IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR COLLIER COUNTY, FLORIDA CIVIL ACTION

ORIGINAL

COMCAST CABLEVISION OF WEST FLORIDA, INC., a Delaware corporation, Plaintiff/Counter-Defendant, v. COZUMEL CONDOMINIUM ASSOCIATION, INC., a Florida not-for-profit corporation, Defendant/Counter-Plaintiff.	Case No. 01-3598-CA

HEARING BEFORE: The Honorable Theodore Brousseau

DATE: November 4, 2002

TIME: 3:32 p.m. to 3:49 p.m.

LOCATION: Collier County Courthouse
3301 East Tamiami Trail
Naples, FL 34112

REPORTER: Barbara Drescher

APPEARANCES:

For the Plaintiff/ Counter-Defendant:
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For the Defendant/ Counter-Plaintiff:
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1 THE COURT: Motion to dismiss?

2 MR. KOESTER: Yes, Your Honor. Ed Koester for
3 the Cozumel Condominium Association. We filed a
4 motion to dismiss in this matter. It's a pretty
5 simple case. Comcast Cable has brought a lawsuit
6 against the Cozumel Condominium Association
7 essentially alleging three things: that the Cozumel
8 Condominium Association entered into a contract with
9 Marco Island Cable -- that's a bulk-rate contract for
10 cable -- that violates a 1986 agreement between
11 Continental and the developer of Cape Marco on Marco
12 Island.

13 The second allegation is that the Cozumel, by
14 entering into a bulk cable contract with Marco Island
15 Cable, has breached an exclusive easement that was
16 granted as part of the 1986 agreement.

17 The third point in the lawsuit is that -- the
18 allegation that the Cozumel breached this 1986
19 agreement between Continental Cable and the developer
20 of Cape Marco by tampering with certain cable
21 equipment when it allowed Marco Island Cable to
22 install or service -- provide cable service to unit
23 owners.

24 The contract itself is in Tab 1 of the first book
25 that I gave you, attached to the complaint. And the

1 most important thing to look at in this case is the
2 actual language of the agreement, and we can go
3 through it. Section 1 of the agreement essentially
4 provides that Point Marco Development Corporation, the
5 original developer of Cape Marco, entered into an
6 agreement with Continental Cablevision of Southwest
7 Florida and provides Continental an exclusive license
8 to provide cable service to the residents of the
9 Cozumel.
10 And the actual language is that -- as follows:
11 "Owner licenses and appoints Continental as the sole
12 and exclusive provider of basic cable television and
13 radio service, expanded cable television and radio
14 service and other cable service programming and
15 broadband communications (the Service) to the
16 Premises, or any part thereof, for the term of this
17 Agreement, its extensions and renewals."
18 The last sentence says, "This exclusive license
19 shall extend to each residential unit, dwelling and
20 lot and Owner further grants Continental the right to
21 connect and disconnect individual residents of the
22 Premises for the Service."
23 So it's clear under Section 1 of the agreement
24 that Continental is to be the exclusive provider, that
25 no unit owner -- anybody at the Cozumel is not

1 supposed to use a cable company other than
2 Continental.
3 On the next page, paragraph 3, we see that
4 Continental is also granted an exclusive easement for
5 access, ingress, and egress in order to provide cable
6 services. And it's an exclusive easement that no one
7 else is to be able to use, Marco Island Cable or any
8 other competing cable company.
9 One last point in the agreement I want to bring
10 out is Section 8. The last sentence simply provides
11 that Continental can make a reasonable determination
12 that technical and economic factors make it impossible
13 or impractical to provide the service to the premises
14 and, therefore, can unilaterally cancel the contract
15 if they deem economic factors are such that it's not
16 beneficial to them to provide services.
17 The motion to dismiss that we filed is under
18 Tab 2 of the first notebook I gave you. The first
19 point in the motion to dismiss is that the Florida
20 legislature through Section 718.1232 passed a statute
21 that says -- it's under Tab 7. The statute says, "No
22 resident of any condominium dwelling unit, whether
23 tenant or owner, shall be denied access to any
24 available franchised or licensed cable service --
25 cable television service, nor shall such resident or

