

Summary: The Plaintiffs filed a motion for an ex parte temporary restraining order, arguing that the Defendants should be enjoined from interfering with the Plaintiff's attempts to access the Defendants' property for the Plaintiff's geophysical operations. The court granted the motion, finding that the Dataphase factors for issuance of a temporary restraining order were satisfied.

Case Name: Geokinetics USA, Inc. v. Marmon, et al.

Case Number: 4-08-cv-104

Docket Number: 4

Date Filed: 12/3/08

Nature of Suit: 290

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHWESTERN DIVISION**

Geokinetics USA, Inc.,)	
)	
Plaintiff,)	ORDER GRANTING EX PARTE
)	TEMPORARY RESTRAINING ORDER
vs.)	
)	
Wayne H. Marmon and)	
Brenda B. Marmon,)	Case No. 4:08-cv-104
)	
Defendants.)	

Before the Court is the Plaintiff's "Motion for Ex Parte Temporary Restraining Order" filed on December 1, 2008. The Plaintiff seeks a temporary restraining order enjoining and restraining the Defendants from interfering in any way with the Plaintiff's attempts to access, and use for geophysical operations, the following real property, located in Mountrail County, North Dakota:

Section 29, Township 156 North, Range 92 West
SW/4, SE/4NW/4 Less 500', SW/4NW4 Less Cemetery

I. BACKGROUND

The plaintiff, Geokinetics USA, Inc., is a geophysical exploration company engaged in the business of conducting geophysical exploration operations throughout the state of North Dakota. The purpose of geophysical exploration is to gather data from strata deep beneath the surface of the earth and analyze it for the purpose of oil and gas exploration. Geophysical exploration involves sending shock waves into the earth by explosive charges set off in holes or from vehicle-mounted vibrators. Seismograph surveys then measure the reflection, refraction, and velocity of the seismic or shock waves created.

Geokinetics was retained by the Hess Corporation to conduct geophysical operations on an area approximately 240 square miles in size located in Williams and Mountrail Counties, North Dakota. This operation is referred to as the Red Sky Project. Geokinetics started geophysical operations on the Red Sky Project in August of 2008. To date, Geokinetics has conducted geophysical operations on approximately half of the Red Sky Project, or approximately 120 acres.

The defendants, Wayne Marmon and Brenda Marmon, own property located in Mountrail County, North Dakota, that is located within the Red Sky Project. The Marmon Property is located at:

Section 29, Township 156 North, Range 92 West
SW/4, SE/4NW/4 Less 500', SW/4NW4 Less Cemetery

The Marmons own the surface estate of the property but they do not own the mineral rights. EOG Resources, Inc. and The Triple T are the owners of an interest in the oil and gas leasehold estate, granting them the right to conduct geophysical exploration operations on the Marmon land. EOG Resources and Triple T have agreed to allow Geokinetics to conduct geophysical operations on the Marmon property.

Geokinetics was granted a “geophysical exploration permit” by the North Dakota Industrial Commission, which grants Geokinetics the right to conduct geophysical exploration activities in and under certain lands in North Dakota, including the Marmon property. Section 38-08.1-04.1 of the North Dakota Century Code grants Geokinetics the right to move onto the Marmon property. On September 15, 2008, pursuant to N.D.C.C. § 38-08.1-04.1, Geokinetics gave notice to the Marmons that it would be commencing geophysical exploration activities on the Marmon property. The notice included an offer of payment to the Marmons as settlement for any damage to the surface lands.

Geokinetics indicates that the Marmons have repeatedly declined to enter into an agreement pertaining to Geokinetics’ planned operations. The Marmons have informed Geokinetics that it may not enter their property and that law enforcement will be called if a Geokinetics representative enters the property. On or about November 26, 2008, representatives of Geokinetics entered the Marmon property to survey the land in preparation for seismograph operations. The representatives placed flags on the Marmon property to indicate the exact locations where the receivers and source instruments are to be placed when the seismic operations begin. On or about November 28, 2008, Geokinetics discovered that some of the flags had been removed, thus inhibiting the seismic operations.

