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

ARC ONE ENTERPRISES, INC.,	:	March Term 2010
Plaintiff,	:	
v.	:	No. 684
AV8, INC.,	:	
Defendant.	:	COMMERCE PROGRAM
	:	
	:	Control Number 10032131
	:	

ORDER

AND NOW, this 3RD day of May 2010, upon consideration of plaintiff, Arc One Enterprises, Inc.'s Petition for Injunctive Relief, and defendants opposition, and after a hearing and in accord with the contemporaneous Opinion being filed, it is **ORDERED** and **DECREED** that plaintiff's Petition is **Denied**, with conditions subsequent.

Defendant is to continue plaintiff's access to the POS software at issue from the two current IP addresses **until June 30, 2010.** This is intended to permit plaintiff to find replacement software to operate its business. After June 30, 2010 the defendant has no responsibility to provide POS software. Plaintiff shall not add or subtract any IP addresses. Further, plaintiff shall utilize, **only**, that equipment which is currently approved under the contract.

BY THE COURT,

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ALBERT W. SHEPPARD, J.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
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O P I N I O N

Albert W. Sheppard, Jr., J. ……. May 3, 2010

This action was instituted by the plaintiff, Arc One Enterprises, Inc. ("plaintiff") to enjoin defendant, AV8, Inc. ("defendant"), from terminating or curtailing plaintiff's access to specific software used to operate plaintiff's business. Presently, before the court is plaintiff's Petition for Preliminary Injunction.

Plaintiff is a franchisee of Incredible Franchise Corporation, a sculptured fruit gift basket business. Plaintiff operates its business from two workshops in Brooklyn, New York where the fruit baskets are assembled. Plaintiff also operates from the home offices of its business officers.

Defendant developed a Point of Service ("POS") software program used by plaintiff, which functions as a computerized cash register, credit card processor, order-taking system, delivery tracking and financial reporting/inventory tracking system. Plaintiff alleges that its

franchisor, Incredible Franchise Corporation ("IFC"), requires franchisees to contract with this defendant to use this specific software designed by defendant.[1]

On March 2007, plaintiff and defendant entered into a written contract under which defendant granted plaintiff the rights to access the POS software and to receive associated support services. The Contract provides in part as follows:

> **2. FEES:**
>
> The Customer agrees to pay the flat fee of $5,000 for configuration, off site hardware setup, and training for BM POS as defined below:
>
> **a. Configuration**
>
> Configuration includes the Developer preparing BM POS to be used by the Customer and the creation of up to ten (10) users for use by the Customer within a single physical location. Additional users, above the 10 allocated user, will incur additional costs to the Customer and will require an additional Agreement.
> · **Notwithstanding the forgoing, Customer hereby is granted the right to utilize BM POS at three physical locations (the "Exception").** [2]
>
> **3. GRANT OF RIGHTS:**
>
> Upon receipt of full payment [$5,000.00], the Developer shall grant to the Customer the following rights for BM POS:
>
> 1. For use as a POA system.
> 2. For use on the world wide web.
> 3. For rights of Code, reference the **End User Software License Agreement.(sic)**
> 4. This license grants 10 users the right use BM POS. These 10 users are to be located at a single static IP address on the internet so that the Developer can securely verify their identity.
> 5. Additional static IP addresses, above a single static IP address, will incur a one time $50 fee for each additional static IP address. This Agreement grants Customer a maximum of ten (10) users among one

[1] Attached to plaintiff's petition is one page of the Franchise Agreement. Although the portion of the exhibit produced by plaintiff states that IFC requires franchisees to use the software system designed by defendant, the record demonstrates that there are at least two franchisees that use a different software system that was not designed by defendant.

[2] This exception is referred to as the "single location exception" in this opinion.

> static IP address. **Nothing in this paragraph limits in any way the single location exception set forth in Section 2 part a. Configuration.**

The 2007 Contract further provides that defendant may terminate plaintiff's single location exception only upon the following conditions:

> if, and only, if, the Developer experiences significantly higher costs associated directly with configuration of BM POS, hardware setup, hosting and training of personnel at Customer's second or third location. Developer may terminate this Exception on the annual renewal date of this Agreement (February 1 of every year) and August 1, 2007 by providing written notice to customer not less than 60 days before such renewal date.

The 2007 Contract also permits defendant to increase its annual support fees up to 8% of the previous year's fee, effective February 1st of every year as follows:

> The Developer reserves the right to raise the support and housing fees as the Developer sees fit on the calendar date of listed under Hosting and support start date of every year [sic]. Yearly fee increases will not exceed 8% of the previous year's fees.

Upon initiation of the contract until the time of the instant dispute, defendant provided plaintiff with use of POS from four physical locations, plaintiff's two workshops and at the home offices of plaintiff's business officers Erik Fridman and Daniel Rakitin.

On December 18, 2008, defendant issued an e-mail notice to its FruitFlowers® customers that effective January 1, 2009, it was going to raise its annual base support fee based on a percentage of gross revenue, as follows:

> $125 per month or .5% (this is half a percent, NOT 5%) of gross revenue, which ever is greater. This means that if your location grosses over $25,000 per month then you will be billed at a rate of .5% of revenue for that month. Gross revenue will be determined by the gross revenue number listed on the royalty report in the POS.