1 cable television service be required to pay anything
2 of value in order to obtain or provide such service
3 except those charges normally paid for like services
4 by residents of, or providers of such services to,
5 single-family homes within the same franchised or
6 licensed area and except for installation charges as
7 such charges may be agreed to between such resident
8 and the provider of such services."
9 So we have Section 718.1232 that the Florida
10 legislature passed back in 1981 that says no unit
11 owner of the Cozumel can be denied the right to choose
12 whatever cable company they want. If we go back and
13 look at the contract, which, again, was under Tab 2,
14 we see that we have an actual agreement between
15 Continental and the original developer that does
16 exactly what 718.1232 says cannot happen. We have the
17 developer, Point Marco Development Corporation, and
18 the predecessor cable company, Continental, prior to
19 the Cozumel even being completed, entering into an
20 agreement that says basically nobody at the Cozumel,
21 no unit owner, no property owner, no unit at all, can
22 use any other cable company other than Continental.
23 That is the essential agreement, and then it goes on
24 to provide that their easement will be exclusive.
25 What we have here today is a situation where unit

1 owners of the Cozumel have determined that they would
2 rather use Marco Island Cable as opposed to Comcast,
3 the successor to Continental. Comcast, unhappy with
4 that decision, has filed a lawsuit for breach of
5 contract. The first argument for the Court to
6 consider today is whether Comcast can bring a case at
7 all. And my point is 718.1232 clearly says they can't
8 stop us from choosing whatever cable company we want.
9 THE COURT: Do you have any case law on that?
10 MR. KOESTER: We have the statute itself, which
11 is quite clear. And there is not really any case law
12 under 718.1232. I will submit the reason there's not
13 any case law under it is because it's extraordinarily
14 clear. And if you look at the contract that's before
15 the Court today that's attached to the motion to
16 dismiss -- and we know that the case law says anything
17 attached to a complaint, the plain language of it will
18 control even at a motion to dismiss stage -- merely
19 provides that it's an exclusive arrangement.
20 The Cozumel Condominium Association is not a
21 party to the agreement. It's not a bulk agreement
22 where they're getting a deal by combining a bunch of
23 people to buy together. It's simply an exclusive
24 relationship that says -- a exclusive agreement that
25 says you can't go use anybody else, which I submit is

1 in clear violation of the statute.

2 The second argument for the Court to consider is

3 in absence of 718.1232, we also have Section 718.304

4 that says any agreement entered into by the developer

5 prior to turnover is unenforceable if it's unfair and

6 unreasonable. And our argument to the Court today is

7 forcing the Cozumel residents to use only Comcast is

8 fair -- is unfair and unreasonable.

9 THE COURT: When was turnover?

10 MR. KOESTER: Turnover occurred back in December

11 of 2000.

12 THE COURT: Is there a time limit on that last

13 statute?

14 MR. KOESTER: There -- there's two separate

15 sections, and I only brought one up today at the

16 motion to dismiss stage. The 718.302 Subsection 4 is

17 in -- Subsection 4 is under Tab 9. And what this

18 basically -- what that statute says is, "Any grant or

19 reservation made by a declaration, lease, or other

20 document, and any contract made by an association

21 prior to assumption of control of the association by

22 the unit owners other than the developer, shall be

23 fair and reasonable."

24 Our argument is on its face the exclusive

25 contract that would prohibit any other cable company

1 from servicing the Cozumel is not fair and is not
2 reasonable. It doesn't require that it be canceled or
3 anything. 302 sub 4 is self-executing.
4 We also have voted as an association to cancel
5 the contract under separate provisions, but I don't
6 believe that's proper for a motion to dismiss. So if
7 it survives a motion to dismiss, we can come back with
8 a summary judgment, the affidavit and the proof of the
9 voting and the filing of the certificate and those
10 types of things.
11 But for purposes of today, we would say an
12 exclusive contract entered into by a developer and
13 entered into by Continental, the predecessor of
14 Comcast, solely for the purpose of stopping any other
15 cable company from ever servicing the Cozumel, at
16 least for 15 years, is not fair and not reasonable and
17 violates 718.1232.
18 And further, to take it another step, if you
19 leave the condominium chapter and you go to 542.18,
20 which is the restraint of trade statute, that says you
21 can't have any agreements that restrain trade.
22 Clearly if a developer enters into an agreement with a
23 provider of cable to prevent people living in an area
24 from ever going out and selecting their own cable
25 company for at least 15 years that would be

1 restraining trade.

