**Lyft v. S.F. Tentative Ruling**

**CGC-19-576554 BAY AREA MOTIVATE, LLC VS. THE CITY AND COUNTY OF SAN FRANCISCO ET AL**

Plaintiff'S Motion For Preliminary Injunction (Per Ex Parte App. Heard On 6/12/19.)

Moving Party:

Filed: Jun 12, 2019

Tentative Ruling:

Plaintiff Bay Area Motivate, LLC's motion for preliminary injunction is granted. Defendants are enjoined from issuing permits to any other bike sharing program for traditional bikes during the term of the Coordination Agreement. Defendants are further enjoined from soliciting others to operate an electric or e-bike sharing program without complying with Plaintiff's right of first offer per section 32.3 of the Coordination Agreement.

"A superior court must evaluate two interrelated factors when ruling on a request for a preliminary injunction: (1) the likelihood that the plaintiff will prevail on the merits at trial and (2) the interim harm that the plaintiff would be likely to sustain if the injunction were denied as compared to the harm the defendant would be likely to suffer if the preliminary injunction were issued." (*Smith v. Adventist Health System/West* (2010) 182 Cal.App.4th 729, 749.)

Plaintiff is likely to prevail on the merits on its claims for specific performance (breach of contract) and declaratory relief. "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (Civ. Code § 1636; see also Code Civ. Proc. § 1859.)

On December 31, 2015, Plaintiff and Defendants entered into a "Coordination Agreement" that granted Plaintiff the "Exclusive Rights" to operate a bike sharing program within San Francisco. The agreement provides in pertinent part: "The Participating Cities hereby grant to Operator the exclusive right to operate a bike share program in the public rights-of-way in the Participating Cities during the Term, with the exception of (i) non-automated non-self service . . . . bike rental operations, (ii) electric scooter sharing program, and (iii) automated . . . roundtrip bike share

operations." (Coordination Agreement § 32.1.) The agreement broadly defines "bicycle" and clarifies that "bicycles" includes e-bikes. (*Id*. § 1.13.)

This agreement does not draw a distinction between docked/stationed and stationless/dockless bikes. The contract provides that certain types of bicycles are excluded from the scope of the exclusive rights covenant, but dockless bikes are not included. Under the doctrine of *expressio unius est exclusio alterius*, the Court finds the failure to include dockless bikes as one of the exceptions is telling. Plaintiff therefore is entitled to unconditional exclusivity for stationed or stationless "traditional" bikes during the term of the agreement. For stationed or stationless e-bikes, Plaintiff is entitled to a right of first offer. (Coordination Agreement § 32.3.)

The court rejects Defendants' and Intervenor's arguments that other sections of the contract that reference "Docks," "Kiosks," and similar station-oriented language means that the exclusivity agreement does not apply to stationless bikes. The companion Bay Area Bike Share Program Agreement that Plaintiff executed on the same date as the Coordination Agreement contemplates upgrades in the bike sharing program, specifically including stationless bikes. (See Program Agreement § 6.5(c) ["Operator may . . . phase out Kiosks when they have become obsolete on account of the availability and usage of mobile phone apps."]; § 6.7 ["Nothing in this Agreement shall limit Operator's right to upgrade the Functional Specifications."]; § 2.6.2 [parties ability to revise program].) These provisions demonstrate that the parties envisioned a dynamic relationship and that changes could occur over the 10-year term of the contract. (See Civ. Code § 1642 ["Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together."].)

Defendants and Intervenors argue that "the City did not know about dockless bike technology in 2015" and therefore the parties never understood that the City would be granting a monopoly over such bikes. (City's Opposing Points and Authorities, 9:21-22.) The evidence does not support that assertion. The SFMTA admits that it was aware that "[d]ockless bike sharing existed as a possibility . . . as early as 2013 or 2014 . . . . ." (Parks Decl. ¶ 11; see also Ginsburgh Decl. ¶ 14 [stationless bikes were available before the Coordination Agreement and Program Agreements were signed, including a pilot program operated by the San Francisco Airport that utilized stationless bikes]; Rzepecki Decl. ¶ 23 [JUMP launched its first dockless non-electric bikeshare system in 2013].) In other words, Defendants were aware of such technology for quite some time before the Coordination Agreement was executed on December 31, 2015. Even if Defendants believed large-scale deployment of dockless bikes in an urban area was not viable, it was incumbent upon them to list that exception in the exclusivity agreement.

There is a difference between being ignorant of a fledgling technology and believing that it is not viable.

Defendants also assert that the City's "intent" in entering into the Coordination Agreement was to limit the grant of exclusivity to docked bikes because "that has always been the SFMTA's understanding of the exclusivity provision." (Parks Decl. ¶ 8; City's Opp. at 9-10.) However, a party's "uncommunicated subjective intent is irrelevant" and cannot contradict the parties' objective manifestation of their intent, which is "'gathered from the reasonable meaning of the words and acts of the parties, and not from their unexpressed intentions or understandings.'" (*Reigelsperger v. Siller* (2007) 40 Cal.4th 574, 579-580.) It is undisputed that the parties did not discuss any carve-out or exception for dockless bikes in the negotiations leading to the Coordination Agreement and the Program Agreement. (Parks Decl. ¶ 6; Ginsburgh Decl. ¶ 13.)

