

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
CROWN CASTLE NG EAST LLC,

Docket No. 7:17-cv-03535

Plaintiff,

-against-

ECF Case

THE CITY OF RYE and the CITY COUNCIL OF THE CITY
OF RYE,

Defendants.
-----X

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF
CROWN CASTLE NG EAST LLC'S MOTION FOR INJUNCTIVE RELIEF**

**CUDDY &
FEDER** LLP

Attorneys for Plaintiff

445 Hamilton Avenue, 14th Floor

White Plains, New York 10601

(914) 761-1300 Tel.

(914) 761-5372 Fax

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS 6

ARGUMENT 6

I. CROWN CASTLE IS ENTITLED TO INJUNCTIVE RELIEF 6

 A. The Standards For A Temporary Restraining Order
 and Preliminary Injunction Are Satisfied..... 6

 i. Crown Castle is Likely to Succeed on The Merits 8

 a. Crown Castle Is Likely To Succeed On Its
 Breach of Contract and Implied Covenant
 Of Good Faith Claims 9

 b. Crown Castle Is Likely To Succeed On Its
 Declaratory Judgment Claim 12

 ii. Crown Castle And Members Of The Public Face Immediate
 Irreparable Harm Unless Temporary And Preliminary Injunctive
 Relief Is Granted, And The Balancing Of Equities Tips Decidedly
 In Crown Castle’s Favor..... 14

CONCLUSION 16

TABLE OF AUTHORITIES

Cases

<u>91-54 Gold Road, LLC v. Cross-Deegan Realty Corp.</u> , 93 A.D.3d 649, 939 N.Y.S.2d 555 (App. Div. 2012)	7
<u>AIM Int'l Trading LLC v. Valcucine SpA.</u> , 188 F. Supp. 2d 384, 386 (S.D.N.Y. 2002)	6
<u>American Libraries Ass'n v. Pataki</u> , 969 F. Supp. 160, 167-68 (S.D.N.Y. 1997)	14
<u>Chanos v. MADAC, LLC</u> , 74 A.D.3d 1007, 1008, 903 N.Y.S.2d 506, 508 (App. Div. 2010)	12
<u>Dalton v. Educ. Testing Serv.</u> , 87 N.Y.2d 384, 389 (1995)	10
<u>Gambar Enters., Inc. v. Kelly Servs., Inc.</u> , 69 A.D.2d 297, 418 N.Y.S.2d 818 (App. Div. 1979)	7, 8
<u>Jackson Dairy, Inc. v. H. P. Hood & Sons, Inc.</u> , 596 F.2d 70, 72 (2d Cir. 1979)	6
<u>Klein, Wagner & Morris v. Lawrence A. Klein, P.C.</u> , 186 A.D.2d 631, 633, 588 N.Y.S.2d 424, 426 (App. Div. 1992)	14
<u>Moczan v. Moczan</u> , 135 A.D.2d 692, 692, 522 N.Y.S.2d 591, 592 (App. Div. 1987)	7
<u>Picotte Realty, Inc. v. Gallery of Homes, Inc.</u> , 66 A.D.2d 978, 412 N.Y.S.2d 47 (App. Div. 1978)	7
<u>Reichman v. Reichman</u> , 88 A.D.3d 680, 930 N.Y.S.2d 262 (App. Div. 2011)	7
<u>Schlusser v. United Presbyterian Home at Syosset</u> , 56 A.D.2d 615, 391 N.Y.S.2d 880 (App. Div. 1977)	7
<u>Sperry Int'l Trade, Inc. v. Government of Israel</u> , 670 F.2d 8, 12 (2d Cir. 1982)	14
<u>Spirit v. Spirit</u> , 209 A.D.2d 688, 619 N.Y.S.2d 316 (App. Div. 1994)	7
<u>Teleprompter of Mohawk Valley, Inc. v. Pumilio</u> , 57 A.D.2d 69, 394 N.Y.S.2d 945, 947 (App. Div. 1977)	10

Town of Union v. Time Warner Entm't-Advance/Newhouse P'ship,
52 Misc. 3d 426, 429-30, 30 N.Y.S.3d 811 (N.Y. Sup. Ct. 2016)..... 10

Vill. of Woodbury v. Brach,
99 A.D.3d 697, 699, 952 N.Y.S.2d 92, 94 (App. Div. 2012)..... 12

PRELIMINARY STATEMENT

Plaintiff Crown Castle NG East LLC (“Crown Castle”), by its attorneys, Cuddy & Feder LLP, respectfully submits this Memorandum of Law supporting its motion for an injunction restraining Defendants the City of Rye (“Rye” or the “City”) and/or the City Council of the City terminate a February 17, 2011 Right of Way Use Agreement (the “RUA”).

