

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT T. HEALY, et al. : CIVIL ACTION
: :
v. : :
: :
COMCAST OF SOUTHEAST PENNSYLVANIA, :
INC. : NO. 03-5773

MEMORANDUM

Bartle, J.

March , 2004

This action involves a dispute between Robert and William Healy, who are the owners of two apartment complexes in Falls Township, Bucks County, Pennsylvania, and Comcast of Southeast Pennsylvania, Inc. ("Comcast").¹ The owners claim the right to terminate the cable television services provided by Comcast to their tenants and to remove the so-called home run wiring over which Comcast transmits its service into the apartments. The owners in their complaint and Comcast in its counterclaim seek a declaration of their rights under the Federal Communications Act, 47 U.S.C. § 541, et seq., and a related regulation, 47 C.F.R. § 76.804(a)(1), as well as under the Pennsylvania Landlord and Tenant Act, 68 Pa. Stat. Ann. § 250.504-B, et seq. Comcast also requests injunctive relief.

1. Comcast Cable Communications, Inc. was erroneously named as the defendant. By agreement of the parties at the trial, Comcast of Southeast Pennsylvania, Inc. was substituted in its place.

This action was tried without a jury. Our findings of fact and conclusions of law follow.

It is undisputed that at all relevant times, the plaintiffs have owned two apartment complexes in Falls Township known as the Commons at Fallsington and Falls Creek Village. Comcast has supplied cable television service to the apartments for a number of years over what is known as home run wiring owned by Comcast. Home run wiring is defined as "[t]he wiring from the demarcation point to the point at which the [cable operator's] wiring becomes devoted to an individual subscriber or individual loop." 47 C.F.R. § 76.800. The plaintiffs have also installed parallel home run wiring at their two properties for use by Viking Communications, Inc. ("Viking"), a competing cable television service that they own. The present dispute had its genesis when Viking Associates,² which manages properties owned by the Healys, sent Comcast two similar letters on May 13, 2003, terminating Comcast's services at the Commons at Fallsington and at Falls Creek Village. The letter concerning the Commons at Fallsington read:

As you know Comcast does not have a contract to serve the above referenced property, accordingly your services to the Commons at Fallsington are hereby terminated effective August 10, 2003. As a result your access to the premises will also terminate on that date.

2. Viking Associates is a real estate management company of which plaintiffs Robert and William Healy are shareholders.

Should you wish to terminate sooner, please let me know.³

On June 13, 2003, Edward Pardini, Regional Vice President of Comcast, met with Edward Nepa, Chief Operations Officer of Viking, to discuss the May 13 letters and other suits that were pending between Comcast and Viking. They made an oral agreement "not to raise new legal issues or challenges within [pending] cases, and not to file any new legal actions" for the time being in an attempt to mollify the escalating conflict between the two companies. On July 25, 2003, the parties entered into a Standstill Agreement which stayed all pending matters between Comcast and Viking until October 8, 2003. Included in the Standstill Agreement were the pending matters that were the subject of the May 13 termination letters. On November 3, 2003, Comcast sent plaintiffs a "Notice of Intention to Provide Cable Television Service Pursuant to the Tenants' Rights to Cable Television Act" for each of the properties and attached requests of tenants for continued Comcast cable service.

Plaintiffs contend that Comcast, after receiving the May 13, 2003 letters, failed to take certain steps within the time periods enumerated in the Federal Communications Commission ("FCC") Regulation at 47 C.F.R. § 76.804(a)(1). According to plaintiffs, Comcast has now abandoned its home run wiring and has

3. The body of the similar letter to Falls Creek Village mistakenly stated that Comcast's "services to the Commons at Fallsington" are being terminated. The "Re:" line, however, identified Falls Creek Village and its proper address.

no right to continue to provide service to the tenants at the Commons at Fallsington and Falls Creek Village. Comcast concedes that it has not met the time requirements set forth in the above regulation but argues that it does not apply.