2 The Marco Island -- and this is just for

3 informational purposes, not for the motion to dismiss.

4 But for informational purposes, the rate they're

5 getting with Marco Island Cable is half of what

6 Comcast was charging them. So you combine that with

7 the 7 -- with the 542.18 and it makes sense. 542.335,

8 which is normally the -- the noncompete statute -- I

9 usually see it used in the employment context. But it

10 has limited exceptions as to when you can have

11 contracts that are going to restrain trade. And this

12 -- this contract would not fall under that particular

13 statute, and therefore it's unenforceable. So just in

14 summary, it violates 718.1232. It violates 718.302

15 sub 4. It violates 542.18.

16 And one more item, and that is it's illusory,

17 that Section 8 that I brought up to the Court

18 indicating that Continental reserved the right that if

19 it becomes unprofitable for them, they can cancel the

20 contract, which means that if it turned out to be a

21 good deal for the Cozumel, they're going to lose the

22 benefit of the contract anyway. That makes it

23 illusory. And we did provide the Court case law that

24 says if there's not mutuality of obligation, that is

25 if we can't hold them to the contract to the same

1 extent they can hold us to the contract, it's a void
2 contract as being illusory in any event.
3 THE COURT: Are they using the new cable supplier
4 now?
5 MR. KOESTER: The Cozumel is. And it's important
6 to note under the contract that's being sued on today,
7 the association itself never signed it. The
8 association itself doesn't pay any fees under it.
9 Individual unit owners were required simply to use
10 Comcast as their cable company. So Comcast had
11 individual service agreements with unit owners, and
12 these unit owners would pay. The Cozumel Association
13 wasn't writing any checks to Comcast. And so it's
14 interesting that they sued us. The association isn't
15 paying any money.
16 Under the Marco Island contract, the association
17 is, in fact, paying the bill for the cable. And under
18 the exclusive arrangement -- I shouldn't say
19 exclusive. Under the bulk arrangement with Marco
20 Island Cable, the unit owners are still free to choose
21 whatever cable company they want. In fact, some of
22 these owners still use Comcast, is my understanding.
23 THE COURT: Thank you. Response?
24 MR. KANTOR: Philip Kantor for Comcast, Your
25 Honor. As to 718.1232, the statutes says that no

1 resident of condominium or dwelling unit shall be
2 prohibited from getting service. This contract,
3 although it is -- says it's exclusive, has to take
4 into account Florida law. So, therefore, if a
5 resident on his own wanted to call up Marco Island
6 Cable -- which happens to be a franchised operator,
7 which is one of the requirements under the statute --
8 and say, "I want to get your service," neither Comcast
9 nor the Cozumel could stop them from doing that. So
10 we have to read that into the contract because it's
11 part of Florida law.
12 That does not mean that the condo association on
13 its own can breach the contract it has with Comcast
14 and sign a completely new contract with Marco Island
15 Cable to make it easier for Marco Island Cable to
16 serve and have a bulk rate and lower price and all
17 that. So while we -- while neither party to this
18 litigation could stop a particular resident from
19 picking up the phone and contracting with Marco Island
20 Cable, that doesn't mean that they -- that the
21 association can simply breach its contract with
22 Comcast and enter into a new contract.
23 Similarly, Florida law under 718.115 -- and I
24 have a copy for Your Honor and for opposing counsel.
25 If a condominium association entered into a bulk

