

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

GEOKINETICS USA, INC.,)	
)	
Plaintiff,)	Civil Action No. 2:17-cv-01314-JFC
)	
v.)	
)	
MUNICIPALITY OF MONROEVILLE,)	
)	
)	
Defendants.)	

**DEFENDANT MUNICIPALITY OF MONROEVILLE’S BRIEF IN OPPOSITION TO
PLAINTIFF’S MOTION FOR TEMPORARY RESTRAINING ORDER AND
PRELIMINARY INJUNCTION**

AND NOW, comes the Defendant, Municipality of Monroeville (the “Municipality”), by and through its counsel, Robert J. Wratcher, Esquire, and files the within Brief in Opposition to Plaintiff’s Motion For Temporary Restraining Order and Preliminary Injunction and, in support thereof, sets forth the following:

I. INTRODUCTION

This case involves the desire of Plaintiff, Geokinetics USA, Inc. (“Plaintiff”) to conduct seismic testing activities on the roadways and road right-of-ways in the Municipality without regard to the health, safety, welfare and convenience of the residents and taxpayers of the Municipality. Plaintiff desires to conduct its seismic testing operations while ignoring the right of the Municipality to use the powers and obligations granted to it by the Commonwealth of Pennsylvania through the Constitution of the Commonwealth of Pennsylvania and legislatively adopted statutes. These powers and obligations include, but not by way of limitation, the power

of the Municipality to regulate the use of its roadways, and the Municipality's duty to protect the environment for its citizens.

II. STATEMENT OF FACTS

Plaintiff's first contact with the Municipality was on February 7, 2017, when Defendant, along with representatives from Huntley & Huntley, Inc. and Cougar Land Services met with the Municipality's Manager (the "Manager") regarding their desire to perform seismic testing on private properties and Municipality roadways and road right-of-ways. At that initial meeting, the Manager informed Plaintiff that at a minimum, it would need to post a road bond in favor of the Municipality and submit a plan identifying the specific portions of roadways and road right-of-ways to be used for seismic testing. The Manager also informed Plaintiff's representatives that they would be required provide a traffic control plan in connection with those proposed activities. On or about March 21, 2017, Plaintiff submitted an unsigned document to the Municipality entitled "Permit No. ISO61317, which requested the Municipality's authorization to allow Plaintiff to perform seismic testing on properties owned by the Municipality (exclusive of roadways or road right-of-ways). The document included an attachment listing the acreage of numerous Municipality owned properties. No other documents were submitted in connection with the request. Since the document submitted did not involve the use of the Municipality's roadways or road right-of-ways, the Municipality took no further action with respect to the March 21, 2017 request at that time. Subsequently, on June 8, 2017, a party acting as an agent of Plaintiff submitted a document entitled "Addendum Permit ISO61317" (the Addendum"), which specifically requested the use of the Municipality's roadways and road right-of-ways to conduct vibroseis testing. The unsigned Addendum indicated that Plaintiff would provide the

Municipality with a certificate of insurance, post a blanket road bond and would not exceed a PPV of .35 in/sec. in its operations. On August 8, 2017, Municipal Council of the Municipality (“Municipal Council”) adopted a resolution denying Plaintiff’s request to perform seismic testing on properties owned by the Municipality (excluding roadways and road right of ways) pursuant to Plaintiff’s March 21, 2017 request. Thereafter, on September 12, 2017, Municipal Council adopted a resolution denying Plaintiff’s request to perform seismic testing on the Municipality’s roadways and road right-of-ways pursuant to the June 8, 2017 submission of the Addendum. During the time period between the Plaintiff’s first meeting with the Municipality on February 7, 2017, and the actions taken by Municipal Council on August 8, 2017 and September 12, 2017 with respect to Plaintiff’s requests, a group of environmentally conscious residents of the Municipality appeared at public meetings and urged Municipal Council to protect their property rights by adopting an ordinance which would control and regulate seismic testing activities in the Municipality. On September 12, 2017, following Municipal Council’s denial of Plaintiff’s request to use the Municipality’s roadways and road right-of-ways, the Municipality adopted Ordinance No. 2668, which establishes regulations for the performance of seismic testing activities in the Municipality. The timing of the adoption of Ordinance No. 2668 and denial of Plaintiff’s requests to conduct seismic testing in the Municipality are the subjects of this litigation.