For present purposes, the key language of § 76.804(a)(1) is found in its first sentence, which reads:

Where an MVPD⁴ [cable television operator] owns the home run wiring in an MDU⁵ and does not (or will not at the conclusion of the notice period) have a legally enforceable right to remain on the premises against the wishes of the MDU owner, the MDU owner may give the MVPD a minimum of 90 days' written notice that its access to the entire building will be terminated to invoke the procedures in this section.

47 C.F.R. § 76.804(a)(1) (emphasis added). The FCC promulgated this regulation pursuant to its authority under the Federal Communications Act, 47 U.S.C. § 544. In a 1997 report, the FCC explained:

the procedural mechanisms we are adopting will apply only where the incumbent provider no longer has an enforceable legal right to maintain its home run wiring on the premises against the will of the MDU owner. These procedures will not apply where the incumbent provider has a contractual, statutory or common law right to maintain its home run wiring on the property. We also reiterate

4. As defined in 47 C.F.R. § 76.800(c), an "MVPD" is "[a] multichannel video programming distributor, as that term is defined in Section 602(13) of the Communications Act, 47 U.S.C. 522(13)." For simplicity's sake, we will refer to the MVPD as a cable television operator.

5. As defined in 47 C.F.R. § 76.800(a), an "MDU" is "[a] multiple dwelling unit building (e.g., an apartment building, condominium building or cooperative)."

that we are not preempting any rights the incumbent provider may have under state law. In the building-by-building context, the procedures will not apply where the incumbent provider has a legally enforceable right to maintain its home run wiring on the premises, even against the MDU owner's wishes, and to prevent any third party from using the wiring.

FCC Report and Order and Second Further Notice of Proposed Rulemaking In the Matter of Telecommunications Services Inside Wiring, CS Docket No. 95-184, MM Docket No. 92-260, 13 FCC Rcd. 3659, *3693 ¶ 69, 1997 WL 644031 (Oct. 17, 1997) (emphasis added).

It is Comcast's position that it has a "legally enforceable right to remain on the premises against the wishes of the MDU owner." Comcast relies on two 1997 agreements between plaintiffs and Suburban Cable TV Co., Inc. ("Suburban"), one of which is in the form of a stipulation and court order,⁶ as well as on a 2002 franchise agreement between it and Falls Township authorizing it to provide cable service within the Township's boundaries. In addition, Comcast contends it has a legally

6. The 1997 "Stipulation and Order and Agreement of Settlement and Release" with respect to the Commons at Fallsington resolved a lawsuit brought by Suburban against the plaintiffs here for injunctive relief and declaratory judgment. Suburban Cable TV Co. Inc. v. Robert T. Healy, et al., Pennsylvania Court of Common Pleas, Bucks County, No. 97001596-17-5 (Apr. 28, 1997). The Bucks County lawsuit came about as a result of a previous attempt of plaintiffs here to oust Suburban from their apartment buildings. Although there was no lawsuit in connection with the wiring at Falls Creek Village, a similar 1997 agreement was struck between Suburban and the plaintiffs within days of the agreement concerning the Commons at Fallsington. We will refer to both documents collectively as "the 1997 agreements."

enforceable right under the Tenants' Rights to Cable Television Act, 68 Pa. Stat. Ann. § 250.501-B, et seq., which is part of the Pennsylvania Landlord and Tenant Act. If Comcast is correct, the federal regulation and its time deadlines on which plaintiffs rely are not applicable. Not surprisingly, plaintiffs maintain that the evidence presented at this trial and the law preclude such a result.

We first turn to the question of whether the 1997 agreement between plaintiffs and Suburban and the 1997 agreement incorporated in a court order operate to the benefit of Comcast. We find that they do. Suburban was a wholly-owned subsidiary of Lenfest Communications, Inc. until the latter merged with Comcast Corporation in November, 1999. As a result of the merger, Suburban became a subsidiary of Comcast Corporation. In September, 2000, Suburban changed its name, first to Comcast Cablevision of Southeast Pennsylvania, Inc., and then in August, 2003, to Comcast of Southeast Pennsylvania, Inc. Thus, Comcast of Southeast Pennsylvania, Inc., the defendant here, is simply Suburban with a new name.

