

Affirmed and Opinion Filed November 10, 2017



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-17-00623-CV

**7-ELEVEN, INC., Appellant
V.
CARDTRONICS, LP, Appellee**

**On Appeal from the 44th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-17-05847**

MEMORANDUM OPINION

Before Justices Francis, Myers, and Whitehill
Opinion by Justice Francis

Cardtronics, LP, operates the ATMs in 7-Eleven stores nationwide under a ten-year agreement that expired on July 31, 2017. Its obligations under the contract continue through a transition period that ends in February 2018 by which time all of the Cardtronics ATMs will be replaced with machines from another company affiliated with 7-Eleven.

Before the contract expired, Cardtronics notified 7-Eleven that, effective July 1, 2017, it was shutting off access to one of the surcharge-free networks available on the ATMs, meaning that some customers who were accustomed to withdrawing money without paying a fee would no longer be able to do so. 7-Eleven objected and ultimately sued Cardtronics for breach of contract, seeking money damages and injunctive relief to prevent Cardtronics from discontinuing

the service. Following an evidentiary hearing, the trial court denied 7-Eleven's request for temporary injunction. This accelerated interlocutory appeal followed.

In three issues, 7-Eleven argues the trial court abused its discretion in denying its request for temporary injunction when the evidence established a probable breach of contract and imminent and irreparable harm beginning on July 1, 2017, and by failing to consider the balance of equities as it related to the relief sought. We affirm.

In July 2007, 7-Eleven entered a ten-year Placement Agreement giving Cardtronics the exclusive right to install and operate ATMs in its stores in the United States. At the time of the injunction hearing, Cardtronics operated almost 8,000 ATMs in 7-Eleven stores. The Agreement identified the financial services to be provided by the ATMs and contained schedules setting out how payments to 7-Eleven would be calculated for ATM transactions, whether with or without a surcharge. The Agreement also provided for a period to negotiate renewal of the contract and, if no renewal was agreed to, a 180-day transition period during which Cardtronics remained obligated under the Agreement. Finally, under the Agreement, both parties waived special, incidental, punitive, exemplary, and consequential damages.

Surcharge-free networks allow cardholders of the contracting financial institutions to make cash withdrawals from the ATMs without being assessed a fee. Cardtronics already had agreements with six networks to provide surcharge-free services, and the Agreement allowed Cardtronics to enter into such agreements in the future only with 7-Eleven's consent. During the contract term, 7-Eleven consented to Cardtronics adding Allpoint, a Cardtronics affiliate network consisting of some 1,300 financial institutions, and amended the Agreement accordingly. The amendment provided that if Allpoint cash withdrawal transactions dropped below a particular threshold, Cardtronics would pay 7-Eleven a "Performance Payment" according to an agreed upon formula.

In 2014, the parties began discussing and negotiating an extension or renewal of the Agreement. Cardtronics made presentations to 7-Eleven in April and May in hopes of retaining 7-Eleven's business. In those presentations, Cardtronics highlighted the impact of the ATMs on store sales, emphasized its goal to convert ATM users who do not make a purchase in the store, identified particular tools to achieve the goal, and predicted "[t]raffic and sales drivers should dwarf economic benefits derived directly from the ATM program[.]" But, in July 2015, 7-Eleven notified Cardtronics it was not going to renew the contract and instead was going to use an affiliate company, FCTI, to provide the service. The parties agreed to a final conversion schedule. Under that schedule, all Cardtronics ATMs would be removed and FCTI machines installed by the end of February 2018 under a "rolling" conversion schedule that went from market to market, rather than on one specific date. (For example, by the end of November 2017, the conversion would be completed in twenty-nine of the thirty-six states, accounting for more than 65 percent of 7-Eleven stores nationwide.)

After 7-Eleven decided not to renew the Cardtronics Agreement, Allpoint began its own negotiations with the new company, FCTI, to remain on networks providing surcharge-free access to 7-Eleven customers. FCTI ultimately declined Allpoint's offer. Two months later, on January 31, 2017, Cardtronics notified 7-Eleven by email that it would be removing the Allpoint network from its ATMs on July 1. Cardtronics explained its decision was based on (1) information that FCTI had been targeting the Allpoint customer base and telling them Allpoint would no longer have access to 7-Eleven and (2) feedback from financial institutions in the Allpoint network that they wanted a "date certain" to communicate to customers for a cutoff date, rather than "rolling" dates on a market-to-market basis.