Crown Castle is a facilities-based provider which deploys telecommunications facilities in public rights of way (“ROW”), thereby providing personal wireless services to people living, working and traveling through Rye. As set forth in the Complaint annexed as Exhibit A to the accompanying Affidavit of Peter Heimdahl (“Heimdahl Aff.”),¹ this action arises from the City’s refusal to grant access to the ROW for expansion of Crown Castle’s small cell network, also known as a Distributed Antenna System (or “DAS”).

The Complaint details the improper efforts by the City to bar Crown Castle from deploying a DAS network in the ROW. As the Complaint explains, the City’s actions violate: (1) federal law, including the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the “Telecommunications Act,” the “Communications Act,” the “Act” or the “TCA”), at § 253 (prohibiting Rye from barring entry of Crown Castle’s telecommunications equipment in the ROW) and § 704 (outlawing the effective prohibition of wireless services and requiring municipal review to be supported by substantial evidence); (2) state law, including Crown Castle’s rights to deploy equipment in the ROW under § 27 of the New York Transportation Corporations Law and as a holder of a Certificate of Public Convenience and Necessity (“CPCN”); and (3) the RUA.

¹ All factual recitations herein are based on the recitations in that Affidavit, or the Complaint where specified.

The City and Crown Castle's predecessor in interest² entered the RUA in February 2011 after the City issued a January 12, 2011 resolution which granted consent to Crown Castle for ROW access in accordance with its federal and state rights (the "Consent Resolution"). The RUA memorialized that consent and recognized Crown Castle's rights of access under federal and state law. The RUA also designated the reasonable terms and conditions for Crown Castle's right of access in furtherance of those rights, and provided expeditious and narrowly tailored review procedures for Crown Castle's future deployment of equipment. (Heimdahl Aff. ¶ 4 and Ex. B).

Crown Castle initially installed nine nodes in its DAS network between 2011 and 2015, pursuant to the Consent Resolution and the RUA. Those installations were subject to a streamlined administrative review process conducted by the City Engineer, as contemplated by the RUA and Consent Resolution. (Heimdahl Aff. ¶ 5).

The good faith which with the City worked with Crown Castle unfortunately, and abruptly, came to an end starting in late 2015. The City bowed to a vocal group of members of the public opposed to wireless deployment. When Crown Castle sought to expand its DAS network, the City abandoned its previously cooperative and legitimate review process in favor of a rigorous, make-it-up-as-you-go discretionary review process conducted by the City Council for the purpose of barring entry of Crown Castle's expansion of its DAS network in the ROW. (Heimdahl Aff. ¶ 6). The City continued this intransigence despite Crown Castle's efforts to cooperate and offer of three alternative proposals – called Plan A, Plan B and Plan C. (Heimdahl Aff. ¶ 8 and Ex. D). All three proposals were consistent with the standards of the RUA, but in an effort to cooperate with the City, Crown Castle ensured that the last two proposals were

² The RUA was entered into by Crown Castle's predecessor in interest, NextG Networks of NY, Inc. ("NextG"). For ease of reference and continuity, all references herein to Crown Castle refer, when appropriate, to NextG as Crown Castle's predecessor. Direct quotations herein replace "NextG" with "[Crown Castle]."

completely compliant with the equipment standards set forth in the RUA.

Instead of responding to Crown Castle's good faith efforts at cooperation in kind, the City committed myriad transgressions, as detailed in the accompanying Complaint.

The injunctive relief sought is necessitated by the City's bad faith attempt to terminate the RUA, and thereby strip Crown Castle of the additional rights conferred by that agreement to ensure a streamlined, narrow review process, as such process is applied to other utility and telecommunications providers such as Incumbent Local Exchange Carriers ("ILECs") (local landline phone companies which provided service prior to the enactment of the Communications Act), cable and fiber companies and other users of the City's streets.