Defendants' conduct prior to the current dispute also supports Plaintiff's interpretation of the Coordination Agreement. (See *Southern Cal. Edison Co. v. Superior Court* (1995) 37 Cal.App.4th 839, 851 ["The rule is well settled that in construing the terms of a contract the construction given it by the acts and conduct of the parties with knowledge of its terms, and before any controversy has arisen as to its meaning, is admissible on the issue of the parties' intent…"]; *Richeson v. Hetal* (2007) 158 Cal.App.4th 268, 280 ["The law is well settled that the construction of a contract as shown by the acts and conduct of the parties prior to the controversy as to its meaning, is entitled to great weight."] In 2017, the SFMTA learned that an entity named Bluegogo planned to launch a dockless bike program in San Francisco. (Parks Decl. ¶ 16.) In response to those plans, Defendants told Bluegogo that "[w]e write to request information about how you intend to operate in San Francisco and to inform you that an exclusive right to operate a bike share program in the public right of way in the City has been granted to another company." (Plaintiff's Evidence, Ex. E, pg. 1.) The second page of that letter further stressed Plaintiff's exclusive rights by quoting § 32.1 of the Coordination Agreement. Defendants' recognition of Plaintiff's exclusive rights is also reinforced by the parties' November 2017 settlement agreement that allowed for the Jump pilot project. (See Plaintiff's Evidence, Ex. D ["Motivate agrees to a one-time exception to its exclusivity in the area of e-bikes."].) There is also evidence that the Metropolitan Transportation Commission, which was a party to the Program Agreement, understood Plaintiff's right of exclusivity to extend to stationless/dockless bikes. (See, e.g, Plaintiff's Evidence, Ex. I and J at 2 [Jan. 30, 2017 letters from MTC to Apple and Google asserting that "Bluegogo's [GPA and app based 'free floating' bike sharing] operations violate the exclusive right granted . . . to Motivate to operate a bikeshare system"].)

The balance of equities and harms weighs in favor of Plaintiff and it is entitled to injunctive relief. Damages are not easily ascertainable over the 10-year term of the contract and damages

to Plaintiff's goodwill and reputation are unquantifiable. Plaintiff obtained the exclusive right to operate the bike-sharing program and allowing competitors to dilute that right would be irreparable. Courts often issue injunctions to protect intangible rights such as the sale of good will, franchises, and valid noncompetition covenants. The Court believes that that body of law is analogous to the instant situation. (See *Alliant Ins. Services, Inc. v. Gaddy* (2008) 159 Cal.App.4th 1292 [finding plaintiff would likely suffer irreparable harm and enjoining continued breach of noncompetition and nonsolicitation covenants]; *City of San Marcos v. Coast Waste Management, Inc*. (1996) 47 Cal.App.4th 320 [upholding injunction to enforce plaintiff's exclusive franchise for waste disposal]; *Jay Bharat Developers, Inc. v. Minidis* (2008) 167 Cal.App.4th 437 [enjoining terminated franchisee from continuing to use trademark]; see also *Stuhlbarg In'tl Sales CO. v. John D. Brush & Co.* (9th Cir. 2001) 2490 F.3d 832, 841 [the "threatened loss of prospective customers or goodwill certainly supports a finding of the possibility of irreparable harm"]; *Morris County Transfer Station, Inc. v. Frank's Sanitation Service, Inc*. (1992) 260 N.J. Super. 570, 574-575 ["The violation of an exclusive franchise entitles the franchise holder to an injunction…There are sound reasons to explain why irreparable damage is implicit in the violation of a utility's exclusive franchise so as to fortify plaintiff's right to an injunction. Once the violation occurs, the character of the franchise as an exclusive property right is destroyed."].) In *Thayer v. Plymouth Center, Inc. v Chrysler Motors Corp.* (1967) 255 Cal.App.2d 300, 306, the court determined that specific performance/injunctive relief was not warranted because the plaintiff had operated at a profit and damages were not "extremely difficult to ascertain." In this case, Plaintiff has yet to turn a profit and the exclusive right to operate a bike sharing program is not similar to the established non-exclusive car dealership in *Thayer*.

The court rejects Intervenor's laches argument. "Laches is an equitable defense which is established by a showing that the plaintiff has been guilty of an unreasonable delay and either acquiescence in the act of which the plaintiff complains or prejudice to the defendant as a result of the delay." (*County of Fresno v. Fair Employment & Housing Com*. (1991) 226 Cal.App.3d 1541, 1556.) In this case, it is unclear how the defense applies vis-à-vis the permissive Intervenor as Plaintiff has no claims against it. Moreover, Intervenor fails to show any sort of unreasonable delay. When the City passed a resolution to establish a "Stationless Bicycle Share Permit Program" in 2017, that was not tantamount to anticipatorily breaching the Coordination Agreement. It appears that the dispute regarding Plaintiff's exclusive rights arose in approximately April of 2019 and Plaintiff did not delay in seeking to vindicate its rights. (Plaintiff's Evidence, Ex. Q; Samponaro Decl. ¶ 17.)