

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

MICHIGAN INTERNET ASSOCIATION, LTD,

Plaintiff,

Case No. 14-141253-CK

v

Hon. Wendy Potts

123.NET, INC,

Defendant.

OPINION AND ORDER RE: PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING
ORDER AND PRELIMINARY INJUNCTION

At a session of Court
Held in Pontiac, Michigan

On
JUN 23 2014

Plaintiff Michigan Internet Association, Ltd, known as MICA, provides telephone and internet access to various customers including local governments such as Macomb County and the cities of Pontiac and Southfield. Since 2008, MICA has been purchasing its communications services from Defendant 123.Net, Inc. In October 2011, after MICA accrued more than \$60,000 in overdue payments, the parties entered into a payment agreement that gave 123.Net a secured interest in MICA's new accounts. The agreement had a default provision that required 123.Net to give MICA written notice of default and allowed MICA 45 days to cure the default. MICA claims that 123.Net has never given written notice of default.

The parties entered into a second payment agreement in March 2013 because MICA had a past due balance of more than \$52,000. MICA was now required to forward all of its receivables to 123.Net who would return approximately \$10,000 to MICA each month for operating expenses. On June 3rd, 123.Net threatened to cut off its services if MICA did not pay

\$88,000. MICA filed this action on June 10th seeking a temporary restraining order. MICA claims that its customers would lose voice and internet access if 123.Net follows through with its threat to cut service. Following a phone conference with attorneys for both sides, the Court entered an order requiring both sides to maintain the status quo. Further, in response to 123.Net's concern that MICA was not forwarding all of its receivables, the Court ordered MICA to provide 123.Net with a full accounting of all receivables from March 1, 2014 to the present. Based on that accounting, 123.Net now claims that MICA is violating the second payment agreement by failing to forward all receivables to 123.Net. After hearings on June 18 and 20, the Court continued the status quo order.

The matter is now before the Court on MICA's motion seeking an injunctive order barring 123.Net from cutting off service. When deciding a motion for injunctive relief, the Court considers (1) whether the applicant will suffer irreparable injury if the injunction is not granted; (2) the likelihood that the applicant will succeed on the merits; (3) whether harm to the applicant in the absence of relief outweighs the harm to the opposing party if the injunction is granted; and (4) the harm to the public if the injunction issues. *Thermatool Corp v Borzym*, 227 Mich App 366, 376 (1998). The Court should also consider whether granting an injunction is necessary to preserve the status quo before a final hearing or whether it will grant one of the parties final relief before a decision on the merits. *Thermatool, supra*.

MICA met its burden of demonstrating that it would suffer an irreparable injury if the injunction is not granted. MICA asserts, and 123.Net does not dispute, that if 123.Net cut off service MICA would likely go out of business because most, if not all, of MICA's customers would immediately seek a new source for telephone and internet service. Financial ruin or complete loss of a business could constitute irreparable injury. *Performance Unlimited v Questar Publishers*, 52 F3d 1373, 1382 (CA 6, 1995).

Although there is evidence of irreparable injury, MICA fails to show that it is likely to prevail on the merits. MICA's claim against 123.Net is based on an alleged failure to give written notice of default and a 45 day period to cure. However, these terms were applicable under only the first payment plan in 2011; the 2014 payment plan has no requirement of written notice of default or an opportunity to cure. It is unclear based on the language of the 2014 agreement whether it superseded the 2011 agreement with respect to 123.Net's obligation to provide notice of default and MICA's right to 45 days to cure. The 2014 agreement states that it supersedes MICA's payment obligation under the 2011 agreement and in the event of a conflict between the two agreements, the 2014 agreement controls. However, the 2014 agreement states that it does not affect 123.Net's rights under the 2011 agreement. It appears that the parties intended that part of the 2011 agreement would remain in effect, however, based on the evidence presented, the Court cannot conclude that the 2011 default provision still applies.

Even if the default notice and cure provision still apply, there is evidence that 123.Net gave MICA written notice of default and an opportunity to cure. On March 8, 2014, 123.Net sent MICA an email with the subject heading: "Past Due Notice – 2nd Reminder" stating that MICA's account was past due. 123.Net sent three more emails on April 7, April 20, and May 8, all of which state that MICA's account is past due. Although the March and April emails did not directly threaten any immediate action if MICA failed to bring its balance current, all of them stated that past due accounts may be subject to disconnection. Further, the May 8th email stated that MICA's services would be disconnected on May 19 if payment was not received. On June 3, counsel for 123.Net emailed MICA's principal Norm Estigoy stating that the account had been in default for 60 days and services would be disconnected on June 10. This series of emails negates MICA's claim that it was not given written notice of its default and more than 45 days to cure it.

MICA argues that the emails do not qualify as notice of default under the 2011 payment agreement because they did not expressly and clearly state that MICA was in default. However, the 2011 agreement did not require that the notice take any particular form or include any particular language. MICA's reliance on *Majestic Golf v Lake Walden Country Club*, 495 Mich 909; 840 NW2d 305 (2013) is misplaced because the default notice provision in *Majestic Golf* has specific requirements as to the default notice's form and language. MICA fails to show that 123.Net's emails did not constitute written notice of default. Further, because the March 8 email was sent more than 45 days before 123.Net first threatened to cut off services on May 19, MICA fails to show that 123.Net did not comply with the default notice and cure provisions. Thus, MICA fails to show a likelihood of prevailing on the merits of its claim

The balance of harms does not favor either party. Although MICA would be harmed if 123.Net cuts off service, 123.Net has been and will continue to be harmed by MICA's failure to pay as agreed. Enjoining 123.Net from cutting off services would force 123.Net to provide MICA with its services without any reasonable assurance of MICA's timely payment for those services, let alone repayment of the substantial arrearage on its account.

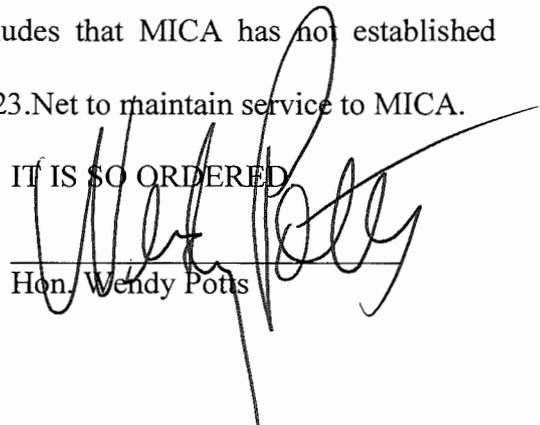
Although the public has an interest in its municipalities maintaining telephone and internet service, that service could be obtained from another provider. Given MICA's precarious financial situation, its customers could be well served by switching to a more dependable provider.

Considering all of these factors, the Court concludes that MICA has not established grounds for injunctive relief and the Court will not order 123.Net to maintain service to MICA.

Dated:

JUN 23 2014

IT IS SO ORDERED


Hon. Wendy Potts