III. ARGUMENT

A. A PRELIMINARY INJUNCTION SHOULD NOT BE GRANTED.

A preliminary injunction is intended to preserve the status quo and prevent imminent and irreparable harm that might occur before the merits of a case can be heard and determined.

Minard Run Oil Co. v. United States Forest Service, 670 F.3d 236, 250 (3d Cir. 2011). A preliminary injunction is an extraordinary remedy and may only be granted if the petitioner has established a clear right to the relief it seeks. T.W. Phillips Gas and Oil Co. v. Peoples Natural Gas Co., 492 A.2d 776 (Pa. Cmwlth. 1985). A court must consider four factors when ruling on a motion for a preliminary injunction:

(1) Whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably injured by the denial of relief; (3) whether granting preliminary relief will result in even greater harm to the non-moving party; and (4) whether the public interest favors such relief. Miller v. Mitchell, 598 F.3d 139, 147 (3d Cir. 2010).

The moving party's failure to show a likelihood of success on the merits must necessarily result in the denial of a preliminary injunction. In re: Arthur Treacher's Franchisee Litigation, 689 F.2d 1137, 1143 (3d Cir. 1982). The burden of proof lies with the plaintiff to establish every element in its favor, or the grant of a preliminary injunction is inappropriate. Tennessee Gas Pipeline Co. LLC v. Delaware Riverkeeper Network, 921 F. Supp. 2d 381, 385 (M.D. Pa. 2013). Based on a close examination of Plaintiff's request for injunctive relief in the instant case, the Plaintiff has not its requisite burden for the requested injunctive relief and such relief should be denied.

1. Plaintiff Has Failed To Demonstrate a Reasonable Probability of Success on the Merits.

Plaintiff is unlikely to succeed on the merits of the instant litigation based upon its own actions and inactions in this dispute, including Plaintiff's failure to exhaust available administrative/state law remedies in connection with the Municipality's denial of the requested permit. Plaintiff's Complaint alleges that the Municipality's action in denying it a permit to use the Municipality's roadways and road right-of-ways for seismic testing violates various

provisions of the U.S. Constitution, including due process and equal protection. Additionally, Plaintiff asserts that the Municipality's actions violate state laws related to land use and the issuance of municipal permits. However, Plaintiff has taken no action to exhaust the various administrative and state law appeal remedies available to it to obtain the desired use permit. It has been recognized that before a plaintiff brings a Fourteenth Amendment due process or equal protection claim in federal court, "he must 'have taken advantage of the processes that are available to him..." Campbell v. Conroy, 55 F.Supp.3d 750, 758 (W.D. Pa. 2014) (other citations omitted). The rule is based on the principle that if there is a process on the books that appears to provide due process, the plaintiff cannot skip that process and use the federal courts as a means to get back what he wants. (Id. at 758-59). Following Municipal Council's denial of the permit requested by Plaintiff, no effort was made by Plaintiff to take any administrative and/or other action to appeal the Municipality's denial of the requested permit as provided by law. Although Plaintiff has alleged in the Complaint that by denying the requested permit, the Municipality violated various provisions of the Pennsylvania Municipalities Planning Code, 53 Pa. Stat. § 10101. et seq. (the "MPC"), Plaintiff failed to take any action to appeal the denial of the requested pursuant to the express provisions of the MPC, the Municipality's Home Rule Charter or Pennsylvania Local Agency Law, 2 Pa. C.S. § 752. Plaintiff's failure to exhaust these administrative/state law remedies and obtain a due process hearing at the municipal level are likely to subject many or all of Plaintiff's claims to dismissal at later stages of the this litigation.