In a February 9 email, 7-Eleven Vice President David Seltzer responded that 7-Eleven expected Cardtronics to meet its contractual obligation to maintain the Allpoint surcharge-free

services through the end of the transition period and warned that 7-Eleven “would sustain significant quantifiable financial damages” if Cardtronics did otherwise. Although the parties agreed 7-Eleven had to consent to Cardtronics adding surcharge-free networks, they disagreed as to whether 7-Eleven had to consent to removing a surcharge-free network. When the parties could not settle the dispute, 7-Eleven filed suit.

The injunction hearing was held almost one month before the July 1 cutoff date. At the hearing, Seltzer testified about the irreparable harm he believed 7-Eleven would suffer in the absence of an injunction. According to Seltzer, 7-Eleven has regular customers who come in on a daily basis, sometimes multiple times. Half of these customers, he said, pay in cash, so the ATM machine is a “very important part of our service offering.” In 2016, he said, 118 million customers withdrew cash from an ATM at a 7-Eleven store; of those, 34 million were on the Allpoint Network. According to Seltzer, in many cases, the primary reason for the customer’s visit was to use the ATM “to get a surcharge-free transaction.”

Seltzer testified that if the trial court did not enjoin 7-Eleven from removing the Allpoint Network, affected customers would come in on July 1, see the same ATM machine, but when they attempted to withdraw cash, would see a screen asking them to approve a surcharge. According to Seltzer, customers will cancel out the transaction and “presumably leave the store in frustration” after complaining to the store clerk and find a store where they can complete a surcharge-free transaction or they will call their banks. Seltzer testified 7-Eleven would lose customers “who will never come back.” He said the customers will change their shopping patterns, go to a different retailer for ATM transactions, and while there, conduct shopping that they otherwise do at 7-Eleven.

Seltzer acknowledged that even if certain customers cannot make surcharge-free transactions at the ATM, they can get cash back at the counter without paying a fee, although the

amount would be limited to \$50. But, he explained, 7-Eleven would lose the ATM transaction and would have to pay the fees on the register transaction.

In addition to Seltzer, Cardtronics's former executive vice president of global markets and accounts, Rick Updyke testified. Updyke was employed by 7-Eleven prior to Cardtronics and, in fact, was a member of the team that negotiated the Cardtronics-7-Eleven Agreement. Updyke was asked by 7-Eleven if he knew "for a fact" whether the removal of the surcharge-free network would have an impact on over-the-counter sales, and Updyke said he couldn't "quantify that" but said he "suspect[ed]" there would be over time, depending on the provider that followed Cardtronics and "what they are able to do to generate traffic." Updyke also acknowledged that, based on his industry experience, when there is a transition from a surcharge-free network to a "surcharge situation," the retailer loses between 65 and 80 percent of those "ATM customers, ATM transactions," not over-the-counter sales customers, over time. Updyke further explained that if this results in lost ATM revenues to 7-Eleven, the Agreement requires Cardtronics to make a performance payment.

After hearing the evidence, the trial court denied 7-Eleven's application for temporary injunction. This appeal followed.

The decision to deny a temporary injunction lies within the trial court's sound discretion and is subject to reversal only for a clear abuse of that discretion. *Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993). We do not review or decide the underlying merits, and we will not disturb the order unless it is "so arbitrary that it exceed[s] the bounds of reasonable discretion." *Henry v. Cox*, 520 S.W.3d 28, 33–34 (Tex. 2017). The trial court does not abuse its discretion when basing its decision on conflicting evidence, nor does it abuse its discretion if some evidence reasonably supports its decision. *Henry*, 520 S.W.3d at 34; *Marketshare Telecom, L.L.C. v. Ericsson, Inc.*, 198 S.W.3d 908, 916 (Tex. App.—Dallas 2006, no pet.). In reviewing

the trial court's decision, we draw all legitimate inferences from the evidence in the light most favorable to the trial court's decision. *Marketshare Telecom*, 198 S.W.3d at 916.

