

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MARYLIN G. DIAMOND

PART 48

Justice

RADIO FREE AMERICA, INC. d/b/a AIR AMERICA
RADIO,

Plaintiff,

-against-

MULTICULTURAL RADIO BROADCASTING, INC.

Defendant.

FILED INDEX NO. 105834/04

JUN 29 2004

NEW YORK COUNTY CLERK'S OFFICE MOTION SEQ. NO. 003

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that: Plaintiff Radio Free America d/b/a Air America Radio provides radio programming on radio stations from which it leases air time. The defendant Multicultural Radio Broadcasting, Inc. owns radio stations in various cities, including Chicago, Illinois. Pursuant to a Time Brokerage Agreement dated January 12, 2004, Air America and Multicultural contracted for Air America to lease **up to 168** hours per week of air time on Multicultural's Chicago station, WNTD. The agreement was for a term commencing February 1, **2004** and terminating on **January 31, 2005**. The agreement required that after certain initial payments, including a deposit, were made, Air America would **pay** \$156,000 in monthly air time fees from March through May, 2004, with increasing monthly fees in later months. The fees were due on the 25th day of the month prior to the month programming was to be provided. Under its express terms, Multicultural was entitled to terminate the agreement on the fifth business day following Air America's receipt of written notice that Air America had failed to make any required payment.

On **April 5, 2004**, Multicultural gave *Air America* written notice that it was in default of its payment obligations and that the agreement would be terminated if the default was not cured. At that point, Air America owed a portion of the initial deposit it had been required to make, as well as the monthly payments for March and April. At Air America's request, Multicultural agreed, on **April 12, 2004**, to permit Air America to stay on the air so long as it paid, by the following morning, the balance of the deposit along with the rent for March. When the \$156,000 check from Air America for the March air time was returned the following day on account of insufficient funds, Multicultural terminated the agreement and pulled **Air America's** program from its Chicago station.

The Time Brokerage Agreement included a provision which requires all disputes to be submitted to arbitration with the exception that **Air America** may sue for injunctive relief. On **April 14, 2004**, Air America commenced this action for **an** injunction restraining defendant from terminating the agreement and from refusing to provide air time on its Chicago station. In conjunction with its commencement of this action, plaintiff moved, by order to show cause, for a preliminary injunction which would require that it be allowed back on the air in Chicago. Air America also sought a temporary restraining order. In its motion papers, Air America notably failed to advise the court that its \$156,000 check for March had bounced and that it had not yet paid for its air time in April although payment had been due almost three weeks earlier.

On **April 15, 2004**, both **parties** appeared before the court on Air America's application. Based on the representation of plaintiffs counsel that the bank's rejection of the \$156,000 check **was** likely a mistake and did not reflect a lack of funds, **and** that Air America would pay the \$156,000 in full the following day, the court issued a temporary restraining order requiring that plaintiff be allowed to broadcast over defendant's Chicago station as soon as **Air America** (1) effectively transferred \$156,000 the following day to Multicultural and (2) posted a \$156,000 bond by 5 p.m. the following day guaranteeing the payment

of its April air time. The parties were directed to appear on April 19, 2004 for a hearing on plaintiffs motion for a preliminary injunction.

The following day, April 16, 2004, Air America effectively transferred \$156,000 to Multicultural and posted a \$156,000 bond which was backed by the Fidelity and Deposit Company of Maryland. That same day, it was permitted to air its programs from defendant's Chicago station.

Prior to the commencement of the preliminary injunction hearing on April 19, 2004, the parties reached a proposed settlement in which Air America agreed to pay Multicultural \$156,000 immediately and to terminate the underlying Time Brokerage Agreement at the end of April. On that day, the case was marked in the court's records as "disposed" and a short form order was signed in which the court indicated that plaintiffs motion for a preliminary injunction had been withdrawn.

At Air America's request, Multicultural thereafter gave it until April 24, 2004 to make payment. Despite repeated representations by plaintiff's counsel that payment of this amount was imminent, no such payment was ever effectively made. When Air America finally deposited a check in Multicultural's account, it was returned on April 29, 2004 for insufficient funds. On April 30, 2004, Air America agreed to immediately remove its programming from defendant's Chicago station.