Additionally, Plaintiff asserts in conclusory fashion that it has been denied the use of the roadways and road right-of-ways in the Municipality. While that statement taken at face value may be true, it must be noted that Plaintiff's proposed seismic testing activities go far beyond simply using the Municipality's roads for passage in the same manner that all other member of

the general public use them. Plaintiff proposes to operate heavy equipment on the Municipality's roadways, using mechanical equipment to produce vibrating waves to complete its seismic testing activities. In addition to interrupting the normal flow of traffic to the Municipality's residents, Plaintiff has presented no evidence to assure that its vibroseis activities will not be harmful to the roadways or to underground infrastructure located in the road right-of-ways or on adjacent private properties. Nor has Plaintiff investigated the condition or suitability of the Municipality's roadways to accommodate the heavy equipment and methods it intends to employ to complete the proposed seismic testing. Moreover, Plaintiff has failed to follow the most basic steps required of a party seeking the issuance of governmental permit. While Plaintiff's representatives have met with the Municipality on several occasions, and submitted requests for a permit to use the Municipality's roadways and road right-of-ways, Plaintiff has failed to provide the Municipality with the required documentation and information to make its application complete. Plaintiff has not provided the Municipality with a list of the specific roadways or the portions of those roadways on which Plaintiff intends to employ the vibroseis testing, nor has Plaintiff provided the Municipality with sufficient information which would permit the Municipality to properly evaluate the impact of the proposed seismic testing activities.

2. Plaintiff Has Failed to Demonstrate Irreparable Injury.

Even if Plaintiff is able to demonstrate success on the merits, Plaintiff has plead no facts which demonstrate proof of immediate, irreparable injury Plaintiff would suffer if the Court declines to grant the requested injunctive relief. Irreparable injury is established by a plaintiff showing it will suffer harm that cannot be redressed by a legal or equitable remedy following trial. The preliminary injunction must be the only way of protecting the plaintiff from harm. Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 801 (3d Cir. 1989). Plaintiff bears

the burden of showing irreparable injury. Opticians Ass'n of America v. Indep. Opticians of America, 920 F.2d 187, 192 (3d Cir. 1990). In fact, the plaintiff must show immediate irreparable injury, which is more than merely serious or substantial harm. ECRI v. McGraw-Hill, Inc., 809 F.2d 223, 226 (3d Cir. 1987). Notably, the word “irreparable” connotes that which cannot be repaired, retrieved, put down again or atoned for... Acierno v. New Castle County, 40 F.3d 645, 653 (3d Cir. 1994). Additionally, the claimed injury cannot merely be possible, speculative or remote. Dice v. Clinicorp, Inc., 887 F. Supp. 803, 809 (W.D. Pa. 1995). The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm. Hadeed v. Advanced Vascular Resources of Johnstown LLC, (W.D. Pa. 2016) (citing Sampson v. Murray, 415 U.S. 61, 90 (1974)).

A close examination of the elements of Plaintiff's alleged irreparable harm fails to demonstrate the requisite facts to lead to a conclusion that such irreparable harm will actually occur. In Paragraph 13 of Plaintiff's Second Motion For Expedited Hearing on Preliminary Injunction, Plaintiff states that if it is denied the requested injunctive relief, it will “be forced to remove Monroeville from the Project resulting in a failure to perform under the contract”. Plaintiff further states in Paragraph 13 that it “will be unable to fulfill its contracts with individual land and mineral owners located in Monroeville” and such inability to perform under its current contract “will affect its ability to obtain contracts and future business”, all of which allegedly constitute irreparable harm. Plaintiff has not provided any contract or other document in support of its alleged time deadline, nor has Plaintiff established, other than through conclusory statements, that the failure to meet such deadlines would result in any penalty or other harm to it, or that any such harm cannot be redressed by a legal or equitable remedy

following trial. Instant Air, 882 F.2d at 801. Nor has Plaintiff established that its contracts with individual landowners in the Municipality, which are not the contracts under which Plaintiff proposes to use the Municipality's roadways and road right-of-ways to conduct its seismic tests, have any specific time constraints, or even if such contractual time constraints exist, that the failure to meet such constraints cannot be cured by money damages.