The 1997 agreements between Suburban and the plaintiffs make it abundantly clear not only that Suburban owns the wiring which Suburban or Suburban's predecessor, Oxford Valley Cablevision Inc. put in place at Falls Creek Village and the Commons at Fallsington but also that Suburban has the right to use it. The 1997 agreement in the form of a stipulation and order by the state court recognized that Suburban was "the

rightful owner" of the wire which Suburban or its predecessor had installed at the Commons at Fallsington and which it "uses or has used to provide cable television service to the tenants."

Suburban Cable TV Co. v. Robert T. Healy, et al., Court of Common Pleas, Bucks County, No. 97001596-17-15, Stipulation and Order and Agreement of Settlement and Release, *4 ¶ 11 (Apr. 28, 1997). It also "permanently enjoined [the Healys] from removing, cutting, using or otherwise tampering with the wire, cable, and equipment ... Suburban Cable uses or has used to provide cable television service to the occupants of the rental units in the Commons at Fallsington." Id. at *4 ¶ 12. The 1997 agreement pertaining to Falls Creek Village contained analogous provisions. The May 13, 2003 letters seeking to terminate Comcast's access to the premises can only be read as attempting to contravene the 1997 agreements. Indeed, the letter related to the Commons at Fallsington is nothing less than a violation of the injunction entered by the Court of Common Pleas of Bucks County.

Plaintiffs next contend that even if Comcast has a valid right to ownership and use of the wiring by virtue of the 1997 agreements, Comcast nonetheless has no legally enforceable right to remain on the properties because Comcast does not have a valid franchise from Falls Township to provide cable television service. With limited exceptions that have not been asserted here, a cable operator cannot provide cable service in a municipality without a franchise. See 47 U.S.C. § 541(b). Suburban's franchise agreement with Falls Township expired on

February 10, 2000 and Comcast's current franchise agreement with Falls Township was not signed and effective until January 22, 2002. Plaintiffs argue that this interval rendered the agreements between Suburban and the plaintiffs ineffective. During this time frame, however, Comcast continued to pay franchise fees to the Township and provide cable television service to tenants at the Commons at Fallsington and Falls Creek Village while the parties negotiated the renewal of the franchise. The Township did nothing inconsistent with the continued existence of a franchise. Moreover, the plaintiffs did nothing inconsistent with the continued validity of the franchise or the 1997 agreements. Although the record is devoid of any written extension of the franchise agreement from February 10, 2000 until January 22, 2002, the conduct of Comcast, Falls Township, and the plaintiffs during this period establish that all three parties maintained their relationships as if nothing had changed. "When [the] parties continued to act under the contract, their tacit agreement to be bound by it is as strong as any express renewal could make it." Good Intent Co. v. Hartzell, 22 Pa. 277, 1853 WL 6452, *10 (Pa. 1853). See also EFCO Importers v. Halsobrunn, 500 F. Supp. 152, 157 (E.D. Pa. 1980).

Plaintiffs also attack the current franchise agreement between Comcast and Falls Township on the basis that there is no evidence that it received the requisite approval from the Township Board of Supervisors. Section I.C of the franchise agreement itself states that it "shall become effective upon

signing by the Board of Supervisors and the Franchisee." The copy of the agreement before us, which provides a ten-year non-exclusive franchise, is signed by the Township Manager and by a representative of Comcast, the franchisee. The Supreme Court of Pennsylvania "has often held that there is a legal presumption that municipal officers are presumed to have properly performed their duties and to have taken the steps necessary to give validity to their official acts." Mamallis v. Borough of Millbourne, 164 A.2d 209, 211 (Pa. 1960) (internal punctuation omitted). See also Kennedy v. Upper Milford Twp. Zoning Hearing Bd., 834 A.2d 1104, 1123 (Pa. 2003). The plaintiffs have presented no evidence that the Board of Supervisors did not approve the agreement and did not authorize the Township Manager to sign on its behalf. Nor have plaintiffs shown that the Township has dishonored the agreement on this or any other ground or that the agreement is not authentic. See Mamallis, 164 A.2d at 211. Thus, based on the presumption under Pennsylvania law, we find the 2002 franchise agreement to be valid and effective.⁷ See id.