Plaintiff rejected defendant's new pricing plan and continued to pay the previously agreed annual fee of $1,500.00 in monthly installment of $125.00. As a result of plaintiff refusing to accept a

modified billing structure, defendant provided plaintiff with notice that it intended to terminate the single location exception in the contract due to increased costs. Defendant requested that plaintiff identify the single static IP address that it wanted to maintain in operation.[3]

On July 9, 2009, defendant once again notified plaintiff that in February 2010 it would be terminating the exception to the single location provision within the contract. Specifically, defendant stated:

> Due to the significantly higher costs associated with supporting additional locations; in Feb. of next year we will no longer be able to support the 3 locations of your operation. You will need to make other arrangements for 2 of your locations. …
>
> We will also exercise our right to increase hosting/service fees by the full 8% ($10/month) allowed in our contract beginning Feb. of next year….[4]

In June and July 2009, defendant terminated POS access to the plaintiff's home offices. Defendant however, continued to provide access to the POS system at the two workshops. On February 12, 2010 and March 2, 2010, defendant informed plaintiff that since it failed to identify a single IP address to operate its business that it was going to terminate its access to the POS service completely on March 4, 1010.

On March 16, 2010, plaintiff filed a complaint seeking injunctive relief and specific performance of contract. Plaintiff also filed an emergency petition to obtain a special and preliminary injunction to enjoin defendant from terminating its access the POS software at its two workshops and to enforce specific performance of its contract with AV8.

On March 18, 2010, counsel for the plaintiff and defendant entered into a stipulation that defendant would not terminate plaintiff's access to the use of defendant's POS software from the two current IP addresses. It was agreed that the status of the IP addresses would remain as they

[3] Exhibit "F" to Plaintiff's complaint.

[4] Exhibit "I" to Plaintiff's complaint.

existed until March 29, 2010, the scheduled date of the injunction hearing. It was further stipulated that plaintiff maintain the current IP addresses, would not add or subtract any IP addresses and that plaintiff would only use the equipment currently approved under the contract between plaintiff and defendant. On March 29, 2010, this court conducted a hearing during which testimony and arguments were presented.

DISCUSSION

A petitioner seeking a preliminary injunction must establish every one of the following prerequisites:

> First, a party seeking a preliminary injunction must show that an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages. Second, the party must show that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings. Third, the party must show that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct. Fourth, the party seeking an injunction must show that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits. Fifth, the party must show that the injunction it seeks is reasonably suited to abate the offending activity. Sixth, and finally, the party seeking an injunction must show that a preliminary injunction will not adversely affect the public interest.[5]

In this case, plaintiff is not likely to prevail on the merits. The unambiguous terms of the contract permitted plaintiff to use POS software at three physical locations.[6] However, the use could be revoked if the defendant experienced significantly higher costs associated with configuration of POS, hardware set up, hosting and training of personnel at the second and third locations.[7]

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[5] York Group, Inc. v. Yorktowne Caskets, Inc., 924 A.2d 1234 (Pa. Super. 2007).

[6] The court notes that plaintiff was in breach of this provision since it appears from the record that it was using the POS from four separate locations, two workshops and the respective homes of plaintiff's two owners.

[7] Agreement p. 2 (a) (exception).

The record demonstrates that on June 16, 2009 and July 9, 2009, defendant provided plaintiff with notice, in accordance with the terms of the contract, that it intended to terminate the single use exception in the contract due to increasing costs to support the four locations. Specifically, defendant stated:

> "Due to significantly higher costs associated with supporting additional locations, in Feb. of next year [2010] we will no longer be able to support the three locations of your operation. You will need to make other arrangements for two of your locations."[8]

Additionally on July 9, 2009, defendant informed plaintiff that it intended to increase the hosting/support fees on the single location. Defendant stated:

> We will also exercise our right to increase hosting/support fees by the full 8% ($10/month) allowed in our contract beginning in Feb. of next year."

This court finds that defendant provided plaintiff with adequate notice that it intended to terminate the single location exception in the contract and that it intended to increase the hosting/service fee in accordance with contract.[9] Additionally, the record presented demonstrates that plaintiff failed to enter into good faith negotiations on the issue of the contract price. Based on the foregoing, it is not likely that plaintiff will succeed on the merits of this action and the petition for injunctive relief is denied. However, the court does acknowledge the economic predicament that this decision could place on the plaintiff. Accordingly, in its role as Chancellor, the court orders that defendant should continue to permit plaintiff access to the POS software at issue from the two current IP addresses until June 30, 2010. The court intends that plaintiff should find replacement software to operate its business.

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[8] Exhibit "I" to plaintiff's complaint.

[9]The court further notes that plaintiff may have breached its duty of good faith and fair dealing in failing to negotiate in good faith with defendant over new pricing for the services plaintiff was receiving.

During these two months plaintiff is not permitted to add or subtract any IP addresses and will use only the equipment which is currently approved under the contract.

CONCLUSION

For the foregoing reasons, plaintiff's Petition for Injunctive Relief is denied; provided however, that the parties should continue to work together until, June 30, 2010.

An Order consistent with this Opinion is being filed contemporaneously.

BY THE COURT,

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ALBERT W. SHEPPARD, J.