1 contract -- the bulk contract is one where a hundred
2 percent of the residents are required to receive cable
3 from a particular operator, and the association
4 collects the money from each resident and then pays
5 the cable operator. If in that condominium
6 association a hearing impaired or a blind person was
7 living in there by themselves and wanted to opt out of
8 the contract, they could do that. So, for instance,
9 if it's a hundred-unit condominium and you have a
10 blind person who doesn't want to receive cable TV
11 because he can't watch it, instead of charging for a
12 hundred units, you charge for 99.
13 Well, if this contract was a bulk one and didn't
14 refer to this provision of the law, we'd still have to
15 follow it. We wouldn't be in violation of the law for
16 not referring to it as long as we applied the law. So
17 if a particular resident, as I said, wanted to opt out
18 of the exclusive and call Marco Island directly, they
19 could do that, and neither party to this contract
20 could stop them. But, as I said, it doesn't give the
21 association a right to just go breach a contract and
22 sign with someone else.
23 Now, had they felt this way and brought a dec
24 action to Your Honor and said, "Hey, we don't think
25 this contract's valid. We want you to rule that we

1 can get out of this," well, that's a different story.
2 But they can't take self help, just breach their
3 contract, and move on.
4 As to 542.18 of the Florida statutes, they
5 haven't cited to you a case that says you can't have
6 an exclusive contract. The 11th Circuit Court of
7 Appeals in Florida has said it's well established that
8 a party may choose with whom he will do business and
9 with whom he will not do business. And an exclusive
10 dealing will not give rise to liability absent a
11 showing of actual competitive injury. There's none
12 here. This -- there's no showing. There's no
13 allegation of competitive injury. We can have
14 exclusive contracts. In fact, several years ago the
15 FCC started a notice of inquiry as to whether these
16 type of contracts were valid. It's never ruled
17 barring exclusive contracts in the cable television
18 industry.
19 As to the illusory fact of the contract, one
20 portion of the contract that was not pointed out to
21 you, Your Honor, is Section 13, which talks about
22 severability. If there is a illegal, inoperable, or
23 invalid provision of this contract or if a provision
24 is ruled to be invalid, illegal, or inoperable, it
25 gets automatically wiped out, and the rest of the

1 contract is deemed proper.

2 So, first of all, if the contract's illusory

3 because Comcast has the right to opt out of it if

4 there's economic or technical infeasibility and Your

5 Honor would rule that that would be invalid, well,

6 fine. We'd put an X through that provision of the

7 contract, and we'd move on. The contract's still

8 good.

9 However, the case law that was cited to by

10 counsel basically said if the company -- if one of the

11 parties to the contract simply had the option to -- we

12 don't want to go with this contract anymore and

13 reserved themselves the right to do that in the

14 contract, then the contract would be invalid for being

15 illusory.

16 We don't quite have that here, Your Honor. We

17 have a case where Comcast has to make a reasonable

18 determination that the complete execution of the

19 contract would be either economically infeasible or

20 technically unavailable. It's not quite the same, so

21 I don't think it's quite illusory. But, as I said

22 before, I don't think it matters because we have a

23 provision in the contract that says if you were to

24 rule that to be invalid, that portion gets stricken,

25 and the rest of the contract is operable.

1 As to Section 718.302 of the condominium statute,
2 I would assert that it's inapplicable to this case
3 because this contract does not, as this -- as the
4 statute requires, it does not provide for operation,
5 maintenance, or management of a condominium
6 association or property serving the unit owners, as
7 718.302 requires. This is a cable contract for the
8 benefit of the residents.
9 Moreover, the very next section of the
10 condominium statute, 3025 subsection 4 says, this
11 section does not apply to contracts for cable
12 television service, vending machines, laundromats,
13 things like that. So I would assert that this section
14 of the statutes does not apply to this contract.
15 And, I guess, finally there was -- I'm getting
16 mixed up on my numbers. I believe it's 518 -- 542.335
17 talks about restrictive covenants. And, as he said,
18 they usually come up in employment contracts or when
19 you sell a business, one of the employees who are
20 operators of the business won't compete with you. We
21 don't have that here. I would again assert that
22 section of the Florida statute is completely
23 inapplicable. We ask that the motion be denied and we
24 move this case along.
25 THE COURT: You've used the word "parties" a