7. The copy of the agreement introduced into evidence also contains a signature line for the Township Solicitor. Although the Township Solicitor's signature is absent from the copy, the wording above the signature line shows that that signature is required to approve the agreement only "as to form and correctness" and is not required for approval of the agreement itself. We find that the Township Solicitor's approval or lack thereof on the document itself is not probative of whether Comcast held a franchise in Falls Township as of January 22, 2002.

In addition to its legally enforceable contractual rights, Comcast contends that the federal regulation § 76.804(a)(1) is not applicable because it also has the statutory right to remain on the premises and provide cable television service under the Tenants' Rights to Cable Television Act, which, as noted above, is part of the Pennsylvania Landlord and Tenant Act. 68 Pa. Stat. Ann. § 250.501-B, et seq. Pennsylvania is known as a "mandatory access" state because it gives a cable television operator mandatory access to an apartment building or complex upon the request of a tenant. See FCC First Order on Reconsideration and Second Report and Order In the Matter of Telecommunications Services Inside Wiring, CS Docket No. 95-184, MM Docket No. 92-260 (January 29, 2003), found at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-9A1.pdf; 68 Pa. Stat. Ann. § 250.501-B, et seq.; Surnamer v. RCN Telecom Servs. of Pa., Inc., No. Civ.A. 98-5077, 1999 WL 171455, *7 (E.D. Pa. March 26, 1997); Weinberg v. Comcast Cablevision of Philadelphia, L.P., 759 A.2d 395, 399 (Pa. Super. 2000); Adelphia Cablevision Assocs. of Radnor, L.P. v. Univ. City Housing, 755 A.2d 703, 712 (Pa. Super. 2000).

When enacting the Tenants' Rights to Cable Television Act, the Pennsylvania General Assembly made the following findings:

- (1) Cable television has become an important medium of public communication, education and entertainment.
- (2) It is in the public interest to assure apartment residents and other tenants of

leased residential dwellings access to cable television service of a quality and cost comparable to service available to residents living in personally owned dwellings.

(3) It is in the public interest to afford apartment residents and other tenants of leased residential dwellings the opportunity to obtain cable television service of their choice and to prevent landlords from treating such residents and tenants as a captive market for the sale of television services selected or provided by the landlord.

68 Pa. Stat. Ann. § 250.502-B, Historical and Statutory Notes.

Upon a tenant's request and the cable operator's decision to provide service, the operator must notify the landlord within ten days after its decision. The notification triggers a forty-five day period for negotiation between the operator and the landlord. 68 Pa. Stat. Ann. § 250.504-B. If there is no agreement between the landlord and the operator during this period, the matter proceeds to arbitration. "The right of a tenant to receive [cable television] service from an operator of his choice may not be delayed beyond the forty-five day period contained in the original notice or otherwise impaired unless the matter proceeds to arbitration." Id. The arbitrator's decision, however, is limited to the issues of just compensation for loss of value of the property resulting from permanent installation of cable television system facilities and reasonableness of the terms of the proposal involving the work to be performed. Weinberg, 759 A.2d at 402; 68 Pa. Stat. Ann. § 250.506-B(b). Once a tenant requests cable television service, the cable operator has the right to provide service even over the

objection of the property owner. See 68 Pa. Stat. Ann. § 250.501-B, et seq. Thus, the negotiation period and arbitration process under the Tenants' Rights to Cable Television Act are not to bargain over or decide whether a cable operator may have access to the property, but only concern matters of compensation and how access will be effectuated. See Weinberg, 759 A.2d at 402. Significantly, the Act states, "the operator shall retain ownership of all wiring and equipment used in any installation or upgrade of a [cable television] system in multiple dwelling premises." 68 Pa. Stat. Ann. § 250.503-B.