This emergency motion is necessary to prevent the City from taking away those rights that it granted to Crown Castle in the RUA and which are intended to facilitate the rapid deployment of wireless technology, in accordance with federal mandates as described in that section of the Complaint titled, "The Important Federal Interests At Issue In This Case And Crown Castle's Provision Of Services In Furtherance Thereof" (beginning at Paragraph 35).

In an effort to unlawfully frustrate and interfere with Crown Castle's entitlement to install additional facilities to its DAS network in the ROW, the City concocted improper conditions and requirements to allege that Crown Castle was in default of the RUA. The City then used these claims as the basis to assert a default of the RUA (the "Notice") and demand a cure within 45 days (which time has been extended to May 12, 2017). According to the City, if the alleged (and non-existent) defaults were not cured, the RUA would terminate and end the additional rights conferred to Crown Castle in the RUA. This would force Crown Castle to renegotiate those rights with an eye toward imposing prohibitory review processes on Crown Castle's efforts to deploy its equipment in the ROW going forward. (Heimdahl Aff. ¶ 7 and Ex. C).

Specifically, the City alleges that Crown Castle defaulted under the RUA by supposedly (i) failing to review municipal-owned alternatives for siting of Crown Castle's equipment and (ii) allowing third party equipment to be mounted on Crown Castle's installations without the City's consent. (See Notice, Heimdahl Aff. Ex. D). As further discussed below, these contentions are wrong.

Crown Castle is entitled to a temporary restraining order and preliminary injunction preserving the *status quo* and preventing the City from illegally terminating the RUA. A termination would not only create further barriers to entry of the telecommunications services provided by Crown Castle, but also would give the City an excuse to demand that the existing nodes which were installed in 2011 be removed. (Heimdahl Aff. ¶ 5).

The Complaint and the accompanying Affidavit establish a *prima facie* entitlement to this relief. As relates to this motion, the applicable Counts of the Complaint are Counts V (for breach of contract), VI (for breach of the implied covenant of good faith and fair dealing), and Count VII (for declaratory judgment holding that the RUA remains in effect).

Further, as detailed below, Crown Castle has a high likelihood of success on the merits of each of these claims in light of the plain language of the RUA and the parties' past course of dealing confirming their understanding of that plain language.

The relief sought is necessary to prevent irreparable harm. In the event Crown Castle is stripped of its rights under the RUA, including to the narrowly tailored administrative review process for deployment in the ROW as stipulated in the RUA, Crown Castle will be irreparably harmed by the unquantifiable economic losses occasioned by the lack of reliable cellular service (particularly for businesses needing this service). In addition, irreparable harm could occur to members of the public relying on Crown Castle's services, by virtue of the unavailability or

disruption in E911 services are not available or disrupted. (Heimdahl Aff. ¶ 16).

Termination of the RUA, which the City would rely upon to mount more onerous obstacles to Crown Castle's federal and state rights to deploy equipment in the ROW, will adversely impact realization of the important federal policy at issue in this case to make available to all people of the United States rapid, efficient and extensive wireless communication services at reasonable charges, 47 U.S.C. § 151, and will pave the way for the City to erect barriers to entry in the telecommunications market, in violation of § 253 of the Communications Act. Absent injunctive relief, there is no remedy for the City mounting such barriers that would prevent the harm described above. (Heimdahl Aff. ¶ 18).

As far as a balancing of the equities of the parties' positions, the maintenance of the *status quo* will have no adverse effect on the City whatsoever, because it has been operating under the terms of the RUA (with Crown Castle housing third party equipment belonging to its third party wireless carrier customer, with the City's full knowledge) since 2011. Crown Castle cannot move forward with its equipment deployment in the City's ROW at this point because the City has issued its SEQRA Determination and Denial (as defined in the Complaint) of Crown Castle's application, so pending resolution of the issues by this Court, the City will not be harmed by the injunction in any way. By contrast, if injunctive relief is *not* issued, Crown Castle and the thousands of wireless consumers who rely upon the wireless services transmitted over Crown Castle's existing network will be irreparably harmed and the clear federal mandates of the Telecommunications Act will be thwarted. (Heimdahl Aff. ¶¶ 18-19).

