

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

VIKING COMMUNICATIONS, INC.,	:	MARCH TERM, 2003
	:	
Plaintiff,	:	No. 02975
	:	
v.	:	COMMERCE PROGRAM
	:	
SAS-1600 ARCH STREET, L.P., and	:	Control No. 041071
COMCAST OF PHILADELPHIA, INC.,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 3RD day of May, 2006, it is hereby **ORDERED** that defendants' Motion for Summary Judgment is **GRANTED**, and plaintiff's Amended Complaint is **DISMISSED**.

It is further **ORDERED** that the Counterclaim for Declaratory Judgment of defendant SAS-1600 Arch Street, L.P. ("SAS") is **GRANTED**. Plaintiff may not enforce the exclusivity provisions in its agreement with SAS so as to exclude defendant, Comcast of Philadelphia, Inc., as a cable service provider at The Phoenix.

BY THE COURT:

MARK I. BERNSTEIN, J.

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Defendants.	:	

OPINION

Defendant SAS-1600 Arch Street, L.P. (“SAS”) is the owner of The Phoenix apartment building in Philadelphia. Plaintiff Viking Communications, Inc. (“Viking”) and defendant Comcast of Philadelphia, Inc. (“Comcast”) are competing television service providers. Viking provides satellite master antenna television (“SMATV”), and Comcast provides cable television (“CATV”).

SAS and Viking entered into an agreement dated March 1, 2002, under which Viking was to provide SMATV service to the tenants of The Phoenix (the “Viking Agreement”).¹ The Viking Agreement provides as follows:

[SAS] hereby grants to [Viking] the exclusive right to provide to Residents microwave, satellite, cable, or any other type of subscription or pay television programming, insofar as such right and services are permissible by law.

[SAS] grants [Viking] the exclusive right to market the Services to all Residents of the property.

SAS installed all of the SMATV/CATV wiring at the Phoenix including the wires that run from the roof to the equipment room and from the equipment room to the electrical closet on

¹ The Viking Agreement is attached to the Amended Complaint as Exhibit A.

each floor of The Phoenix (the “Vertical Wiring”) and the wires that run from the electrical closet on each floor to the individual apartments at The Phoenix (the “Hallway Wiring”).

The Viking Agreement provides that “subject to the rights of the parties set forth in paragraph 1(d) hereof, [Viking] shall retain title to the System and all of its components, which shall remain the personal property of [Viking] and shall not become fixtures.” The “System” is defined in the Viking Agreement as:

certain equipment and facilities for the reception and delivery of all RF, video or data signals over coaxial cable, Cat 5, Cat 7 or . . . a distribution system which may consist of Fiber Optics, satellite dishes, antennas, earth stations, head-end electronics and other equipment.

Paragraph 1(d) of the Viking Agreement, provides:

[SAS] hereby grants [Viking] the right to use . . . any coaxial cable, outlets, and equipment, now owned or hereinafter acquired by [SAS] (the “Existing Systems”) for the sole purpose of delivering the Service.

[SAS] is in the process of installing and . . . shall complete the installation of, the cable and other wiring required to transport television signals from the roof to the Equipment Room and trunk line distribution to each electrical closet as required to deliver the services. [Viking] hereby purchases from [SAS], and [SAS] hereby sells to [Viking], all such cable and wiring. . . . [Viking] shall pay to [SAS] the sum of \$16,200.00 . . . which payment represents the full consideration and purchase price for said cable and wiring installed and to be installed at the Property.

Pursuant to these terms of the Viking Agreement, Viking paid SAS \$16,200 for the Vertical Wiring. In addition, Viking uses the Hallway Wiring to provide its SMATV services to tenants.

After the Viking Agreement was executed, a Comcast executive who is a tenant of The Phoenix demanded that he be permitted to receive CATV services from Comcast under the provisions of the Tenants’ Right to Cable Television Act (the “Act”).² Accordingly, on

² This Act was enacted on December 20, 1990, prior to the Viking Agreement.

November 27, 2002, SAS and Comcast entered into an agreement permitting Comcast to provide CATV to the tenants of The Phoenix (the “Comcast Agreement”).³

The Comcast Agreement “grants to Comcast the right to provide the [CATV] Services only insofar as defined and allowed under the ‘Tenants’ Right to Cable Television Act’.” The Comcast Agreement also states:

Comcast may use certain coaxial cable or outlets owned by [SAS] (the “Existing Systems”) that are not being utilized by another service provider.