A temporary injunction is an extraordinary remedy and does not issue as a matter of right. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). Its purpose is to preserve the status quo of the litigation's subject matter pending a trial on the merits. *Id.* To obtain a temporary injunction, the applicant must plead and prove three specific elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. *Id.* For purposes of this opinion, we presume without deciding that 7-Eleven satisfied the first two elements and focus our analysis on the third element of probable, imminent, and irreparable injury.

Generally, a court will not enforce contractual rights by injunction, because a party can rarely establish an irreparable injury and an inadequate legal remedy when damages for breach of contract are available. *Butnaru*, 84 S.W.3d at 211; *Walling*, 863 S.W.2d at 57 ("Damages are usually an adequate remedy at law, and the requirement of demonstrating an interim injury is not to be taken lightly."). An injury is irreparable if the injured party cannot be adequately compensated in damages or if the damages cannot be measured by any certain pecuniary standard. *Butnaru*, 84 S.W.3d at 204.

7-Eleven argues the trial court erred in its analysis of irreparable harm. Specifically, it argues the record demonstrates 7-Eleven would suffer "substantial business disruption, including diversion of customers," as a result of the cutoff of Allpoint access. And, 7-Eleven asserts, business disruption is "categorically sufficient to prove irreparable harm."

While 7-Eleven characterizes the harm as "business disruption," its defined harm is the loss of over-the-counter sales that 7-Eleven believes it will lose from customers frustrated that they cannot make surcharge-free withdrawals from its ATMs. As evidence, 7-Eleven relies on a

portion of Seltzer's testimony, arguing the shut-off of Allpoint access will result in complaints from customers who are accustomed to surcharge-free transactions and will "[p]redictably" lead to the loss of established customers who will find other locations to make surcharge-free transactions. Further, relying on Updyke's testimony, it asserts the impact "will likely be a loss of over 65 percent of the customers who are suddenly faced with a surcharge."

An injunction is not proper when the claimed injury is merely speculative. *Frequent Flyer Depot, Inc. v. American Airlines, Inc.*, 281 S.W.3d 215, 227 (Tex. App.—Fort Worth 2009, pet denied). Fear and apprehension of injury are not sufficient to support a temporary injunction. *Id.*

Seltzer's testimony is nothing more than fear and speculation as to what may occur unsupported by any relevant data. Although the Agreement had been in place for almost ten years, 7-Eleven offered no evidence to show how over-the-counter sales have been impacted by the addition of the ATMs, or as specific to this case, the impact of the Allpoint network. This does not mean 7-Eleven had to prove any specific amount of damage, only that it needed to offer some concrete evidence that damages will in fact occur by something more than Seltzer's unsupported conclusory opinion. As for Updyke, he testified only that the retailer loses between 65 and 80 percent of those "ATM customers, ATM transactions" over time. He specifically stated he was not referring to over-the-counter sales customers. To the extent 7-Eleven relies on Cardtronics's promotional material used to retain 7-Eleven's business, the trial court could have reasonably seen that as nothing more than a sales pitch, not concrete evidence of specific irreparable harm.

Under the particular facts before us, we conclude the trial court could have reasonably determined that 7-Eleven's claim of harm is speculative and that 7-Eleven failed to demonstrate

irreparable injury. We overrule the second issue. Our disposition of this issue makes it unnecessary to address the remaining issues.

We affirm the trial court's order denying the temporary injunction.

/Molly Francis/
MOLLY FRANCIS
JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

7-ELEVEN, INC., Appellant

No. 05-17-00623-CV V.

CARDTRONICS, LP, Appellee

On Appeal from the 44th Judicial District
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Trial Court Cause No. DC-17-05847.

Opinion delivered by Justice Francis;

Justices Myers and Whitehill participating.

In accordance with this Court's opinion of this date, the trial court's order denying temporary injunction is **AFFIRMED**.

It is **ORDERED** that appellee CARDTRONICS, LP recover its costs of this appeal from appellant 7-ELEVEN, INC.

Judgment entered November 10, 2017.