Since the May 13, 2003 termination letters were sent, a number of tenants at the Commons at Fallsington and Falls Creek Village have requested that Comcast continue to provide cable services. On November 3, 2003, Comcast sent the plaintiffs a "Notice of Intention to Provide Cable Television Service Pursuant to the Tenants' Rights to Cable Television Act" for each of the properties, in order to trigger, if necessary, the negotiation period under the Act. See 68 Pa. Stat. Ann. § 250.504-B. Under the circumstances, Comcast has the right pursuant to the Act to provide cable to tenants at Commons at Fallsington and Falls Creek Village, despite the owners' opposition.

Comcast, of course, is already present on both properties as a result of the 1997 agreements with the landlord. Even assuming that for some reason an incumbent cable television operator must negotiate or renegotiate with a landlord, we do not view the Act as authorizing the landlord to terminate that

operator's services during any negotiation period or subsequent arbitration. See 68 Pa. Stat. Ann. § 250.501-B, et seq. Allowing the building owner to require an incumbent operator to cut off service or allowing the building owner to rip out the operator's home run wiring during this short hiatus, absent some compelling ground not present here, would be an unreasonable and absurd interpretation of the Tenants' Rights to Cable Television Act. See 1 Pa. Cons. Stat. Ann. § 1922(1). The wiring and equipment under the Act belong to the operator. 68 Pa. Stat. Ann. § 250,503-B. Moreover, as we have previously noted, the operator has an absolute right to provide service at the request of the tenant. The only issues for resolution are compensation and the manner of access. We must not forget that the Act seeks to "afford apartment residents and other tenants of leased residential dwellings the opportunity to obtain cable television service of their choice and to prevent landlords from treating such residents and tenants as a captive market for the sale of television services selected or provided by the landlord." 68 Pa. Stat. Ann. § 250.502-B, Historical and Statutory Notes.

Accordingly, we will enter a declaratory judgment in favor of Comcast and against the plaintiffs. We will also enjoin plaintiffs and their agents, successors, and assigns from displacing Comcast from the premises at the Commons at Fallsington and Falls Creek Village or from interfering with Comcast's home run wiring or service at those locations.

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 COMCAST OF SOUTHEAST PENNSYLVANIA, :
 INC. : NO. 03-5773

ORDER

AND NOW, on this day of March, 2004, based on
the foregoing findings of fact and conclusions of law, it is
hereby ORDERED that:

(1) judgment is entered in favor of defendant Comcast
of Southeast Pennsylvania, Inc. and against plaintiffs Robert T.
Healy and William J. Healy, as co-partners t/a "Falls Creek
Village" and "Commons at Fallsington" on plaintiffs' complaint
for declaratory relief; and

(2) judgment is entered in favor of the counterclaim
plaintiff Comcast of Southeast Pennsylvania, Inc. ("Comcast") and
against counterclaim defendants Robert T. Healy and William J.
Heal, as co-partners t/a "Falls Creek Village" and "Commons at
Fallsington" declaring that:

(a) Comcast owns and has the right to use the
home run wiring installed by Comcast or its predecessor
at the Commons at Fallsington and Falls Creek Village;
and

(b) Comcast is entitled to access to the Commons at Fallsington and Falls Creek Village to provide cable television service to the tenants requesting service;

(3) the plaintiffs Robert T. Healy and William J. Healy, as co-partners t/a "Falls Creek Village" and "Commons at Fallsington", their agents, successors, and assigns are enjoined from preventing Comcast from entering the premises at the Commons at Fallsington and Falls Creek Village for the purposes of constructing, reconstructing, installing, servicing, or repairing its cable television system facilities or maintaining cable television services for the tenants requesting those services.

BY THE COURT:

J.