Comcast understands that [SAS] has granted [Viking] the exclusive right to market its CATV services to all Residents of the Property. Therefore, Comcast shall not have the right to directly market and/or promote its Services to the Residents of the Property, except through the [Comcast] System, telemarketing and direct mail pieces.

Comcast installed its own Vertical Wiring for its CATV system at The Phoenix, but uses the Hallway Wiring installed by SAS to deliver its services to those tenants who request CATV. At least 135 tenants at The Phoenix received Comcast CATV services.

Viking brought this action against SAS for breach of the Viking Agreement and for intentional interference with Viking’s exclusive relationship with the tenants. Viking further asserts claims against Comcast for inducing SAS to breach the Viking Agreement and intentionally interfering with SAS’ performance of the Viking Agreement and Viking’s contracts with the tenants. Viking also asserts a claim for civil conspiracy against both SAS and Comcast. Both SAS and Comcast filed counterclaims seeking declaratory judgment declaring the exclusivity provisions of the Viking Agreement void as a result of the Tenants’ Right to Cable Television Act.

³ The Comcast Agreement is attached to SAS’ Motion for Summary Judgment as Exhibit 2.

The Motion for Summary Judgment filed by SAS on Viking's claims against SAS and on SAS' counterclaim is presently before the court. Comcast joined in SAS' Motion at oral argument on the basis that all of the claims asserted against it are derivative of the claims asserted against SAS.

I. Comcast's Provision of CATV Services At The Phoenix Does Not Violate the Viking Agreement.

Viking contends that SAS violated the exclusivity provisions of the Viking Agreement by entering into the Comcast Agreement. However, the Tenants' Right to Cable Television Act expressly requires a landlord to enter into an agreement with a CATV operator, such as Comcast, if a tenant requests the operator's services:

If a tenant of a multiple dwelling premises requests an operator to provide CATV services and if the operator decides that it will provide such services, the operator shall so notify the landlord in writing within ten days after the operator decides to provide such service.⁴

The Act also provides that "[a] landlord may not prohibit or otherwise prevent a tenant from requesting or acquiring CATV services from an operator of the tenant's choice provided there has been an agreement between a landlord and an operator."⁵ A landlord who refuses to enter into an agreement with an operator can be compelled to do so by an arbitrator or a court.⁶ There is no dispute that at least one tenant of The Phoenix requested CATV services from Comcast. Accordingly, SAS and Comcast entered into a statutorily mandated agreement to allow Comcast to provide CATV services at The Phoenix.

⁴ 68 P.S. § 250.504-B.

⁵ *Id.* § 250.503-B.

⁶ *See id.* § 250-506-B(b)(2), § 250.504-B.

“The laws in force when a contract is entered into become part of the obligation of contract with the same effect as if expressly incorporated in [the contract’s] terms.”⁷ Having been enacted prior to the Viking Agreement, the requirements of the Act are perforce incorporated into the Viking Agreement. Indeed, the Viking Agreement expressly recognizes its exclusivity provisions are limited by what is “permissible by law.” Since the Act required SAS to enter into the Comcast Agreement, the Act necessarily nullifies the Viking Agreement’s exclusivity.⁸ SAS did not breach the Viking Agreement by entering into the statutorily required Comcast Agreement.

Viking’s contention, that the Comcast Agreement is overbroad because it permits Comcast to install an entire competing CATV system at The Phoenix and not just wiring sufficient to provide service to the tenant(s) who requested Comcast services, is without merit. The Act does not require new wiring each time a tenant at The Phoenix requests CATV services. The Act provides that “A second or subsequent installation of cable television facilities, if any, shall conform to such reasonable requirements in such a way as to minimize further physical intrusion to or through the premises.”⁹ The Act demonstrates a legislative preference for a single CATV installation. Allowing Comcast to install a single CATV system that could reach all the tenants in The Phoenix is permissible. SAS has not breached the Viking Agreement, and Comcast has neither induced a breach nor interfered with SAS’ performance.

⁷ DePaul v. Kauffman, 441 Pa. 386, 398, 272 A.2d 500, 507 (1971).

⁸ “The exclusivity clause of [plaintiff’s] contract is clearly contrary to the public policy expressed in the Act which prevents a landlord from denying any CATV system access to the premises so long as the tenant requests it and so long as it complies with negotiating requirements.” Cablevision of Pennsylvania, Inc. v. The Klein Company, 130 Montg. Co. L. R. 217, 230 (1993).