On these bases, Crown Castle respectfully seeks an Order by this Court granting emergency temporary and preliminary injunctive relief pursuant to CPLR 6301 enjoining and restraining the City from terminating Crown Castle's rights to and interest in the RUA.

STATEMENT OF FACTS

For a full and complete recitation of the relevant facts on this motion, the Court is respectfully referred to the accompanying Complaint and Affidavit of Peter Heimdahl.

ARGUMENT

I. CROWN CASTLE IS ENTITLED TO INJUNCTIVE RELIEF

The City's alleged breaches of the RUA are wrong. There was no breach because: (1) contrary to the City's claim, Crown Castle considered installing facilities on City-owned poles; and (2) contrary to the City's allegations, the RUA allows Crown Castle to install third-party equipment, such as existing equipment in the DAS network belonging to Crown Castle's current wireless carrier customer. (Heimdahl Aff. ¶¶ 9-10). An injunction will prevent the irreparable harm stemming from an illegal termination of the RUA to the prejudice of Crown Castle, its customers and the public who rely on wireless services, while having no detrimental impact on the City.

A. THE STANDARDS FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION ARE SATISFIED

Crown Castle is entitled to temporary and preliminary injunctive relief pursuant to NY CPLR 6301, which applies in this case to the state law claims at issue on this motion.³ That rule provides:

³ The standards for temporary and preliminary injunctive relief under New York and federal law are essentially the same, except that the federal standard actually requires less of a showing. *See* F.R.C.P. 65(a); *Jackson Dairy, Inc. v. H. P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979) (Second Circuit standard for injunctive relief calls only for showing of "(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief"); *see also* *AIM Int'l Trading LLC v. Valcucine SpA.*, 188 F. Supp. 2d 384, 386 (S.D.N.Y. 2002) (same). Accordingly, satisfaction of the New York standard for injunctive relief which requires a showing of likelihood of success on the merits, irreparable harm, *and* a balancing of the equities necessarily satisfies the federal standard.

[A] preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.

CPLR 6301 also provides that a “temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.” Injunctive relief may be granted within the Court’s discretion where, as here, the moving party demonstrates (a) a likelihood of ultimate success on the merits; (b) irreparable injury absent the granting of the injunctive relief; and (c) that a balancing of the equities weighs in favor of the moving party. *See Gambar Enters., Inc. v. Kelly Servs., Inc.*, 69 A.D.2d 297, 418 N.Y.S.2d 818 (App. Div. 1979); *Picotte Realty, Inc. v. Gallery of Homes, Inc.*, 66 A.D.2d 978, 412 N.Y.S.2d 47 (App. Div. 1978); *Spirt v. Spirt*, 209 A.D.2d 688, 619 N.Y.S.2d 316 (App. Div. 1994); *Moczan v. Moczan*, 135 A.D.2d 692, 692, 522 N.Y.S.2d 591, 592 (App. Div. 1987). All of these prerequisites are met in this action.

“The mere existence of an issue of fact will not itself be grounds for the denial of the motion.” *91-54 Gold Road, LLC v. Cross-Deegan Realty Corp.*, 93 A.D.3d 649, 939 N.Y.S.2d 555 (App. Div. 2012) (citations omitted); *see also Reichman v. Reichman*, 88 A.D.3d 680, 930 N.Y.S.2d 262 (App. Div. 2011). The purpose of preliminary injunctive relief is to preserve the *status quo* until a decision can be reached on the merits; such relief is properly granted where the denial thereof would render a subsequent judgment ineffectual. *Schlosser v. United Presbyterian Home at Syosset*, 56 A.D.2d 615, 391 N.Y.S.2d 880 (App. Div. 1977). That is the case here. A

judicial declaration that the RUA is valid after it has been terminated would render the claim moot and the judgment of no practical effect.

