

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT DEPT.

CIVIL ACTION NO. MICV2003-2512

CROWN CASTLE ATLANTIC LLC)
)
Plaintiff)
)
vs.)
)
GUY A. MCKAY AND)
SHERYLL MCKAY)
)
Defendants)
)

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT**

Plaintiff Crown Castle Atlantic LLC ("Crown") respectfully submits the following Memorandum of Law in Support of its Motion for Summary Judgment against Defendants Guy A. and Sheryll McKay ("McKays") on Count I of the Complaint dated June 13, 2003 and filed with this Court on the same date pursuant to MASS. R. CIV. P. 56.

INTRODUCTION

Crown commenced this action after the McKays materially breached the terms, covenants and conditions of a Land Lease Agreement dated August 12, 1996 ("Lease") between the McKays, as Lessor, and Crown as successor by assignment to Cellco Partnership d/b/a Bell Atlantic Mobile, as Lessee. The McKays have prevented Crown from upgrading the existing underground landline telephone service to the previously constructed and operating wireless telecommunications tower ("Tower") at property leased by Crown at 982-988 Main Street, Acton, Massachusetts ("Property"). The Lease permits Crown, as successor by assignment, to upgrade the underground landline telephone service at the Tower at its discretion. Since March of 2000, the McKays have prevented Crown from upgrading the landline telephone service by

their persistent refusal, in material breach of the Lease, to execute a standard Easement Agreement for Verizon New England, Inc. (the landline telephone company) ("Verizon Communications"), which would permit Crown to upgrade the existing underground landline telephone service to meet the critical operational needs of Crown's wireless service subtenants/licensees on the Tower.

Crown's has six (6) Federal Communications Commission ("FCC") licensed Commercial Mobile Radio Services ("CMRS") provider subtenants/licensees on the Tower, which have installed wireless telecommunications equipment for the transmission of wireless telephone and/or data signals through the air. Crown's subtenant/licensees have demanded that Crown upgrade the existing underground landline telephone service to the Tower by installing fiber optic telephone lines at the Property. The upgrade necessitates the installation of a fiber optic telephone line in an existing conduit under the existing Right-of-Way granted in the Lease and the installation of an approximately 41" Long x 36" Wide x 54" deep Cabinet within Crown's leased Property.

Verizon Communications (the landline phone company formerly known as Bell Atlantic ("BA")) and its predecessor telephone companies require that landowners execute their standard Easement Agreement before they will perform the installation of a telephone line ("Easement Agreement"). By its terms, the Easement Agreement is coterminous with the requirement to serve the Tower. The McKays have refused, and continue to refuse, to execute the Easement Agreement of Verizon Communications and its predecessor telephone companies for the upgrade of telephone lines for the Property. This refusal constitutes a material breach of the Lease, and has prevented Crown's subtenants/licensees from effectively meeting the increasing operational coverage, performance and capacity needs of their customers including, but not limited to, reliable emergency service calls being broadcast and received by their equipment on the Tower, including 911 calls.

Crown respectfully submits that the McKays' refusal to permit the upgrade to the existing underground telephone lines constitutes a material breach of their obligations under the Lease, and asks that the Court enter summary judgment against the defendants on Count I of the Complaint. Crown respectfully requests that the Court grant it declaratory relief stating that Crown has the right, now and in the future, to install telephone lines in accordance with the terms, covenants and conditions of the Lease and make improvements on the Property. Crown also asks the Court to grant it specific performance under the Lease by a permanent injunction preventing the McKays from interfering with Crown's right to utilize its easement for the aforesaid purposes, and requiring the McKays to execute the Easement Agreement to facilitate the installation of telephone lines.

STATEMENT OF FACTS¹

Crown is a Delaware limited liability company with a mailing address for its Northeast Area-New England office at 46 Broadway, Albany, NY 12204. (Barbadora Aff. ¶ 4.) Crown is a full-service tower company that leases, monitors and maintains wireless telecommunications towers and is authorized to conduct business in the Commonwealth of Massachusetts. (*Id.* ¶ 5.) Crown provides space on its telecommunications towers for the leading FCC-licensed Commercial Mobile Radio Service providers such as: AT&T Wireless, Verizon Wireless, Nextel Communications, Cingular Wireless, T Mobile and Sprint PCS. (*Id.* ¶ 6.)

