

COPIES MAILED

6 / 19 / 18

10

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, SS

SUPERIOR COURT NO.:
1873CV487B

CITY OF NEW BEDFORD,
PLAINTIFF

BRISTOL, SS SUPERIOR COURT
FILED

v.

ABC DISPOSAL SERVICE, INC.,
DEFENDANT

JUN 19 2018

MARC J. SANTOS, ESQ.
CLERK/MAGISTRATE

**ORDER AND MEMORANDUM OF DECISION ON THE
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

The case was before this Court for hearing on the Plaintiff, City of New Bedford's ("City") Motion for Preliminary Injunction seeking this Court to enter an Order compelling the Defendant, ABC Disposal Services, Inc. ("ABC") to perform its contractual obligations for trash and recyclable waste pick up in the City, to refrain from billing the City for a "Monthly Recycling Fee" and to require the Defendant to renew and/or obtain a performance bond in accordance with the contractual terms. After hearing and upon review of all briefs, memoranda, affidavits and controlling law, the Court **DENIES** the Motion for Preliminary Injunction.

Background Facts:

In ruling upon the motion the Court "may accept as true the well pled facts and uncontroverted affidavits" in the submissions. See, Rohm & Haas Elec. Materials, LLC v. Elec. Circuits, 759 F. Supp. 2d 110, 114, n.2 (D. Mass 2010). In this case, the City and ABC entered into a ten (10) year contract on October 1, 2013 by which ABC was required to provide customers with one a week curbside collection service of solid waste and recyclables included in the City of New Bedford curbside recycling program. The contract was for a fixed price and for a term of ten (10) years.

In January 2017, China enacted its “national sword” policy which bans many recyclable materials it traditionally imported ¹ and now requires a lower contamination rate in recyclables². China is the largest importer of US recyclables. Since November 2017, ABC has sent the City a “Monthly Recycling Recovery Fee”, which is not provided for in the contract between the parties. Those fees exceed \$189,000 and are continuing. None of the additional fees have been paid by the City. Since November 2017 the City, through its Chief Financial Officer and ABC have attempted to resolve the issue of the additional fees for the collection and disposal of recyclables to no avail³. Since that time, various correspondence has gone back and forth between the parties addressing the fees. On April 12, 2018, Michael Camara of ABC sent a letter to Mayor Jonathan Mitchell of New Bedford stating “This letter serves as formal notification that ABC... may not be financially able to continue to provide curbside collection Beginning July 1, 2018 without contributions from the City supporting new unanticipated cuts...”. The letter also stated that “ABC... sent this notice in a timely fashion to give... an opportunity to negotiate a mutually beneficial solution...or give you the opportunity to contract with another hauler...”. ⁴ In response, Mayor Mitchell⁵ by writing informed ABC that its failure to comply with contract would be viewed as a breach of the contract.⁶ Thereafter, on May 18,

¹ Since the 1990s, the world has shipped the bulk of its used paper, plastics and metals to China. Nearly one-third of North America’s recyclables were processed in China. See, “The Columbian, “Brunell: China’s sword policy cutting deep into recycling”. January 16, 2018. <http://www.columbian.com> .

² Under the new standards, the threshold for waste and scrap plastics has been reduced to 0.5%.

³ New Bedford sought information regarding ABC’s financials which they aver was never produced.

⁴ See, Exhibit “H” to the Plaintiff’s Motion.

⁵ Along with representatives of Fairhaven, Mattapoisett, Rochester and Plymouth.

⁶ See, Exhibit “I” to Plaintiff’s Motion.

2018 Mr. Blanchard, Director of the the City's Department of Facilities and Fleet Management emailed Michael Camara at ABC relative to comments made at a Plymouth Board of Selectman's meeting by Camera on behalf of ABC. In the email, Blanchard inquired "I heard you tell Plymouth... that you would not continue to pick up their recyclables unless they paid ABC more money. What about New Bedford? Will you continue to collect our recyclables beyond June 30 within the current contract terms?" Camera responded to that email as follows "Yes we will as long as we all agree to continue to work together on a financial solution...". It is those emails upon which the Plaintiff bases their theories of anticipatory repudiation by ABC of the contract and now seek the grant of a Preliminary Injunction.