Gambar Enterprises, *supra*, is illustrative. In that case, the defendant threatened to terminate a contract with the plaintiff because of an alleged failure to maintain satisfactory sales performance. In affirming the Supreme Court's temporary and preliminary injunction restraining the defendant from terminating the agreement, the Court found that the plaintiff adequately demonstrated likelihood of success on the merits, noting that "it is enough if the moving party makes a prima facie showing of [its] right to relief," and that "the actual proving of [its] case should be left to the full hearing on the merits." 418 N.Y.S.2d at 824. The court further held that the showing of irreparable harm, grounded in the downstream effects termination of the contract would have on the plaintiff and its business, was also sufficient. *Id.*

The same reasoning applies here, where the downstream sufferers of irreparable harm would be the members of the public who rely, in some cases exclusively, on personal wireless services and benefit from the rapid deployment of same.

i. Crown Castle is Likely to Succeed on The Merits

In the accompanying Complaint and Affidavit submitted herewith, Crown Castle has pleaded three New York state Counts related to the City's specious and unreasonable interpretation of the RUA and threat to terminate Crown Castle's rights and interests: (i) breach of contract, (ii) breach of the implied covenant of good faith and fair dealing inherent in all contracts under New York law and (iii) declarations that Crown Castle has been in full compliance with the RUA at all times, and that the RUA remain in full force and effect. Crown Castle is likely to succeed on each of them.

a. Crown Castle is Likely To Succeed On Its Breach of Contract and Implied Covenant Of Good Faith Claims

Crown Castle's Fifth Count alleges breach of contract relating to the City's onerous review process, beyond what is allowed by the RUA, and the City's advancement of erroneous applications and interpretations of the RUA. Specifically, the City falsely claims that Crown Castle did not consider mounting equipment on City-owned poles, and has taken the legally and factually tenuous position that the equipment deployed cannot be owned by third parties such as Crown Castle's wireless carrier customers.

The Sixth Count alleges that the City breached the implied covenant of good faith and fair dealing by interpreting the RUA in a manner that restricts the installation of third party equipment, including of existing wireless carrier customers, on Crown Castle's DAS infrastructure. This interpretation is not only contrary to the express language of the RUA, but could render the RUA meaningless by prohibiting circumstances where carrier equipment is necessary to the installation and operation of Crown Castle's DAS network. As set forth in greater detail in the accompanying Complaint, it is disingenuous for the City to feign shock at the presence of third party equipment on Crown Castle's infrastructure, particularly given the City's previous interpretation of the RUA which allowed Crown Castle's installation of nine nodes in 2011.

That the City's position on this point is in bad faith is also evidenced by the fact that the ownership of the equipment is irrelevant to any legitimate City concern. As set forth in the Complaint, the City's scope of review under the RUA, as well as under state and federal law, is narrowly limited to such issues as ensuring traffic and pedestrian safety. Whether an antenna that is installed is technically owned by Crown Castle or by its wireless carrier customer has absolutely no bearing on any such inquiry.

New York law recognizes as inherent in all contracts an implied covenant of good faith and fair dealing which, among other things, prohibits a party to a contract from conducting itself in a manner that subverts the primary purpose of the bargained-for exchange at the heart of the contract. *See Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 389 (1995). The implied covenant “embraces a pledge that ‘neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.’” *Id.* Municipal franchise agreements like the RUA are treated as ordinary contracts under New York law. *Teleprompter of Mohawk Valley, Inc. v. Pumilio*, 57 A.D.2d 69, 394 N.Y.S.2d 945, 947 (App. Div. 1977); *see generally Town of Union v. Time Warner Entm't-Advance/Newhouse P'ship*, 52 Misc.3d 426, 429-30, 30 N.Y.S.3d 811 (N.Y. Sup. Ct. 2016) (applying well-settled principles of contract interpretation to determine the proper effective date of several municipal franchise agreements between cable provider and town).

The City’s interpretation of the RUA, prohibiting installation of third party equipment on Crown Castle’s infrastructure, is the essence of bad faith and runs contrary to the RUA’s plain language. Indeed, the RUA expressly contemplates that third parties will locate equipment on Crown Castle’s infrastructure by virtue of its definition of “equipment” and its statement of purposes.

The RUA defines “equipment” as:

[T]he optical repeaters, DWDM, and CWDM multiplexers, antennas, fiber optic cables, wires, and related equipment, whether referred to singly or collectively, to be installed and operated by [Crown Castle] hereunder. Examples of typical Equipment Types and installation configurations are shown in the drawings and photographs attached hereto as Exhibit A and incorporated herein by reference.