A. Lease Between the McKays and Bell Atlantic NYNEX Mobile

On or about August 12, 1996, the McKays entered into a binding and enforceable Lease with Crown's predecessor-in-interest, Cellco Partnership d/b/a Bell Atlantic NYNEX Mobile ("BANM"). (Duval Aff. ¶ 6, Ex. 4; Def.'s Answer ¶ 4.) The McKays, as Lessors, agreed to lease the Property – a sixty (60) foot by sixty (60) foot parcel of their land at 982-988 Main

¹ The facts recited herein are taken from the sworn Affidavits of Earl W. Duval and Jeffrey Barbadora and from the exhibits submitted therewith.

Street in North Acton, Massachusetts – to Crown’s predecessor-in-interest, as Lessee, for the purpose of “constructing, maintaining, and operating a communications facility and uses incidental thereto together with one (1) antenna structure and all necessary connecting appurtenances.” (Duval Aff. ¶ 7, Ex. 4; Def.’s Answer ¶ 5.) Crown’s predecessor-in-interest commenced construction of the communications tower facility on or about March of 1997 and completed construction on or about June, 1997. (Barbadora Aff. ¶ 16.)

In the Lease, the McKays granted its Lessee:

the non-exclusive right for ingress and egress, seven (7) days a week twenty-four (24) hours a day, on foot or motor vehicle, including trucks, **and for installation and maintenance of underground utility wires, cables, conduits, and pipes under, or along a fifteen (15’) foot wide right-of-way extending from the nearest public right-of-way, Main Street, to the demised premises,**... (“Right-of-Way”) (emphasis added).

[i]n the event any public utility is unable to use the aforementioned right-of-way, the Lessor hereby agrees to grant a substitute right-of-way either to the Lessee or to the public utility at no cost to the Lessee. (emphasis added).

(Duval Aff. ¶ 8, Ex. 4; Def.’s Answer ¶ 7.) The Lease further states that the “installation of all improvements shall be at the discretion and option of the Lessee.” (Duval Aff. ¶ 7, Ex. 4; Def.’s Answer ¶ 8.)

On November 10, 1997, the McKays and BANM executed a binding and enforceable First Amendment to the Lease (“First Amendment”). (Duval Aff. ¶ 10, Ex. 5; Def.’s Answer ¶ 13.) The First Amendment expressly provides that the Lessee has the right to sublet any portion of the Property without the consent of the McKays to any third party. (Duval Aff. ¶ 11, Ex. 5.)

B. Connection With Landline Public Telephone Network

To allow a CMRS provider to adequately service its customers’ needs, a wireless service carrier is required to connect to the traditional landline public telephone network. (Barbadora Aff. ¶ 10.) This is accomplished by the installation of a traditional landline telephone cable that directs the wireless call through a Mobile Telephone Switching Office (“MTSO”), which is a central computer that connects wireless phone calls to the public telephone network. (*Id.*) The

ability to connect to the traditional landline telephone network is essential to the effective operation by a CMRS provider of a wireless telecommunications system. (Id.)

To provide for the necessary connection to the traditional landline telephone network, Crown's predecessor-in-interest, BANM, contracted with Mirra Construction to install the existing underground conduit and New England Telephone Company ("NETC") (a landline telephone company), installed its copper wire telephone line through the underground conduit running under the Right-of-Way from Main Street to the Property. (Id. ¶ 16.) Mirra Construction installed the underground conduit running under the Right-of-Way from Main Street across the Property to the communications tower facility. (Id.) NETC installed the telephone line in the underground conduit running under the Right-of-Way from Main Street across the Property to the Tower without first obtaining from the McKays its standard Easement Agreement. (Id.) BANM, by and through its contractor, NETC, performed the installation in the location on the Property requested by the McKays. (Id.)

C. Assignment of Lease to Crown

By letter dated January 8, 1999 from Attorney Michael S. Giaimo of Robinson & Cole LLP, legal counsel for Bell Atlantic Mobile ("BAM"), the McKays were notified of BAM's formation of a joint venture with Crown Castle International Corp. and the intent to assign BAM's interest in the Lease to the joint venture company, Crown. (Barbadora Aff. ¶ 17, Ex. 1; Def.'s Answer ¶ 31.) The McKays were requested to accept, and agree to, the proposed assignment. (Id.) The McKays consented to the assignment of the Lease to Crown by signing a letter from BAM dated January 8, 1999. (Barbadora Aff. ¶ 18, Ex. 1; Def.'s Answer ¶ 32.) On or about March 31, 1999, BAM assigned its interest in the Lease and corresponding subleases to Crown as evidenced by the Memorandum of Assignment. (Barbadora Aff. ¶ 19, Ex. 3; Def.'s Answer ¶ 33.)