The Plaintiff's assertions that its inability to perform under its current contract due to the Municipality's actions will affect its ability to obtain future contracts are at best remote and speculative. The proof required for injunctive relief has been characterized as a "clear showing of immediate irreparable injury" or a "presently existing actual threat; [an injunction] may not be used simply to eliminate a possibility of a remote future injury..." Viad Corp. v. Cordial, 299 F.Supp.2d 466, 480 (W.D. Pa. 2003) (quoting Acierno 40 F.3d at 655). Plaintiff is in the business of performing seismic testing for the oil and gas industry. Due to the recognized need of service providers such as Plaintiff to obtain use permits and other governmental authorizations to conduct its activities on behalf of its clients, the denial or delay in the issuance of a use permit or other governmental authorization is a foreseeable event. As a reputable and recognized service provider in the oil and gas industry, it is unlikely that delays in contract performance due to the denial of such authorizations would cause future potential customers of Plaintiff to deny it contractual opportunities on that basis. The moving party must demonstrate that the alleged harm is imminent, not merely in the "indefinite future" Campbell Soup Co. v. ConAgra, Inc., 977 F.2d 86, 91 (3d Cir. 1992). Plaintiff's claims of future loss of customers are clearly remote and speculative, and do not support its request for injunctive relief.

3. Greater Harm will Result From Granting the Preliminary Injunction Than From Denying It.

The analysis of this prong of the test for evaluating the grant of a preliminary injunction requires the Court to perform a balancing test to determine which party will suffer greater harm. Essentially, the alleged irreparable harm of the moving party if the preliminary injunction is not granted is balanced against the harm a non-moving party would suffer if the injunction was granted. Miller v. Mitchell, 598 F.3d at 147. The Court must weigh these respective harms, with the burden on the party requesting injunctive relief.

In the instant case, the irreparable harm alleged by Plaintiff is speculative, remote and unsupported by the facts as set forth in the Complaint and Plaintiff's Motion For Preliminary Injunction. The essence of Plaintiff's position is that it will be irreparably harmed and potentially forced out of business if the Court does not grant it the expedited injunctive relief it seeks. Ironically, the harm alleged by Plaintiff appears financial in nature (loss of contracts, delay damages) even though Plaintiff asserts that it requires injunctive relief due to the inadequacy of money damages. Plaintiff asserts that it began its field work related to the Interstellar 3D Project in January of 2017, and expected to complete its work on February 1, 2018. (Carpenter Affidavit, ¶ 3). Plaintiff has further indicated that the expected date of completion, "due to delays, including those involving Monroeville" have extended the project deadline to February 28, 2018. (Carpenter Affidavit, ¶ 3). The affidavit essentially admits that there have been various project delays, and not all of those delays are the result of the actions of the Municipality. Additionally, the affidavit indicates that the project deadline has been extended. By Plaintiff's own admission, there have been numerous delays in Plaintiff's project, not all of which have been attributed to the actions of the Municipality. The Plaintiff has further stated that these delays have already

extended the project deadline. Plaintiff's assertions seem to indicate that the time constraints which Plaintiff uses as the basis for requiring expedited injunctive relief to prevent the alleged irreparable harm are arbitrary, and created for the purpose of attempting to win the injunctive relief it seeks.

The Plaintiff's desired relief and the harm it alleges if such extraordinary relief is not granted must be balanced against the rights of the Municipality to regulate the use of its roadways, particularly when the Plaintiff's proposed vibroseis operations go well beyond simply driving across such roadways, and involves potential damage to the roadways and the public infrastructure that lies beneath them. Plaintiff asserts that "vibroseis operations are benign and approved by the Pennsylvania Department of Transportation ("PennDOT") on Commonwealth highways". (Complaint, ¶ 15). This assertion does not take into account that the Municipality's roads are in some cases built to specifications that are inferior to those used by PennDOT. The failure of Plaintiff to provide any pre-test review of the potentially affected Municipality roadways subjects the Municipality and its residents to potential damage and inconvenience. As set forth elsewhere, Plaintiff has failed to provide the Municipality with the exact list of streets and portions of those streets Plaintiff intends to use for seismic testing. Nor has Plaintiff submitted the required traffic control plan, so that the Municipality could properly evaluate the potential damage to its roadways and sub-surface infrastructure, and inconvenience to its residents.