On or about November 28, 2008, Geokinetics met with Kenneth Halverson, the Mountrail County Sheriff, to advise him of the situation with the Marmons. After talking with Mountrail County State’s Attorney Wade Enget, Sheriff Halverson informed Geokinetics that if its representatives were to enter the Marmon property and the Marmons alleged trespass, he would stop all Geokinetics’ operations on the property until Geokinetics receives a court order authorizing the work.

On December 1, 2008, Geokinetics filed a complaint in federal court in which it brought a claim for declaratory judgment and a claim for injunctive relief. Geokinetics contends that the Marmons have delayed Geokinetics' surveying activities and if Geokinetics is not allowed immediate access to the Marmon property, further delays will continue or Geokinetics may have to exclude the Marmon property from its operations entirely. Geokinetics contends that if it is forced to exclude the Marmon property from its operations entirely, Geokinetics' survey will be missing data it agreed to provide the Hess Corporation for oil and gas exploration activities in the area. Geokinetics also contends that the lack of geophysical data will have a detrimental effect on the operations for the Red Sky Project; that the mineral owners and oil and gas leasehold owners will suffer harm; and that adjacent mineral owners will also suffer harm due to the lack of sufficient geophysical information. See Docket No. 3-3. Therefore, Geokinetics moves for a temporary restraining order enjoining and restraining the Marmons from interfering in any way with Geokinetics' attempts to access the Marmon property for its geophysical operations.

II. LEGAL DISCUSSION

Pursuant to Rule 65(b) of the Federal Rules of Civil Procedure, in determining whether a temporary restraining order should be granted, the Court must look to the specific facts shown by an affidavit to determine whether immediate and irreparable injury, loss, or damage will result to the applicant. It is well-established that applications for preliminary injunctions and temporary restraining orders are generally measured against the same factors. Wachovia Securities, L.L.C. v. Stanton, 571 F. Supp. 2d 1014, 1031 (N.D. Iowa 2008). In determining whether preliminary injunctive relief should be granted, the Court is required to consider the factors set forth in

Dataphase Sys., Inc., v. C L Sys., Inc., 640 F.2d 109, 114 (8th Cir. 1981). Whether a preliminary injunction or temporary restraining order should be granted involves consideration of “(1) the movant’s probability or likelihood of success on the merits, (2) the threat of irreparable harm or injury to the movant absent the injunction, (3) the balance between the harm to the movant and the harm that the injunction’s issuance would inflict on other interested parties, and (4) the public interest.” Wachovia Securities, L.L.C., 571 F. Supp. 2d at 1032 (citing Dataphase Sys., Inc., 640 F.2d at 114).

It is well-established that the burden of establishing the necessity of a temporary restraining order or a preliminary injunction is on the movant. Baker Elec. Co-op., Inc. v. Chaske, 28 F.3d 1466, 1472 (8th Cir. 1994); Modern Computer Sys., Inc. v. Modern Banking Sys., Inc., 871 F.2d 734, 737 (8th Cir. 1989). “No single factor in itself is dispositive; in each case all of the factors must be considered to determine whether on balance they weigh towards granting the injunction.” Baker Elec. Co-op., Inc., 28 F.3d at 1472 (quoting Calvin Klein Cosmetics Corp. v. Lenox Lab., Inc., 815 F.2d 500, 503 (8th Cir. 1987)).

A. PROBABILITY OF SUCCESS ON THE MERITS

When evaluating a movant’s “likelihood of success on the merits” the Court should “flexibly weigh the case’s particular circumstances to determine ‘whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined.’” Calvin Klein Cosmetics Corp., 815 F.2d at 503 (quoting Dataphase Sys., Inc., 640 F.2d at 113). At this preliminary stage, the Court does not decide whether the party seeking the temporary restraining order will ultimately win. PCTV Gold, Inc. v. SpeedNet, LLC, 508 F.3d

1137, 1143 (8th Cir. 2007). Although a temporary restraining order cannot be issued if the movant has no chance on the merits, “the Eighth Circuit has rejected a requirement as to a ‘party seeking preliminary relief prove a greater than fifty per cent likelihood that he will prevail on the merits.’” Id. (quoting Dataphase Sys., Inc., 640 F.2d at 113). The Eighth Circuit has held that of the four factors to be considered by the district court in considering preliminary injunctive relief, the likelihood of success on the merits is “most significant.” S & M Constructors, Inc. v. Foley Co., 959 F.2d 97, 98 (8th Cir. 1992).