1 couple times, but I'm looking at Point Marco
2 Development Corporation as being the party. How do
3 you get to the condominium association and sue them?
4 MR. KANTOR: Well, two pro -- two things, Your
5 Honor. We did allege in the contract -- I'm sorry --
6 in the complaint that Cozumel is the successor in
7 interest to the -- to the developer. And Section 10
8 of the contract says, "This agreement shall be binding
9 on the successors, assigns, transferees, mortgagees,
10 heirs and executors of the -- exec -- I'm sorry --
11 executors of Owner and the Premises and is entered on
12 behalf of any condominium residents by their
13 association."
14 I don't think there's any argument that Cozumel
15 Association is not the successor to Point Marco of
16 this contract, and we've made that allegation in the
17 complaint.
18 THE COURT: And paragraph 5 says, "Continental
19 shall establish individual accounts with those
20 residents of the Premises" -- I emphasize -- "desiring
21 to purchase any portion of the Service and shall bill
22 and collect directly from the individual subscribers."
23 So it sounds to me like if they choose not to take any
24 of your services, you can't make them. Isn't that
25 what that paragraph --

1 MR. KANTOR: That's correct. But they can't just
2 breach the contract.
3 THE COURT: How did they breach the contract?
4 MR. KANTOR: The association just said we're not
5 applying this contract. They're entering into another
6 contract with another operator.
7 MR. KOESTER: The rub is the association wasn't
8 buying cable from anybody under the contract cited
9 here by Comcast. The Comcast contract simply says
10 that no unit owner of the Cozumel can use any other
11 cable company other than Comcast. So when we go to
12 the severability provision that he talks about, if
13 there's some invalid part, we've got to follow
14 718.1232. It becomes part of the contract. The only
15 part that's there is the exclusive part.
16 If you were to take an individual unit owner and
17 they wanted to go buy Marco Island Cable, they can't
18 unless the association gives Marco Island Cable an
19 easement, which would violate this agreement because
20 this agreement gives Comcast an exclusive easement, or
21 its predecessor. It says here exclusive, exclusive,
22 exclusive. It goes to the residential unit, the
23 dwelling, the lot. That's all there is.
24 Under the argument that was set forth, one, the
25 Cozumel itself, I guess the only cable it would

1 provide would be in the management office. I'm not
2 sure they have a TV in there, but common areas. The
3 rest of the Cozumel is owned by individual unit owners
4 where all the TVs and everything are.
5 And if the individual unit owners want to have
6 Marco Island Cable, they can do that under 718.1232.
7 And I think they can do it as an individual. They can
8 do it as a group. They can form a cable club. They
9 can vote to have the association grant easements to
10 Marco Island Cable to make it more efficient to do so.
11 I think they can do it any way they want, and there
12 isn't any cases to suggest otherwise.
13 And even the memorandum submitted by Comcast
14 agrees that the individual unit owners have the
15 choice, and he even agrees today, when he stands up to
16 speak, that the individual unit owners have the
17 choice. The Cozumel association itself isn't doing
18 anything with cable other than allowing Marco Island
19 Cable to put it in the individual units.
20 Another item that was brought up is this 11th
21 Circuit case. The 11th Circuit case is under Tab 2 of
22 the second notebook I gave you. That's the Seagood
23 Trading Corporation versus Jerrico case. This case
24 has absolutely no application to the case before this
25 Court at all. This isn't a case that's decided under