D. Crown's Subtenants/Licensees

By such described assignment, Crown, as sublessor, has an existing sublease/license for tower space and ground space within the Property with: Omnipoint Communications MB Operations, Inc. n/k/a T-Mobile ("T-Mobile"); Nextel Communications of the Mid-Atlantic, Inc., ("Nextel"); Southwestern Bell Mobile Systems, Inc. d/b/a Cellular One, n/k/a Cingular Wireless ("Cingular"); Cellco Partnership d/b/a Verizon Wireless ("Verizon Wireless"); and Sprint Spectrum, L.P., ("Sprint PCS"). (Barbadora Aff. ¶¶ 20, 21, 23-25.) Crown has an existing sublease/license agreement for tower space only with AT&T Wireless ("AT&T Wireless"). (Id. ¶ 22.) The subtenants/licensees make their payments directly to the McKays. (Id. ¶¶ 21-25.) (T-Mobile, Nextel, Cingular, AT&T Wireless, Verizon Wireless and Sprint PCS are collectively referred to herein as "Subtenants").

On or about February 2000, the Subtenants requested that Crown upgrade the existing underground landline telephone lines servicing the Tower with fiber optic telephone lines. (Id. ¶ 28.) The Tower is currently serviced by a copper wire telephone line that had been installed in an underground conduit from Main Street to a demarcation point within the wireless telecommunications compound. (Id. ¶ 10.) The existing copper wire telephone line is subject to limitations in the amount and type of voice and/or data that may be transmitted by the CMRS provider's wireless network to the traditional landline public telephone network. (Id.)

E. Requirement of Standard Easement Agreement

Following its Subtenants' request, Crown contacted Bell Atlantic, (the landline telephone company formerly known as NETC), to upgrade the telephone lines at the Property. (Id. ¶ 30.) Bell Atlantic n/k/a Verizon Communications informed Crown that for reasons unknown to it, its predecessor, NETC, had not obtained the standard Easement Agreement from the McKays when the underground conduit and copper wire telephone lines were initially installed. (Id.) Verizon Communications informed Crown that in order to run the fiber optic telephone line, it would

require the McKays to execute the Easement Agreement that was never obtained when the original copper wire telephone line was installed in the underground conduit. (Id.)

F. McKays' Continuing Refusal to Execute Standard Easement Agreement

On or about March 2000, Crown contacted the McKays and informed them that the newest Subtenant on the Tower, Sprint PCS, had also repeated the prior request of Crown's existing Subtenants that Crown upgrade to fiber optic lines at the Property. (Id. ¶ 31.) Crown informed the McKays that the work would simply require the installation of a fiber optic telephone line in the existing underground conduit and the placement of a new 41" Long x 36" Wide x 54" deep Cell Site Cabinet ("CSC") within the leased area of the established wireless telecommunications compound on the Property. (Id.)

Crown, through correspondence and in meetings with the McKays, has described to the McKays that the Subtenants' request to upgrade the telephone landline service to the Tower is necessary to allow for the increasing operational, coverage, performance and capacity demands made upon the communications equipment installed on the Tower by the Subtenants including, but not limited to, emergency service calls being able to be broadcast and received by such equipment on the Tower, including 911 calls. (Id. ¶ 32.) For a period in excess of three (3) years, Crown has repeatedly informed the McKays that the Lease permitted Crown to upgrade the telephone lines at the Property and that the terms of the Lease required the McKays to sign the Easement Agreement. (Id. ¶ 33.) Notwithstanding Crown's repeated requests for a period that has exceeded three (3) years, and in violation of the Lease, the McKays have refused to execute Verizon Communications' Easement Agreement. (Id. ¶ 33.)

By letter dated February 14, 2002, Attorney Earl W. Duval ("Attorney Duval"), legal counsel for Crown, of Duval, Bellone & Cranford, P.C. (n/k/a Duval, Bellone, Cranford & Celli, P.C.), requested that the McKays "adhere to the terms of the Land Lease and execute an

Easement with Verizon for the installation of telephone lines.” (Duval Aff. ¶ 15, Ex. 8; Def.’s Answer ¶ 45.)