⁹ 68 P.S. § 250.505-B

II. Comcast's Use of The Hallway Wiring Does Not Violate The Viking Agreement.

Viking contends that it is improper for SAS to let Comcast use Viking's Hallway Wiring. Viking's claim to ownership of the wiring is grounded in the Viking Agreement. However, the Viking Agreement does not give Viking title to the Hallway Wiring. The Viking Agreement provides for the sale by SAS of only the Vertical Wiring to Viking.

SAS did not sell the Hallway Wiring to Viking. SAS retained title to the Hallway Wiring. It is part of the "Existing System," owned by SAS, which SAS grants Viking the right to use. Since SAS owns the Hallway Wiring, it may permit Comcast to use that wiring. SAS has not breached the Viking Agreement by allowing Comcast to use the Hallway Wiring, and Comcast has not induced SAS to breach the Viking Agreement or intentionally interfered with the Viking Agreement by using the Hallway Wiring.

III. Comcast's Limited Marketing At The Phoenix Does Not Violate the Viking Agreement.

Viking contends that SAS breached the Viking Agreement by allowing Comcast to market its services at The Phoenix. Viking also alleges that SAS and Comcast tortiously interfered with Viking's existing and prospective contracts with the tenants when SAS permitted Comcast to market its services. To survive a motion for summary judgment, Viking must present some evidence that Comcast engaged in improper marketing activities with SAS' connivance.

In the Comcast Agreement, SAS granted Comcast permission to market its services on its own CATV system, by mail, and by phone. Viking contends that this grant was improper. However, SAS could not prevent Comcast from advertising on Comcast's own CATV system, nor could it prohibit Comcast from sending mail or telephoning the tenants. SAS' permission is

simply recognition of modern marketing realities. It is neither a breach of the Viking Agreement, nor tortious interference with contract.¹⁰

Viking also alleges that “Comcast’s uniformed employees were frequently present on the premises.”¹¹ The Act requires SAS to allow Comcast employees onto its premises to install and to activate the Comcast system.¹² Viking has not presented any evidence that Comcast employees were at The Phoenix for any other purpose. Legislatively mandated installation activities cannot constitute a breach of the Viking Agreement. Neither have Comcast and SAS tortiously interfered with Viking’s contracts with the tenants by engaging in such statutorily permitted activities.¹³

Viking claims that an SAS representative was quoted in a newspaper article as saying that Comcast services were available at The Phoenix. No copy of this article is attached as an exhibit to the Motion. Even if this did occur, such a statement cannot be actionable since it is true and it reflects circumstances compelled by the Tenants’ Right to Cable Television Act.¹⁴

Viking offers Comcast work orders for tenants and the testimony of a Comcast employee that “usually” these forms are generated as the result of door-to-door solicitation by Comcast

¹⁰ See Gilbert v. Otterson, 379 Pa. Super. 481, 489, 550 A.2d 550, 554 (1988) (“One's privilege to engage in business and to compete with others implies a privilege to induce third persons to do their business with him rather than with his competitors”) *citing* Restatement (Second) Torts § 768 (1979) (Normal competitive activities do not constitute tortious interference with contract.)

¹¹ This claim is set forth in Viking’s Answers to SAS’ First Set of Interrogatories, which are attached to SAS’ Motion as Exhibit 14.

¹² See 68 P.S. § 250.503-B.

¹³ See Strickland v. University of Scranton, 700 A.2d 979, 985 (Pa. Super.1997) *citing* Restatement (Second) Torts §§ 766, 767 (1979) (In order for intentional interference with contract to be actionable as a tort, the interference must be improper.)

¹⁴ Viking also claims that a SAS leasing agent told tenants about the availability of Comcast’s services. Viking has offered no evidence to support this contention.

representatives.¹⁵ Viking claims that door-to-door solicitation is impermissible. However, there is no evidence that SAS permitted or enabled any such solicitations to take place. Accordingly, even if the manner in which such forms are “usually” generated is applied as fact in this case, the work orders do not constitute evidence of SAS’ breach of the Viking Agreement or tortious interference with Viking’s contracts with the tenants. If Comcast did solicit tenants in this manner, such solicitations are normal competitive activities and do not constitute tortious interference by Comcast.

CONCLUSION

For all of the foregoing reasons, defendants’ Motion for Summary Judgment is granted, plaintiff’s claims are dismissed, and defendants’ request for declaratory judgment is granted.

BY THE COURT,

MARK I. BERNSTEIN, J.

¹⁵ See Exhibit M of Viking’s Supplemental Submission at pages 20 and 24.