Analysis:

Despite the characterization of their Motion as one for Preliminary Injunction, what the City is essentially seeking is a mandatory injunction compelling the Defendant, ABC, to take some affirmative act (i.e., continue to perform on the contract). Such mandatory injunctions are disfavored in the law, and courts generally are reluctant to issue mandatory injunctions in doubtful cases or where the alleged injury is capable of compensation in damages or where serious damage is unlikely to result if the order is not granted. See, Automatic Radio Mfg. Co. v. Ford Motor Co., 272 F. Supp. 744, 749 (D. Mass. 1967). Such mandatory injunctions are more appropriate in cases where the "termination of the wrongful conduct involves a restoration of conditions existing before the wrongful conduct

began.” See e.g., Peters v. Archambault, 361 Mass. 91, 92 (1972) (mandatory injunction compelling party to remove structure encroaching on another’s land). Unlike preliminary injunctions, mandatory injunctions, disturb the status quo by affirmatively mandating action by a non-moving party. As a result, the burden is elevated and such motions should only be granted in those “[c]ircumstances when the exigencies of the situation demand such relief.” Mass. Coal. of Citizens with Disabilities v. Civil Defense Agency, 649 F. 2d 71, 76 (1st Cir. 1981).

In this case, a mandatory injunction would be inappropriate as there has been no breach of the contract among the parties. Despite the new billing for a “monthly recycling fee”, the defendant continues to perform services under the contract and there has been no change in the status quo requiring a mandatory injunction.

Additionally, the City’s motion for preliminary injunction fails as it cannot establish a likelihood of success on the merits or irreparable harm. It is well settled that “a preliminary injunction is an extraordinary remedy never awarded as of right”. See, Winter v. Natural Res. Def. Council., Ins. 555 U.S. 7, 24 (2008); Tri-Nel Mgt., Inc. v. Board of Health of Barnstable, 433 Mass. 217, 219 (2001). Rather, to the contrary, the “[s]ignificant remedy of a preliminary injunction should not be granted unless the plaintiffs have made a clear showing of entitlement thereto.” Student No. 9 v. Board of Educ., 440 Mass. 752, 762 (2004). It is within the trial judge’s sound discretion to grant or deny injunctive relief. Lightbulb Imaging, Inc. v. Axsun Technologies Inc., 469 Mass. 181, 194 (2014).

To succeed on a motion for a preliminary injunction, a plaintiff must show “(1) a likelihood of success on the merits; (2) that irreparable harm will result from denial of the injunction; (3) that, in light of the plaintiff’s likelihood of success on the merits, the risk of irreparable harm to the plaintiff outweighs the potential harm to the defendant in granting the injunction. Packaging Indus. Group., Inc. v. Cheney, 380 Mass. 609, 617 (1980). In order to establish a likelihood of success on the merits of the underlying claim, a party must prove “actual or threatened irreparable harm in the absence of injunction; and a lesser degree of irreparable harm to the opposing party from the imposition of an injunction must be established. Wilson v. Commissioner of Transitional Assistance, 441 Mass. 846 (2004). What matters as to each party is not the “raw amount of irreparable harm the party might conceivably suffer, but rather the risk of such harm in light of the party’s chance of success on the merits.” Siemens Bldg. Techs., Inc., v. Division of Capital Asset Mgmt., 439 Mass. 759,762 (2003), quoting Packaging Industries Group, Inc. v. Cheney, 380 Mass. 609, 616 (1980).

A plaintiff is not entitled to preliminary injunction relief where it cannot prove that it is likely to succeed on the merits of its claim. *See, e.g.*, Fordyce v. Town of Hanover, 457 Mass. 248, 265 (2010) (vacating preliminary injunction on this ground); Wilson v. Commissioner of Transitional Assistance, 441 Mass. 846, 858-859 (2004). Success on the merits is the threshold inquiry in determining these motions and, it is clear from the record that the City cannot meet this prerequisite.

In this case, the Plaintiff's motion for a preliminary injunction must fail as it cannot establish a likelihood of success on the merits of its action against ABC. Plaintiff's Complaint avers a claim of anticipatory breach of contract by ABC predicated upon statements in electronic mail correspondences and those made at other meetings which the City construes as evidence of ABC's anticipatory breach of the waste and recyclable contract which is the subject of this suit.

In support of this position, the City relies on the statements of Michael Camara, Director of ABC Disposal Services, Inc., in a letter dated April 12, 2018 to Mayor Jonathan Mitchell of New Bedford in which he stated: "This letter serves as formal notification that ABC... may not be financially able to continue to provide curbside collection Beginning July 1, 2018 without contributions from the City supporting new unanticipated costs...". The letter also stated that "ABC... sent this notice in a timely fashion to give... an opportunity to negotiate a mutually beneficial solution...or give you the opportunity to contract with another hauler...".⁷ In response, Mayor Mitchell⁸ informed ABC that its failure to comply with contract would be viewed as a breach of the contract.⁹ Thereafter, on May 18, 2018 Mr. Blanchard, Director of the City's Department of Facilities and Fleet Management emailed Michael Camara at ABC relative to comments made at a Plymouth Board of Selectman's meeting by Camera on behalf of ABC. In the email, Blanchard inquired "I heard you tell Plymouth... that you would

⁷ See, Exhibit "H" to the Plaintiff's Motion.

⁸ Along with representatives of Fairhaven, Mattapoisett, Rochester and Plymouth.