By letter dated February 28, 2002, Attorney Duval informed the McKays that Verizon Communications is “upgrading the existing telephone lines in the existing conduit.” (Duval Aff. ¶ 16, Ex. 9; Def.’s Answer ¶ 46.) Along with the letter dated February 28, 2002 from Attorney Duval to the McKays, Attorney Duval forwarded a letter dated February 25, 2002 to Attorney Duval from Jeffrey Barbadora to the McKays. (Duval Aff. ¶ 16, Ex. 9; Def.’s Answer ¶ 47.) In the letter dated February 25, 2002 from Barbadora to Attorney Duval, Barbadora explained that Crown “must install” a fiber optic line to “allow carriers to upgrade their communication at the North Acton site.” (Duval Aff. ¶ 16, Ex. 9; Def.’s Answer ¶ 48.)

On March 20, 2002, Crown Representatives’ Jeffrey Barbadora, James Donahue, former Crown Vice President/General Manager, and Kristian Zoeller, along with Attorney Duval, met with the McKays at the Property. (Barbadora Aff. ¶ 37; Def.’s Answer ¶ 49.) They explained to the McKays that the upgrade of the existing telephone service was essential to the operation of the wireless communications equipment located on the Tower by the Subtenants. (Barbadora Aff. ¶ 37.) They also explained that because the fiber optic telephone line would utilize the existing underground conduit, there would be no disruption to the McKays’ operations at the site and would require not more than two (2) days installation time. (Id.) It was further explained that the Lease granted Crown the right to install the fiber optic telephone line, and that the execution of the Easement Agreement was provided for in the Lease to satisfy the documentation requirements of Verizon Communications. (Id.)

At the March 20, 2002 meeting between the representatives of Crown and the McKays, Mr. McKay was very hostile and confrontational. (Id. ¶ 38.) He was particularly abusive to Mr. Donahue, which prompted Mrs. McKay to repeatedly request that Mr. McKay “calm down.” (Id.) Continuing with his confrontational behavior, Mr. McKay further demanded \$600.00 per

month from Crown in exchange for signing the Easement Agreement. (Id.) Mr. McKay asserted that CSC unit should be installed outside the leased area telecommunications compound so he could make more money and the McKays refused to acknowledge the terms and conditions of the Lease and Crown's rights thereunder. (Id. ¶ 39.)

Following months of unproductive efforts to reach a mutually acceptable resolution, Attorney Duval was informed that the McKays had sought representation from Attorney Francis A. DiLuna of the Law Firm of Murtha, Cullina, Roche, Carens & DeGiacomo. On July 8, 2002, the McKay's attorney, Francis A. DiLuna ("Attorney DiLuna") sent correspondence to Attorney Duval alleging that the McKay's were entitled to certain revenues from ground space leases from collocators on the communications tower. (Duval Aff. ¶ 22, Ex. 13; Def.'s Answer ¶ 54.)

By letter dated July 12, 2002, Attorney Duval sent a reply to Attorney DiLuna's July 8th correspondence clarifying the nature of the financial arrangements that allows the McKays to receive revenue for ground space from the collocating wireless service providers and suggesting that Attorney Duval and Attorney DiLuna meet to discuss resolution of the easement and access issues. (Duval Aff. ¶ 23, Ex. 14; Def.'s Answer ¶ 55.) On November 7, 2002, Attorney Duval sent Attorney DiLuna a revised draft of the proposed Easement Agreement that specifically addressed the McKay's concern of the duration of the easement. (Duval Aff. ¶ 24, Ex. 15; Def.'s Answer ¶ 56.) By its terms, the Easement Agreement is coterminous with the requirement to serve the Tower. (Barbadora Aff. ¶ 40.)

By letter dated February 28, 2003, Attorney DiLuna informed Attorney Duval "...that all communications concerning Butterbrook Farm are to be directed to Guy McKay," providing notice of his withdrawal as counsel for the McKays. (Duval Aff. ¶ 28, Ex. 18.)

As of this filing, despite repeated requests, the McKays, in material breach of the Lease, have refused to execute an Easement Agreement with Verizon Communications. (Barbadora Aff. ¶ 43.) As of this filing, Verizon Communications has not installed the fiber optic telephone

line to the Property needed by Crown's six (6) Subtenants in order to provide adequate coverage to their many wireless customers in the area who rely upon this service to make not only calls of convenience and business, but calls requesting emergency services. (Id. ¶ 44.)

ISSUES PRESENTED

1. Whether the McKays' continued obstruction of the installation of the fiber optic telephone line in the existing underground conduit that is located in the approved Right-of-Way, by refusing to execute Verizon Communications' standard Easement Agreement, is a breach of the terms, covenants and conditions of the Lease.