The defendant has now moved, by order to show cause, for an order (1) vacating the TRO which the court issued on April 15, 2004, (2) denying the plaintiff's motion for a preliminary injunction, (3) dismissing the complaint as moot, (4) awarding Multicultural \$156,000 against the Fidelity bond which was posted in connection with the TRO, (5) awarding Multicultural the reasonable attorney's fees which it has incurred in defending against this action and (6) directing Air America to return certain radio equipment owned by Multicultural which is located in Los Angeles. Fidelity has appeared in opposition to this motion insofar as Multicultural seeks to collect on the entire \$156,000 of the bond. Air America, which initially indicated that it did not oppose Multicultural's motion and would not be submitting opposition papers, ultimately appeared, with Multicultural's consent, after the submission of the motion in order to oppose defendant's application insofar as it seeks attorney's fees and the return of its radio equipment.

Discussion

1. Damages and Costs Sustained by Reason of the TRO -Multicultural's motion arises from the fact that rather than obtain a bond, as the court had directed, which guaranteed that defendant would receive the \$156,000 fee for April in the event plaintiff failed to make payment, Air America obtained a bond which guaranteed only that Multicultural would be paid up to \$156,000 for the damages which it sustained by reason of the TRO. Thus, as it now recognizes, Multicultural is not automatically entitled to the payment of \$156,000 from Fidelity but, rather, must establish the damages which it sustained by reason of the TRO.

In this respect, CPLR 6312(b) and 6313(c) provide that a plaintiff will pay to the defendant all damages and costs resulting from the issuance of a TRO where the court finally determines that the plaintiff was not entitled to such an injunction. CPLR 6315 provides that the damages which the defendant so sustained may be ascertained upon motion on notice to all interested persons. It further provides that the amount of damages so sustained is conclusive upon all persons who were served with notice of the motion and such amount may be recovered by the defendant in a separate action.

In order to be entitled to recover on the bond and to obtain an order under CPLR 6315 fixing the amount recoverable thereunder, Multicultural is not required to obtain an order from this court vacating the TRO and denying the plaintiffs motion for a preliminary injunction. Indeed, the court is unable to do so since the motion has already been entered in the court's records as withdrawn and such a disposition of the underlying motion effectively dissolved the TRO. Rather, as already noted, in order to recover on an undertaking, the CPLR only requires that the court finally determine that the plaintiff was not entitled to the TRO.

Clearly, Air America was not entitled to a TRO. The TRO was issued on the representation by counsel for Air America that the plaintiff was ready, willing and able to meet its monthly payment obligations and should therefore be permitted to remain on the air. In view of Air America's demonstrated inability to make its requisite payments and its ultimate agreement to relinquish its claim to remain on the air, it is evident that it was not entitled to a TRO requiring Multicultural to allow it to return for the last 15 days in April.

It is therefore incumbent upon the court to identify the actual damages to the defendant which resulted from the issuance of the TRO. The court has identified two types of damages which Multicultural sustained.

First, if the TRO had not been issued, Air America would not have returned to the air and its air time could have been leased to another radio broadcaster. Since the TRO thus prevented the defendant from leasing this air time from April 16, 2004 until April 30, 2004, Multicultural suffered damages in the amount of exactly one-half month's rent. In view of the fact that its agreement with Air America for a monthly payment of \$156,000 was entered into only a few months earlier, the court concludes that this amount represents the fair market value of the station's air time for the last half of April, 2004 and that Multicultural therefore sustained \$78,000 in damages by reason of the TRO.

Second, by reason of the TRO, the defendant has incurred attorney's fees in attempting to collect on the bond. These fees are for legal discussions with Fidelity about recovering against the bond, as well as for having to bring this motion to have the court finally determine that plaintiff was not entitled to the TRO and to fix the amount of the damages sustained thereby. In its motion papers, the defendant has not identified the discrete attorney's fees which it has incurred in connection with bringing this motion. Rather, it has grouped together the costs it incurred in bringing this motion with the costs it incurred in opposing the plaintiff's motion for a preliminary injunction. These latter costs would, however, have been incurred irrespective of whether the TRO had been issued and should not therefore be included in the court's calculation of damages which defendant sustained by reason of the TRO.