Geokinetics contends that it is likely to prevail on the merits of its declaratory judgment claim. Geokinetics seeks declaratory relief under the Declaratory Judgment Act codified at 28 U.S.C. § 2201. The Declaratory Judgment Act authorizes a court to “declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.” 28 U.S.C. § 2201. “Since its inception, the Declaratory Judgment Act has been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants.” Wilton v. Seven Falls Co., 515 U.S. 277, 286 (1995). Geokinetics contends that it is likely to prevail because, under North Dakota law, the mineral estate is dominant over the surface estate, and because Geokinetics has the right to perform geophysical exploration based on a permit issued by the North Dakota Industrial Commission.

Geokinetics contends that its mineral estate rights are dominant to the Marmon’s surface estate rights. It is well-established in North Dakota that a property’s mineral interests may be separated from the surface rights and may exist distinct from the ownership of the surface. See Slaaten v. Cliff’s Drilling Co., 748 F.2d 1275, 1277 (8th Cir. 1984) (citing Beulah Coal Mining Co. v. Heihn, 180 N.W. 787, 789 (N.D. 1920)). When the mineral estate is severed from a property’s

surface estate, the mineral estate is dominant. Hunt Oil Co. v. Kerbaugh, 283 N.W.2d 131, 135 (N.D. 1979). “The mineral estate is dominant in that the law implies, where it is not granted, a legitimate area within which mineral ownership of necessity carries with it inherent surface rights to find and develop the minerals, which rights must and do involve the surface estate. Without such rights the mineral estate would be meaningless and worthless.” Id. Therefore, the owner of the mineral estate retains the right to enter and use the surface estate for any purpose reasonably necessary to explore, develop, and transport the minerals. Geokinetics contends that it has the right to move onto the Marmon property and use so much of the surface estate on the property as is necessary to conduct the geophysical operations.

Geokinetics also contends that it has the right to perform geophysical exploration on the Marmon property because it followed the proper procedures for obtaining an exploration permit. Under N.D.C.C. § 38-08.1-04.1(1), a company such as Geokinetics must apply for a permit to conduct geophysical exploration and the North Dakota Industrial Commission may issue an applicant a “geophysical exploration permit.” An applicant may not perform geophysical exploration without such a permit. The landowner must be notified at least seven days before the commencement of geophysical exploration. N.D.C.C. § 38-08.1-04.1(5). Geokinetics contends that it applied for, and was issued, a permit to conduct geophysical exploration operations, and that Geokinetics provided the Marmons with proper notice. At this early stage of the proceedings, the Court finds that under North Dakota law, Geokinetics’ mineral estate rights are likely dominant to the surface rights owned by the Marmons, and that Geokinetics followed the proper procedures in North Dakota to conduct its geophysical exploration operations.

The Court finds that at this preliminary stage of the litigation, and based on the information on file with the Court, Geokinetics has established a sufficient likelihood of success on the merits. Accordingly, the Court finds that this factor weighs in favor of the issuance of a temporary restraining order.

B. IRREPARABLE HARM

Geokinetics must next establish that there is a threat of irreparable harm if injunctive relief is not granted and that such harm is not compensable by money damages. Doe v. LaDue, 514 F. Supp. 2d 1131, 1135 (D. Minn. 2007). “Possible or speculative harm is not enough.” The party that seeks the temporary restraining order must show a significant risk of harm exists. Id.