2. Whether Crown is entitled to specific performance of the Lease to allow the installation of the fiber optic telephone line in the existing underground conduit that is located in the approved Right-of-Way, which would require the McKays to sign the Easement Agreement.

STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue as to any material fact and, where viewing the evidence in the light most favorable to the nonmoving party, the moving party is entitled to judgment as a matter of law. Harrison v. Netcentric Corp., 744 N.E.2d 622, 627 (Mass. 2001). The party moving for summary judgment assumes the burden of affirmatively demonstrating that there is no genuine issue of material fact on every relevant issue. Pederson v. Time, 532 N.E.2d 1211, 1213 (Mass. 1989). Disputed issues of fact must be material; that some facts are in dispute will not necessarily defeat a motion for summary judgment. Hudson v. Comm'r of Corr., 725 N.E.2d 540, 543 (Mass. 2000). If the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts which would establish the existence of a genuine issue of material fact in order to defeat a motion for summary judgment. Id. The opposing party may not rest on the allegations of the pleadings, nor may it rely on bare assertions and conclusions regarding its own understandings, beliefs, and assumptions. See Key Capital Corp. v M & S Liquidating Corp., 542 N.E.2d 603,

607 (Mass. App. Ct. 1989). If the opposing party fails to establish a triable issue, summary judgment is appropriate and must be entered. MASS. R. CIV. P. 56.

SUMMARY OF ARGUMENT

In August, 1996, the McKays entered into a binding and enforceable Lease with Crown's predecessor-in-interest for the purpose of constructing, maintaining, and operating a wireless communications facility. The McKays signed a Lease for a use that requires the installation of landline telephone service and that specifically allows Crown to upgrade the telephone service at the Property. The Lease also requires the McKays to cooperate with the Lessee in the development, construction and operation of the wireless telecommunications facility on the Property and refrain from any action that would adversely affect the use of the Property for the purpose permitted in the Lease. Crown desires to upgrade the telephone service at the Property by installing fiber optic lines, which requires the execution of an Easement Agreement in favor of the telephone company. The McKays' refusal to sign a standardized easement document that is necessary for the upgrade of the landline telephone service represents a material breach of the terms, covenants and conditions of the Lease and prevents Crown from providing essential operational service to the Subtenants.

In this instance, Crown is entitled to the equitable remedy of specific performance because the McKays' material breach of the Lease is of such a nature that no adequate remedy at law will wholly compensate Crown. In light of the unique attributes of the Property, which provides an essential location for CMRS providers to fulfill the mandate of the Federal Communications Commission to provide an established level of service, this Court should recognize that money damages will not be wholly adequate to address the deprivation of the full and complete use of the Property. Because the requested relief is consistent with the previously agreed upon terms of the Lease, granting specific performance would not give Crown anything that was not provided for in the Lease nor would it place any undue hardship on the McKays.

ARGUMENT

- I. **The McKays' obstruction of the installation of the fiber optic telephone line represents a material breach of the terms of an unambiguous, written Lease that allows Crown to install telephone lines and requires the cooperation of the McKays, as Lessor.**

The Court should grant Crown's Motion for Summary Judgment because the McKays materially breached an unambiguous and essential term of the Lease requiring them to execute the Easement Agreement. A commercial lease is a contract, and the breach of its covenants by a lessor is actionable by the lessee. See Wesson v. Leone Enters., 774 N.E.2d 611, 622 (Mass. 2002). Covenants may be expressly contained in a lease or they may be implied from its language viewed in light of the intent of parties. See Stop & Shop, Inc. v. Ganem, 200 N.E.2d 248, 251 (Mass. 1964). The undertakings of each promisor in a lease must include any promises which a reasonable person in the position of the promisee would be justified in understanding were included. Id.; see Winchester v. O'Brien, 164 N.E. 807, 809 (Mass. 1927). Furthermore, the reality of a commercial lease "contemplates a continuing flow of necessary services from landlord to tenant, services that are normally under the landlord's control." Wesson, 774 N.E.2d at 621.

Crown's Lease expressly allows it to install fiber optic lines, and it requires the McKays to execute Verizon's Easement Agreement. The McKays' continued refusal to execute the Easement Agreement, which is required for every installation in the country, constitutes a violation of a Lease covenant and a breach of contract. See Wesson, 774 N.E.2d at 622; RESTATEMENT (SECOND) OF PROP.: LANDLORD AND TENANT § 7.1 (1977). Because this breach deprives Crown of its right to the full enjoyment of an interest in land, to which there exists no adequate remedy at law, Crown is entitled to specific performance of the contract. See Greenfield Country Estates Tenants Ass'n v. Deep, 666 N.E.2d 988, 993 (Mass. 1996).