(Heimdahl Aff. Ex. B § 1.3). There is no language concerning ownership of the equipment.

Recital A on the first page of the RUA expressly notes that Crown Castle deploys infrastructure in connection with “serving [Crown Castle’s] wireless carrier customers.” (Heimdahl Aff. Ex. B Recital A). As the City is well-aware, equipment may need to be provided by these “wireless carrier customers” in connection with transmitting carrier signals, without which Crown Castle’s DAS infrastructure would be entirely useless (in which event so would the RUA). (Heimdahl Aff. ¶ 13). For the City to now advance an erroneous interpretation disallowing installation of third party equipment is the height of bad faith, breaches the RUA, and undermines the implied covenant of good faith and fair dealing inherent in the RUA under New York law.

The course of dealing also supports Crown Castle’s position. In 2011, Crown Castle was approved for installation of nine nodes which, as the City was well aware, were coupled with Crown Castle’s wireless carrier customer equipment for the purpose of transmitting that customer’s signals. Not once did the City indicate that this installation of third party equipment ran counter to the plain terms of the RUA. Instead, the City complied with its clear obligations under the RUA and, consistent with Crown Castle’s interpretation of the RUA, approved the node installations. (Heimdahl Aff. ¶ 11).

Finally, the City’s claim that Crown Castle breached the RUA by failing to consider mounting equipment on City-owned poles is simply false. (Heimdahl Aff. ¶ 9). Specifically, it cannot be disputed that, as evidenced by Crown Castle’s proposed Plan C proposed, Crown Castle did in fact conduct a review of City-owned sites, and then, at significant time and expense, reengineered the DAS expansion to incorporate a few City owned traffic lights and poles in commercial areas of Rye. (Heimdahl Aff. ¶¶ 8-9 and Ex. D).

Accordingly, Crown Castle has demonstrated that the City has breached its contract and the implied covenant of good faith and fair dealing inherent in all contracts under New York law by virtue of the City's ignoring the actual facts and disregarding the RUA's language and asserting an unreasonable, bad faith claim that the RUA prohibits installation of third party equipment.

**b. Crown Castle Is Likely To Succeed
On Its Declaratory Judgment Claim**

Crown Castle's Seventh Count seeks a declaration that Crown Castle has at all relevant times been in full compliance with the RUA, that the RUA does not restrict Crown Castle from mounting third party equipment in the ROW, that Crown Castle has considered and planned for use of municipal poles where feasible for mounting equipment, and that therefore the RUA remains in full force and effect.

CPLR 3001 provides for "a declaratory judgment...as to the rights and other legal relations of the parties to a justiciable controversy." "To constitute a 'justiciable controversy,' there must be a real dispute between adverse parties, involving substantial legal interests for which a declaration of rights will have some practical effect," and "[a] controversy is said to exist where the plaintiff asserts rights which are actually challenged by the defendant." Chanos v. MADAC, LLC, 74 A.D.3d 1007, 1008, 903 N.Y.S.2d 506, 508 (App. Div. 2010); Vill. of Woodbury v. Brach, 99 A.D.3d 697, 699, 952 N.Y.S.2d 92, 94 (App. Div. 2012) (same).

There certainly is a real dispute between Crown Castle and the City as to Crown Castle's legal rights under the RUA. The City is attempting to improperly strip Crown Castle's rights under the RUA.

Chanos is instructive. In that case, the Appellate Division found a justiciable controversy where the parties disagreed over the width of an easement. The plaintiff claimed it should be no

more than four feet wide and the defendant countered that the easement extended over a 15-foot strip of land. *Id.* The Court found the private property interests at stake to be substantial. Here, Crown Castle's interest in preserving its ability to deploy a DAS network is substantial. The City seeks to terminate the RUA, which helps Crown Castle exercise those rights.

For predominantly the same reasons as set forth above with respect to Crown Castle's likelihood of success on its claim for breach of contract and breach of the implied covenant of good faith and fair dealing, Crown Castle is entitled to a declaration that it has not defaulted under the RUA. That is because (i) Crown Castle did, in fact, conduct a review of City-owned sites and actually reconfigured its plans so as to be able to locate on whatever City facilities were feasible; and (ii) the RUA does not restrict Crown Castle from installing third-party owned equipment on its facilities. (Heimdahl Aff. ¶ 8 and Ex. B).

