but that, subsequently, Dianet's attorney moved to withdraw as counsel. The court granted the motion and stayed the proceedings. Thereafter the motion was adjourned for 45 days pending the stay. City asserts that the 45 days has passed and that Dianet has failed to oppose or otherwise appear.

awarded to Dianet after it fully responded to a Request for Proposals ("RFP") that was issued on February 9, 2004. NextG and Lextent are also telecommunications companies and NextG was awarded a franchise on February 8, 2008, after a July 19, 2007 RFP was issued. Lextent holds a franchise issued in 2007. Dianet alleges in its Fourth Cause of Action that:

> . . . In breach of the Franchise Agreement, the City has allowed NextG and Lextent to select poles and install equipment on those poles in all three zones during this latest Reservation Phase, in contravention of Dianet's contractual privity rights. As a result of the City's breach of Dianet's Franchise Agreement, Dianet has incurred damages in an amount to be determined at trial.

City, in support of its motion, submits: the petition; an Order and Decision of this court, dated December 18, 2008; City's answer; the affidavit of Douglas S. Glen; a copy of the "FCRC December Meeting Transcript (12 12 2007)(Franchise and Concession Review Committee);" the Franchise Agreement between City and Dianet; a copy of the "FCRC December Meeting Transcript (2 6 2008);" a Department of Information Technology and Telecommunications Memorandum, regarding "Priority List for Zones;" and a copy of the "Phase Three Zone Schedules."

City first argues that Dianet cannot show that City's actions actually caused Dianet damages. Dianet's Third Cause of Action, which was previously dismissed by this court, states, in relevant part:

> But for the City's interference with Dianet's rights under the Franchise Agreement, Dianet would have entered into a contract with MetroPCS worth more than $160 million . . . as a result of the City's breach . . . Dianet incurred damages in an amount to be determined at trial, but, in any event, of at least $160 million . . .

City argues that the formation of the agreement between NextG and MetroPCS occurred ten months before NextG was permitted to participate in the pole selection process on March 17, 2008, nine months before the FCRC approved the franchise awards and "even predated their successful responses to the July 2007 RFP." Thus, City argues that the allegation that NextG was permitted to select street poles in the

Third New Reservation Phase, could not be the cause of Dianet's failure to win the contract with MetroPCS.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]).

It is well settled that "without a clear demonstration of damages, there can be no claim for breach of contract." (*Milan Music, Inc. v. Emmel Communications Booking, Inc.*, 37 AD3d 206[1st Dept. 2007]). In *Kenford Company, Inc. v. Erie County*, 67 NY2d 257[1986], the court found that:

> First, it must be demonstrated with certainty that such damages have been caused by the breach and, second, the alleged loss must be capable of proof with reasonable certainty. In other words, the damages may not be merely speculative, possible or imaginary, but must be reasonably certain and directly traceable to the breach, not remote or the result of other intervening causes . . . In addition, there must be a showing that the particular damages were fairly within the contemplation of the parties to the contract at the time it was made. (internal citations omitted) (where listing company sued a published for publisher's alleged breach of agreement to purchase its mailing lists).

Here, Dianet claims that "in September 2006, [it] entered into negotiations with MetroPCS for the provision of equipment . . . for MetroPCS' planned wireless network in New York City," However, Dianet does not show how those alleged negotiations were anything more than an assessment of MetroPCS' options. Indeed, City submits evidence which refutes Dianet's assertions that it was certain to have won the contract with MetroPCS, but for City's alleged breach. Mr. Glen, Vice

President of MetroPCS states in his affidavit, in relevant part:

> At the time that plans for the New York City market were being developed by MetroPCS, it was MetroPCS' judgment that NextG was the only DAS network vendor that had the length and breadth of experience and the operational capacity to undertake construction of a network of the scale and scope required by MetroPCS . . .for example, in addition to MetroPCS' experience with NextG in San Francisco, NextG had at that time recently built for another CMRS provider in San Diego what was represented by NextG as being the largest DAS network ever constructed in the United States . . .On May 3, 2007, MetroPCS entered a master services agreement with NextG Networks ("NextG") pursuant to which in could enter into individual network orders to construct and operate DAS systems in future MetroPCS markets nationwide . . . on May 30, 2007, after several months of working with NextG to design a DAS network to meet its requirements in the City of New York, MetroPCS New York, LLC. . . a wholly owned subsidiary of MetroPCS, executed a network order with NextG for the construction and operation of a DAS network for use as part of MetroPCS' New York CMRS system . . .

The evidence submitted by City shows that MetroPCS had selected NextG to be its equipment provider well before March 17, 2008, the date that City allowed NextG and Lextent to select poles and install equipment, allegedly in contravention of Dianet's rights. There is no support in the record for Dianet's "merely speculative" allegations that it suffered any damages as a result of such allowance. (see *Kenford*). Indeed, plaintiff fails to oppose the instant motion. It is well settled that where the movants have established a prima facie showing of entitlement to summary judgment, the motion, unopposed on the merits, shall be granted. (*See, Access Capital v. DeCicco*, 302 AD2d 48, 53-54 [1st Dept. 2002]). Further, "the factual allegations of the moving papers, uncontradicted by plaintiff, are sufficient to entitle defendants to judgment dismissing the complaint as a matter of law." (*Tortorello v. Carlin*, 260 A.D.2d 201[1st Dept. 1999]).

Wherefore it is hereby

ORDERED that the motion is granted without opposition and the fourth cause of action is hereby dismissed.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: June 23, 2009

EILEEN A. RAKOWER, J.S.C.