In any event, the court agrees with Fidelity that a hearing is necessary and appropriate in order to determine the reasonable attorney's fees which Multicultural has incurred in attempting to recover against the bond. The hearing shall be held before this court.

Finally, the court declines the defendant's request that it issue an order directing Fidelity to pay the amount of damages which have been fixed herein. As already noted, CPLR 6315 unambiguously provides that the amount of damages which the court has so ascertained may be recovered in a separate action. Clearly, this provision is addressed to a situation, such as here, where the party which is obligated to pay is not a party to the action where the damages have been fixed. The defendant has not cited any statute or case which authorizes this court to issue an order directing the payment of monies by a nonparty.

2. Attorney's Fees Under the Time Brokerage Agreement - The Time Brokerage Agreement provides that in the event any action is commenced by either party to seek remedies for a wrongful termination of the agreement, the prevailing party shall be entitled to an award of the reasonable attorney's fees and costs incurred therein. In opposition to Multicultural's request for attorney's fees under this provision, Air America argues that there was no prevailing party here because no disposition on the merits of its complaint was ever issued since the two sides settled the action. This argument is frivolous. Air America has not cited any case which has held that a party who effectively prevails through the settlement and discontinuance of an action may not be considered the "prevailing party" as that term is used under a contractual agreement entitling the prevailing party to an award of attorney's fees.

Clearly, Multicultural is the prevailing party in this action. Indeed, Air America's complaint was entirely without merit. It was based upon Air America's assertion that it was not in default in its monthly payments, that its check to Multicultural was erroneously returned by the bank for insufficient funds, that it was ready, willing and able to make its monthly payments for air time and that it was entitled to an

injunction requiring Multicultural to provide it with the air time for which the parties had contracted. The facts which later became known and the events which later occurred all belied this assertion and established that Multicultural was entitled to terminate the agreement and take Air America off of the air. The mere fact that Air America agreed to discontinue the action pursuant to a settlement agreement - - the terms of which it did not even live up to - - does not mean that it may thereby avoid the application of the contractual provision entitling the prevailing party to an award of attorney's fees. Having brought this meritless lawsuit which thus required the defendant to incur attorney's fees, it is entirely appropriate that Air America reimburse Multicultural for these expenses.

Air America also argues that, in any event, the issue of attorney's fees represents a dispute between the parties involving money and, as such, may only be resolved through arbitration. This argument is also frivolous. The attorney's fees which a party incurs in a judicial proceeding is an issue for the court, not an arbitration panel, to decide. Since this action was authorized by the agreement, it is entirely appropriate and necessary for the court to make an attorney's fee award. A hearing on the amount of reasonable attorney's fees which defendant has incurred in defending against this action should be held before this court at the same time as the hearing on the amount of attorney's fees which may be obtained against the Fidelity bond.

3. The Return of Multicultural's Property in Los Angeles - As the court has already indicated to Multicultural on numerous occasions, it is without authority to order Air America to return property of defendant which it allegedly holds in Los Angeles. First, the issue is not before the court as part of any pleading since it is not the subject of any cause of action or counterclaim. The mere fact that the parties are before the court does not authorize the court to address any and all disputes between them. Second, it is not even clear whether the equipment in Los Angeles is subject to the agreement which is before the court involving Multicultural's Chicago station or is subject to another agreement involving the Los Angeles station. The court notes that under the Time Brokerage Agreement involving the Chicago station, this issue is not one which Multicultural may raise in a judicial proceeding but, rather, is one which must be resolved in arbitration.

action, which amount shall be determined at a hearing before the court. The motion is otherwise denied.

The parties, including Fidelity, shall appear before the court in Room 412, 60 Centre Street, New York, New York on July 22, 2004 at 10:30 a.m. to pick a hearing date.

ENTER ORDER

Dated: 6-23-04

FILED MARYLIN G. DIAMOND, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

JUN 29 2004

NEW YORK
COUNTY CLERK'S OFFICE