⁹ See, Exhibit "I" to Plaintiff's Motion.

not continue to pick up their recyclables unless they paid ABC more money. What about New Bedford? Will you continue to collect our recyclables beyond June 30 within the current contract terms?" Camera responded to that email as follows: "Yes we will as long as we all agree to continue to work together on a financial solution...". The court finds that those statements, while elucidating some uncertainty in the performance of services are insufficient to establish an anticipatory breach¹⁰ (repudiation) of the contract.

It is well settled in Massachusetts that in order to constitute a repudiation, a party's language must be sufficiently unequivocal to be reasonably interpreted to mean that the party will not or cannot perform. See, Bucciero v. Drinkwater, 13 Mass. App. Ct. 551, 555 (1982) (holding repudiation language must be clear and unequivocal with respect to the entire performance of the contract). Mere expression of doubt as to his willingness or ability to perform is not enough to constitute a repudiation. See, Thermo Electron Corp. v. Schiavone Construction Company, 958 N.E.2d 1158, 1164 (1st Cir. 1992). While words or conduct may be sufficient to manifest an intention to repudiate a contract, those words and/or conduct must be "definite, unequivocal and absolute. See, Restatement (Second) of Contracts sec. 250(1979). In this case, the language relied upon by the Plaintiff to establish an anticipatory breach fails to totally meet this test. Here, the City cannot establish that the statements made by Mr. Camera were of such a "definite and unequivocal manifestation of intent" on the part of ABC to repudiate

¹⁰ The terms "anticipatory breach" and "repudiation" are used interchangeably.

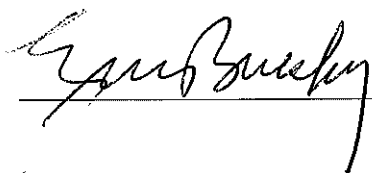
the contract and cease performance of contracted services. See, Thermo Electron Corp v. Schiavone Construction Co., 958 N.E. 2d 1158, 1164 (1st Cir. 1992); 4 **Corbin, Corbin on Contracts** sec. 973 (1957).

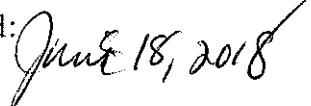
The court finds that Camera's words while they are suggestive of a possible difficulty of ABC in performance, those words in no way assert a firm conviction or intent to cease performing services under the contract necessary for a finding of anticipatory repudiation of the contract. Alternatively, even were the Court to find that the initial statements of Camera rose to the level of "clear and unequivocal" manifestation of ABC's intent not to perform under the contract, Camera retracted that rescinded that repudiation in his May 21, 2018 email to Blanchard. It is well settled that until a repudiating party's next performance is due, the repudiating party can retract the repudiation, unless...the aggrieved party has ...materially changed the aggrieved party's position or otherwise indicated that it considers the repudiation final." See, M.G.L. c. 106, sec. 2A-403(1).

The Court also finds that the Defendant's meritorious defenses under the contract counterbalance the Plaintiff's claims and therefore the Plaintiff's likelihood of success on the merits of the action is not clear. For example, section 12.02 of the contract (Uncontrollable Circumstances) operates to excuse ABC's performance under the contract. While the terminology is not defined in the contract, Webster's Dictionary 2018 defines "uncontrollable" as "incapable of being controlled: ungovernable". Interpreting the contract term, "uncontrollable"

by its plain meaning of “incapable of being controlled, circumstances”, it is clear that ABC has a colorable defense to this action under that provision. As such, the Plaintiff cannot establish, at this juncture, a likelihood of success on the merits of its action sufficient to allow grant of a preliminary injuncton.

Finally, the Court also notes that ABC continues to perform under the contract and there has been no breach of the contract. Therefore, the City’s Motion is premature given that this Court has found there is no anticipatory breach of the contract by ABC¹¹. Wherefore, the City’s Motion for Preliminary Injunction is DENIED¹²¹³.

 _____, J.

Dated: 

¹¹ To the extent that the City wants to avers a breach due to ABC’s failure to receive a performance bond, that bond is not due until July 1, 2018 and counsel for ABC stated at hearing that it has been applied for and ABC believes it will be received prior to the July 1, 2018 date. So, as to the bond, there is no breach and for the reasons set forth, this Court finds no anticipatory breach in that counsel confirmed that ABC has performed efforts to obtain the bond.

¹² Should however, ABC later breach the contract, the City has a remedy for damages for breach by non-performance against ABC. To the extent that the City has claims against ABC for the additional contract fees, the “monthly recycling fee” which it has not yet paid, those claims do not rise to the level sufficient to grant a preliminary injunction.

¹³ As the Court has found sufficient grounds to deny the preliminary injunction, the Court does not address the issues of commercial impossibility, frustration of purpose.