A. The Lease expressly allows Crown to install underground telephone lines and upgrade its equipment at its own discretion.

On or about August 12, 1996, the McKays entered into a binding and enforceable Lease with Crown's predecessor-in-interest, BANM. (Duval Aff. ¶ 6, Ex. 4; Def.'s Answer ¶ 4.) The Lease in paragraph 1 unambiguously allows the "installation and maintenance of underground utility wires, cables, conduits, and pipes under, or along a fifteen (15') foot wide right-of-way...." (Duval Aff. ¶ 8, Ex. 4; Def.'s Answer ¶ 7.) In addition, paragraph 7 states that "Lessee shall use the property for the purpose of constructing, maintaining, and operating a Communications Facility" and that "the installation of all improvements shall be at the discretion and option of the Lessee." (Duval Aff. ¶ 7, Ex. 4; Def.'s Answer ¶¶ 5, 8.)

It is reasonable for this Court to conclude that these provisions clearly and unequivocally grant Crown, as lessee under the Lease, the right to upgrade the existing underground landline telephone service by installing new fiber optic telephone lines. Fiber optic lines clearly qualify as "utility wires" since they accomplish the same ends as the existing copper lines, except that fiber optic lines do so with greater efficiency and reliability. Fiber optic lines are the telecommunications equivalent of a Pentium® processor. Since the installation of fiber optic lines would substantially improve the service at the Tower, they must be considered a permitted "improvement" under the Lease. Furthermore, the fact that the McKays entered into a lease for a high-tech structure on their land indicates their willingness to accommodate the latest innovations and technologies at the site. The McKays knew that a wireless telecommunications facility would be installed on their land, and therefore cannot now object to a routine upgrade that is consistent with the site's intended purpose.

Not only does the express language of the Lease clearly provide for the proposed upgrade of the existing underground landline telephone line with a fiber optic telephone line, the permitted use provided for in the Lease impliedly grants Crown the right. The express permitted

use in the Lease is for “constructing, maintaining, and operating a Communications Facility and uses incidental thereto together with one (1) antenna structure and all necessary connecting appurtenances.” (Duval Aff. ¶ 7, Ex. 4; Def.’s Answer ¶ 5.) The First Amendment to the Lease expressly provides that the Lessee shall have the right to sublet any portion of the Property without the consent of the McKays to any third party. (Duval Aff. ¶ 11.) By enabling Crown’s Subtenants to meet their critical operational, coverage, performance and capacity needs, the upgrade of the existing copper wire telephone line with the fiber optic telephone line is required to fulfill the permitted use provided for in the Lease.

B. The requirement that the McKays sign Verizon Communication’s Easement Agreement comports with a Lease term permitting the installation and maintenance of underground utility lines, and the McKays’ refusal to sign the Easement Agreement constitutes a material breach of the Lease.

The McKays refusal to execute the Easement Agreement constitutes a material breach of the terms of the Lease. The Lease grants to the Lessee the right to install and maintain underground utility wires, cables, conduits and pipes. The Lease also provides:

[i]n the event any public utility is unable to use the aforementioned right-of-way, the Lessor hereby agrees to grant a substitute right-of-way either to the Lessee or to the public utility at no cost to the Lessee (emphasis added).

(Duval Aff. ¶ 8, Ex. 4; Def.’s Answer ¶ 7.) The Lease states further that the “Lessor... shall take no action which would adversely affect the status of the Property with respect to the proposed use thereof by Lessee.” (Duval Aff. ¶ 7, Ex. 4.)

The Lease obligations require the McKays to not only permit the installation of underground utility wires but also to take the affirmative action in granting directly to the public utility an easement that is necessary to provide the necessary utility service. Verizon Communications is currently unable to use the existing Right-of-Way, and therefore the Lease obligates the McKays to execute the Easement Agreement. In addition, the proper enjoyment of Crown’s leasehold interest hinges upon Crown’s ability to upgrade the existing underground

landline telephone service with a fiber optic telephone line. The nature of the telecommunications industry requires Crown to keep up with the latest technologies in order to remain competitive.