Plaintiff has not adequately demonstrated irreparable harm in the absence of immediate injunctive relief, and permitting Plaintiff to conduct its seismic operations prior to giving both Plaintiff and the Municipality the opportunity to fully litigate the issues raised by the Municipality will cause a greater degree of harm to the residents of the Municipality than the

potential speculative harm that Plaintiff may incur. If Plaintiff is permitted to simply commandeer the use of the Municipality's roadways for a private, commercial purpose through immediate injunctive relief, any harm to the Municipality and its residents will be much more difficult to remedy, and far outweighs that suffered by Plaintiff if the preliminary injunction is not granted.

4. The Public Interest is Best Served By Denying the Requested Injunctive Relief.

The public interest is best served by denying the Plaintiff's request for injunctive relief. In addition to Plaintiff's failure to demonstrate the requisite irreparable harm, the Plaintiff has ignored the impact of its activities on the residents of the Municipality who are not parties to contracts with the Plaintiff. The arguments advanced by the Plaintiff have also disregarded the duties and obligations of the Municipality to its citizens under the Pennsylvania Constitution and statutes enacted by the Pennsylvania legislature. Most significantly, the responsibility owed to its citizens to uphold its duties pursuant to the Environmental Rights Amendment, as recognized in Robinson Township v. Commonwealth, 83 A.2d 901 (Pa. 2013) and subsequent related decisions. The Environmental Rights Amendment imposes a duty upon municipalities to protect their citizens against activities that potentially have a profound impact upon the environment. This duty has been illuminated in subsequent decisions of the Pennsylvania appellate courts. See: Robinson Township v. Commonwealth, 96 A.3d 1104 (Pa. Cmwlth. 2014); Robinson Township v. Commonwealth, 147 A.3d 536 (Pa. 2016); and Pennsylvania Environmental Defense Foundation v. Commonwealth, 161 A.3d 911 (Pa. 2017). In recognizing and reinforcing the existence of the Environmental Rights Amendment, Pennsylvania courts have made a strong

statement of public policy regarding the importance of this provision of the Pennsylvania Constitution.

The denial of Plaintiff's requested injunctive relief also serves the public interest by recognizing the right of Municipality to regulate the use of its roads. As previously stated, Plaintiff seeks not to just drive over the Municipality's roads, rather, Plaintiff seeks to conduct seismic testing by driving onto the Municipality's roadways, some of which are subject to weight restrictions due to age and design, with heavy equipment and engage in the seismic testing process by causing intentional vibrations. Plaintiff proposes to initiate these tests without prior investigation into the condition of the roadways and any public infrastructure located beneath them and in the adjacent right-of-ways. The Supreme Court of Pennsylvania has determined that boroughs have broad authority to control the use of its public roadways pursuant to Section 1202(17) of the Pennsylvania Borough Code, 53 Pa.C.S. § 46202(17)¹. See: Board of Sup'rs of New Britain Tp v. Bucks County Cablevision, 492 A.2d 461 (Pa. Cmwlth. 1985). The Supreme Court's reasoning underscores the importance to the public interest in permitting a municipality to control the use of its roadways from various private, commercial interests such as those advanced by Plaintiff in the instant case in favor of the citizens of the impacted communities.

¹ Even though the Municipality is organized under the Pennsylvania Home Rule Charter and Optional Plans Law, many of its powers are exercised pursuant to the Pennsylvania Borough Code.

IV. CONCLUSION

For the foregoing reasons, Plaintiff's Motion For a Temporary Restraining Order and Preliminary Injunction should be denied.

Respectfully submitted,

Date: October 30, 2017

/s/ Robert J. Wratcher
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CERTIFICATE OF SERVICE

I, Robert J. Wratcher, Esquire, counsel for Defendant certify that a true and correct copy of the foregoing was filed electronically through the Court's CM/ECF System this 30th day of October, 2017 to all parties by operation of the Court's electronic filing system

/s/ Robert J. Wratcher
Robert J. Wratcher
Counsel for Defendant