The Eighth Circuit has held that a threatened loss of goodwill is sufficient to constitute irreparable harm. Medicine Shoppe Int’l, Inc. v. S.B.S. Pill Dr., Inc., 336 F.3d 801, 805 (8th Cir. 2003). Also, other courts have concluded that the loss of an ongoing business “cannot be fully compensated by subsequent monetary damages” and “is not measurable entirely in monetary terms.” Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1205 (2d Cir. 1970). Courts have similarly found irreparable harm where a party is threatened with the loss of a business and customer goodwill. See Tom Doherty Associates, Inc. v. Saban Entm’t, Inc., 60 F.3d 27, 37 (2d Cir. 1995); Ryko Mfg. Co. v. Eden Services, 759 F.2d 671, 673 (8th Cir. 1985) (affirming district court’s finding that irreparable harm was shown and injunction was warranted when distributor would be possibly forced out of business).

Geokinetics contends that it will suffer irreparable harm if the Marmons are allowed to continue to prevent Geokinetics from entering the Marmon property and conducting geophysical

exploration operations. Geokinetics contends that it is also threatened by the possibility that the Marmons will have Geokinetics' representatives arrested. The Court finds, at this early stage, that Geokinetics has shown that it will suffer significant harm to its ongoing geophysical exploration operations if it is not allowed to proceed with its plans for the Marmon property. The Court further finds that at this preliminary state of the litigation, Geokinetics has established that it will likely suffer irreparable harm if a temporary restraining order is not issued. Therefore, this factor weighs in favor of the issuance of a temporary restraining order.

C. BALANCE OF HARM

Geokinetics contends that the request for a temporary restraining order will not harm the Marmons. Geokinetics contends that the Marmons will merely be prevented from further delaying Geokinetics' operations and from taking action against Geokinetics' representatives who enter the Marmon property. However, if the temporary restraining order is not granted, Geokinetics contends that it will be forced to give up its planned operations, suffer a lengthy and costly delay in exercising its rights, or risk arrest or physical harm to its employees. The Court finds that the issuance of a temporary restraining order will not harm the Marmons, especially in light of the fact that they are to be compensated for any damage to their property, and that the issuance of a temporary restraining order will prevent harm to Geokinetics. Thus, this factor weighs in favor of the issuance of a temporary restraining order.

D. PUBLIC INTEREST

Geokinetics contends that the development and production of oil and gas is in the public interest. According to N.D.C.C. § 38-08-01, it is “in the public interest to foster, to encourage, and to promote the development, production, and utilization of natural resources of oil and gas in the state” Therefore, at this preliminary stage, this factor arguably weighs in favor of the issuance of a temporary restraining order.

III. CONCLUSION

After carefully reviewing the entire record, the Court finds that the Plaintiff has met its burden of establishing the necessity of a temporary restraining order. The Court **GRANTS** the Plaintiff’s “Motion for Ex Parte Temporary Restraining Order” and will reserve ruling on the request for a preliminary injunction until after the show cause hearing.

Based on the foregoing findings and conclusions, it is **ORDERED**:

- 1) That the Defendants and any persons or entities acting in concert with or on behalf of the Defendants, shall be restrained and enjoined during the pendency of this action from interfering with the Plaintiff’s attempts to access the Marmon property and use the property for geophysical exploration.
- 2) That the Defendants shall appear in Courtroom One of the U.S. District Court for the District of North Dakota, in Bismarck, North Dakota, on Thursday, December 11, 2008, at 1:30 p.m. to show cause under Rule 65 of the Federal Rules of Civil Procedure why they should not be restrained and preliminarily enjoined during the pendency of this action.

- 3) That the Defendants may at any time file a motion to dissolve or modify this temporary restraining order in accordance with Rule 65 of the Federal Rules of Civil Procedure. If such a motion is not filed within ten (10) days after service of this order, the temporary restraining order shall be deemed consented to based upon the grounds set forth above until further order of the Court.
- 4) No bond shall be required to be posted by the Plaintiff before the temporary restraining order is effective.
- 5) The Plaintiff shall arrange for the immediate service of this order together with the Plaintiff's "Motion for Ex Parte Temporary Restraining Order" and supporting pleadings and affidavits, and shall promptly file proof of service with the Court.

Dated this 3rd day of December, 2008.

/s/ Daniel L. Hovland

Daniel L. Hovland, Chief Judge
United States District Court