The McKays' continued refusal to execute the Easement Agreement constitutes a violation of a Lease covenant and a material breach of contract, and severely handicaps Crown's ability to remain competitive. See Wesson, 774 N.E.2d at 622 (finding that tenant was entitled to relief after landlord breached his covenant to maintain the roof by failing to adequately repair its chronic leaking, which directly interfered with the tenant's business by depriving it of a substantial benefit significant to the purpose of the lease); RESTATEMENT (SECOND) OF PROP.: LANDLORD AND TENANT § 7.1. The power to sign the Easement Agreement is exclusively within the control of the McKays, and as the Court noted in Wesson v. Leone Enterprises, the reality of a commercial lease "contemplates a continuing flow of necessary services from landlord to tenant, services that are normally under the landlord's control." See 774 N.E.2d at 621. By failing to cooperate in, the McKays have not only breached the terms of the Lease, but they have acted in bad faith.

It is clear from the facts presented that the McKays' refusal to sign the Easement Agreement is not motivated by a reasonable dispute of the terms of the Lease or the obligations thereunder, but rather by the McKays' desire to increase their revenues at the expense of Crown and its Subtenants. This point became painfully clear at the March 20, 2002 meeting between the McKays and representatives of Crown in which Mr. McKay eliminated any pretext and demanded \$600.00 per month for his and his wife's signature on the Easement Agreement. (Barbadora Aff. ¶ 38.) The McKays already receive a substantial financial benefit from Crown and Crown's Subtenants and should not be rewarded for their efforts at extortion.

Even if this Court were to conclude that the Lease does not explicitly require the McKays to execute the Easement Agreement, such a requirement may be implied because Crown

justifiably understood that it would have the McKays' cooperation in operating its facility. See Stop & Shop, Inc., 200 N.E.2d at 251. The facts of the present case closely parallel those of Winchester v. O'Brien, where the court found that there was an implied covenant for the lessor not to interfere with his lessee's business. See 164 N.E. at 809. Just as the landlord in Winchester was implicitly required to refrain from harming his tenant's business, the McKays likewise must not be permitted to interfere with Crown's right and obligation to provide the essential operational services to the Subtenants.

From the undisputed facts presented, this Court could reasonably conclude that under the terms of the Lease Crown has the right to install fiber optic telephone lines in the already-existing conduit, and that the McKays are obligated to sign the Easement Agreement to facilitate this installation. Crown is therefore entitled to such legal and equitable relief as is necessary to remedy this material breach of the Lease.

- C. Crown is entitled to specific performance because the McKays have interfered with its unique, compelling, and significantly invested interest in the Property as a wireless telecommunications facility, to which there can be no wholly adequate remedy at law.**

As this Court is well aware, specific performance is an equitable remedy that may be granted within the sound discretion of the judge. Greenfield Country Estates Tenants Ass'n, 666 N.E.2d at 992. It may be granted if it does not impose an undue hardship upon a party or permit the moving party to obtain an inequitable advantage. Id. at 994. Although specific performance is generally not available to a party who can be adequately compensated at law, the availability of money damages does not bar a suit in equity for specific performance. Id. at 993.

Specific performance is especially appropriate in cases involving an interest in real property because "real property is unique and money damages will often be inadequate to address a deprivation of an interest in land." Id. Courts often grant specific performance in cases where a lessor breaches a covenant in a lease. Eg., Hook Brown Co. v. Farnsworth Press,

Inc., 203 N.E.2d 681, 684-85 (Mass. 1965); Carey's, Inc. v. Carey, 517 N.E.2d 850, 856 (Mass. App. Ct. 1988); Leisure Sports Inv. Corp. v. Riverside Enter., Inc., 388 N.E.2d 719, 722 (Mass. App. Ct. 1979).

Specific performance should be granted in favor of Crown because of the unique nature of its leasehold interest in the Property and the substantial investment it made in reliance on the McKays' promises in the Lease. Cell tower sites such as Crown's epitomize the uniqueness of an interest in land. See Greenfield Country Estates Tenants Ass'n, 666 N.E.2d at 993. The development of a location for a wireless telecommunications tower can require a time period of over eighteen (18) months from the site selection process through the permitting and construction of the tower facility. (Barbadora Aff. ¶ 12.) The process begins for a CMRS provider by analyzing gaps in wireless service coverage in geographical areas and then finding an appropriate site to build a facility to bridge the gaps in coverage. (Id. at ¶ 13.) Tower owners must then negotiate long-term leases with landowners, obtain easements from all necessary parties, and undergo a lengthy approval process with cities and towns. (Id. ¶ 12.) Once the tower is approved and constructed, subleases must be negotiated with CMRS providers for space on the tower, which often requires an amendment of the original lease, as in this case. (Id.) It is the very unique qualities of height and location that only one site will satisfy the necessary coverage objectives of the CMRS provider. (Id. ¶ 9.) A loss of any one site will cause a hole or gap in the coverage of a CMRS provider. Thus, tower owners like Crown make substantial investments of time, effort, and capital to acquire and maintain critical sites like the Tower in the present case.