1 718.1232. This isn't a case where a developer got
2 together with somebody else to set up a contract to
3 prevent somebody else from getting service. In this
4 particular case, you had a franchiser and a
5 distributor that apparently had a pact or agreement
6 not to serve a particular fish company the kind of
7 fish that they wanted to have, and somebody brought an
8 antitrust claim. And the Court said, Well, you can
9 choose to do business wherever you want. I can't make
10 a franchiser and I can't make a distributor go give
11 somebody else fish. If they don't want to do it, I
12 can't make them do it.
13 But it goes on to say that legal consequences
14 would be different if it's between independent parties
15 and they are trying to enter into an agreement to
16 refuse to allow people to use others, and that would
17 be subject to a per se rule of illegality. And if you
18 go through the case, there's some wonderful language
19 that actually helps me; although I can't honestly tell
20 the Court it has anything to do with this case or
21 anything to do with cable.
22 Section 718.115, if we've got somebody who was
23 disabled or hearing impaired and they don't want to
24 participate in cable, that has zero application to
25 this case for a lot of reasons. One, we maintain

1 anybody at the Cozumel doesn't have to have cable if
2 they don't want to. That clearly complies with
3 718.115.
4 On declaratory relief, I don't believe there's an
5 obligation that when there's a contract that's void as
6 a matter of statute, that we come ask the Court for
7 declaratory relief before the board goes and uses
8 another cable company. I've never seen a case that
9 would suggest one cannot disavow a void contract.
10 Apparently the FCC has not ruled on whether as a
11 matter of federal law exclusive agreements are
12 permissible. I would say that's irrelevant. The
13 FCC's position whether to have one or not is
14 irrelevant. Florida law has its own. There's no
15 allegation that the FCC is going to preempt 718.1232.
16 There's no allegation as to how they're going to rule,
17 and I believe it's not proper for the Court to
18 consider.
19 And on the illusory argument, I believe that
20 since Continental gave themselves the right to cancel
21 the contract whenever they felt it wasn't economically
22 in their interest to stay in it, that that makes the
23 contract illusory. Thank you, Your Honor.
24 THE COURT: Okay. Most of your arguments are
25 based on factual matters and not appropriate for a

1 motion to dismiss. However, the aspect of the
2 contract and the fact that individual owners have the
3 option, I think -- first of all, the Court grants the
4 motion to dismiss with leave to amend.
5 It looks to me like the only allegations that you
6 could -- or in the context of the facts that have been
7 argued -- there may be a lot of others that I don't
8 know about -- it would be that Jim Jones or Mary Smith
9 or somebody came to Comcast and said, "We want you to
10 provide us with services," and the association said,
11 "Nope. They can't have them. We're providing this
12 other service." Well, then that would breach the
13 contract. But the Court cannot see where the
14 contract, based on the terms that have been pled, has
15 been breached at this point. So granted.
16 MR. KANTOR: Your Honor, I'm -- can I just ask a
17 question? I don't understand. If the contract says
18 -- if Florida law says a resident can go get service
19 but the contract that we're suing under is not between
20 us and the residents, it's between the association,
21 how can the association just say, "We're not going to
22 honor this contract any longer" and enter into a new
23 contract with someone else?
24 THE COURT: Okay. Because the contract isn't
25 just between the -- in fact, it isn't even -- the

1 association isn't even in there. But assuming your
2 argument that they're successors, the only thing in
3 that contracts that they succeed -- they didn't
4 succeed -- they inherited is the exclusivity part,
5 which we all know isn't binding because the statute
6 says that anybody that wants to hook up their cable
7 there can do it, and you can't stop them.
8 So then the only other aspect would be the part
9 where it says you can go in -- and it's up to each
10 individual owner if you want to make a deal with them
11 and that you'll bill them separately, and they'll pay
12 each month for whatever services; that if they were
13 getting in the way of that and --
14 MR. KANTOR: But how can the association just
15 enter into another contract?
16 THE COURT: I don't know. Maybe you've got a --
17 what's it called -- a -- where you get in the way of a
18 contract -- tortious interference with a contract or
19 something. Maybe that's what you've got. But on your
20 basis, granted.
21 (Proceedings concluded at 3:49 p.m.)
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23
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COURT CERTIFICATE

STATE OF FLORIDA

COUNTY OF COLLIER

I, Barbara Drescher, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

Dated this 28th day of April, 2004.

Barbara Drescher

Barbara Drescher