In light of the above, and to resolve the parties' justiciable dispute over whether the RUA permits installation of third party equipment on Crown Castle's infrastructure, Crown Castle is entitled to a judicial declaration that Crown Castle has been in full compliance with the RUA at all times, that the RUA does not restrict Crown Castle from mounting third party equipment in the ROW, that Crown Castle has considered and planned for use of municipal poles where feasible for mounting equipment, and that therefore the RUA remains in full force and effect.

For these reasons, Crown Castle respectfully submits that it is likely to succeed on its claims under New York State law, and that the temporary and preliminary injunctive relief sought herein should be granted.

ii. Crown Castle And Members Of The Public Face Immediate Irreparable Harm Unless Temporary And Preliminary Injunctive Relief Is Granted, And The Balancing Of Equities Tips Decidedly In Crown Castle's Favor

In the event the Court denies the injunctive relief sought by Crown Castle herein, both Crown Castle and those members of the public who rely upon the wireless services made possible by Crown Castle's installations will be irreparably harmed. On the other hand, granting the injunction and maintaining the *status quo* pending a determination on the merits will in no manner impact the City. Accordingly, the balance of the equities favors Crown Castle.

In the context of injunctive relief, irreparable injury "means any injury for which money damages are insufficient." Klein, Wagner & Morris v. Lawrence A. Klein, P.C., 186 A.D.2d 631, 633, 588 N.Y.S.2d 424, 426 (App. Div. 1992); *see also* American Libraries Ass'n v. Pataki, 969 F. Supp. 160, 167-68 (S.D.N.Y. 1997), *quoting* Sperry Int'l Trade, Inc. v. Government of Israel, 670 F.2d 8, 12 (2d Cir. 1982) ("Irreparable injury means 'the kind of injury for which money cannot compensate'. . . and which is 'neither remote nor speculative, but actual and imminent'").

Based upon the facts as set forth more fully in the accompanying Complaint and Affidavit, termination of the RUA will cause irreparable harm to Crown Castle and members of the public who rely upon the wireless services it facilitates. The City could assert that with the RUA no longer in effect, the existing DAS system located on municipal-owned structures within the ROW would have to come down (although that would expose the City to further liability for impeding Crown Castle's federal and state rights). In that event, there would be a loss of currently provided services, and the proposed DAS system would be further forestalled. (Heimdahl Aff. ¶¶ 15-16). This would result in an indefinite delay, or more likely a complete prohibition of the ability to provide personal wireless services, in violation of the important state

and federal policies at issue in this case which are designed to facilitate the deployment of utility and telecommunications infrastructure in the rights-of way.

Members of the public rely upon the services made possible by Crown Castle's installation of the nodes. Preventing the further provision of such services, will reduce critical wireless coverage and endanger community health and welfare in the process, including mobile access to E911. Critically, in addition to the incalculable public safety impact, monetary damages are insufficient because there is no rational indicator of much business and other revenue will be lost by Crown Castle and those in the community who rely upon the services facilitated by its installations.

Based on the foregoing, and on Crown Castle's showing of likelihood of success on the merits with respect to its claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and declaratory judgment, it is respectfully submitted that Crown Castle is entitled to temporary and preliminary injunctive relief pursuant to CPLR 6301 enjoining the City from terminating Crown Castle's rights to and interest in the RUA.

CONCLUSION


Based upon Crown Castle's showing of likelihood of success on the merits of its Complaint, irreparable harm, and a balancing of the equities, it is respectfully requested that the Court grant Crown's application for emergency temporary and preliminary injunctive relief pursuant to CPLR 6301 enjoining and restraining the City from terminating, or attempting to terminate, Crown Castle's rights to and interest in the RUA prior to a full determination on the merits.

Dated: White Plains, New York
May 12, 2017

**CUDDY &
FEDER LLP**

Attorneys for Plaintiff Crown Castle
445 Hamilton Avenue, 14th Floor
White Plains, New York 10601
(914) 761-1300 Tel.
(914) 761-5372 Fax

By: _____


Andrew P. Schriever (AS 9788)
Christopher B. Fisher (CF 9494)
Conor J. Walline (CW 2586)