Crown assumed the Lease and subleases with CMRS providers in reliance on the promises of the McKays in the Lease that it could operate a wireless telecommunications facility, and further, that the "Lessor...[would] take no action which would adversely affect the status of the Property with respect to the proposed use thereof by Lessee." (Duval Aff. ¶ 7, Ex. 4.) In doing so, Crown not only invested time and capital, but invested its reputation as a capable

provider of tower space for the nation's leading wireless companies. The investment Crown made based on its reliance on the McKays' promises in the Lease mirrors the actions of the plaintiff in Hook Brown Co. v. Farnsworth Press, Inc., who surrendered a lease and moved its business equipment in reliance on the promise of the defendant to lease space to the plaintiff. See 203 N.E.2d at 684-85. The court granted specific performance because of the plaintiff's unique interest in the property and its detrimental reliance on the defendant's promises. See id.

As evidenced by the fact that the six (6) major CMRS providers have sublet space on the Tower, the site uniquely satisfies the coverage objectives of the carriers for the Acton area. (Barbadora Aff. ¶ 14.) If Crown were not granted specific performance, it would not be able to meet the legitimate and crucial service, performance, and capacity needs of its Subtenants. (Id. at ¶ 41.) This failure could lead to a loss of Subtenants and the potential necessity of locating a new site, negotiating new leases, gaining local approval, and finding new subtenants. Such a disruption to operations at the Tower, coupled with the impending loss of goodwill and damage to Crown's reputation, cannot be adequately compensated at law. See Greenfield Country Estates Tenants Ass'n, 666 N.E.2d at 993.

Allowing Crown to install telephone lines would not enlarge its rights or give it any advantage over the McKays. As was explained by correspondence and at the meeting between Crown and the McKays, the fiber optic telephone line would be installed inside the existing underground conduit and therefore there should be no disruption to the McKays' operations at the Property. (Barbadora Aff. ¶ 37.) All that would be required of them is the signing of a standard document that is used nationwide by Verizon Communications. In fact, Crown persuaded Verizon to alter the language in the Easement Agreement to address the McKays' concerns about the removal of the equipment upon termination of the need for service to the Tower. (Duval Aff. ¶ 25, Ex. 16.) As provided in the Lease, Crown would also bear all expenses related to the installation. Crown therefore asks the Court to grant it specific

performance under the Lease by a permanent injunction preventing the McKays from interfering with its right to utilize the easement for the aforesaid purposes, and requiring the McKays to execute the Easement Agreement to facilitate the installation of telephone lines.

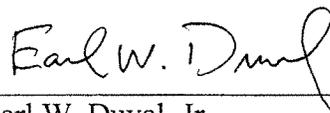
CONCLUSION

The Court should grant Crown's motion for summary judgment because there is no genuine issue of material fact in dispute concerning the McKays' material breach of the Lease, and Crown is entitled to judgment as a matter of law. The Lease expressly allows Crown to install telephone lines and upgrade its technology at its discretion. The McKays must execute the Easement Agreement because the Lease requires them to cooperate with Crown, grant such further rights-of-way as may be required by a public utility company, and allow Crown the full enjoyment of its leasehold interest. The McKays' continued refusal to cooperate with Crown constitutes a material breach of contract.

No adequate legal remedy exists that could wholly compensate Crown for the injury it will suffer if it cannot enjoy the full use of its leasehold interests. Wireless tower sites such as Crown's are of such a unique nature that equitable relief, in the sound discretion of the court, is the only appropriate remedy. Granting Crown specific performance would not give it an inequitable advantage nor would it place any undue hardship on the McKays. The installation would be of minimal impact to the property, as it would take place in the existing conduit, and all equipment would be removed upon the termination of the need for the landline telephone service. Simply put, the copper wires would be taken out, and the fiber optic ones would be installed in their place. Crown therefore respectfully requests the Court to grant its motion for summary judgment.

Respectfully Submitted,

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