SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 5
NASSAU COUNTY

A.D.E. SYSTEMS, INC.,

Decision and Order

Plaintiff,

MOTION SEQUENCE: 05, 06
INDEX NO: 601433/2016

-against-

GIL-BAR INDUSTRIES, INC.,

Defendant.

The following papers and the attachments and exhibits thereto have been read on this motion and cross motion:

Notice of Motion (Motion Sequence Number 5)
Affirmation in Support
Memorandum of Law in Support
Affirmation in Opposition
Memorandum of Law in Opposition
Memorandum of Law in Reply

Notice of Cross-Motion (Motion Sequence Number 6)
Affirmation in Opposition
Memorandum in Opposition
Memorandum of Law in Opposition
Memorandum of Law in Reply

In an action to recover damages for, *inter alia*, tortious interference with contract, the Defendant moves for an order "pursuant to CPLR 2221(e) & (f) and 3211(a)(7), renewing Defendant's prior motion to dismiss and Plaintiff's prior motion to renew, both of which resulted in" an order of the court dated June 26, 2018, and upon such renewal, granting Defendant's motion dismissing the complaint for failure to state a claim upon which relief can be granted.

The Plaintiff cross-moves for an order pursuant to CPLR 3025(b) for leave to serve and file a second amended verified complaint.

Procedural History

Related Action

In 2015, A.D.E Systems, Inc. ("ADE") commenced an action against Energy Labs, Inc. ("Energy Labs") entitled *A.D.E. Systems, Inc. v Energy Labs, Inc.* (Index No. 604036/15) (the "related action") predicated upon the alleged breach of a Manufacturer's Representative Agreement ("Agreement") between ADE and Energy Labs. The complaint therein asserted causes of action for breach of contract, anticipatory breach of contract, and breach of the implied covenant of good faith.

Energy Labs thereafter moved to dismiss the complaint on the grounds, *inter alia*, that it did not breach its Agreement with ADE. The motion was granted and thereafter followed by an amended complaint and Energy Lab's motion to renew its motion to dismiss aimed at the amended complaint. Upon renewal, Energy Lab's motion to dismiss was denied (Order dated June 23, 2017).

On May 20, 2020, the Second Department reversed the Court's June 23, 2017 order, holding, *inter alia*, that Energy Labs did not breach its agreement with ADE and dismissed the amended complaint.

The Instant Action

In March 2016, ADE filed a complaint against Gil-Bar Industries, Inc. ("Gil-Bar") which asserted causes of action for tortious interference with contract, tortious interference with prospective economic relations, and unfair business practices. The complaint was dismissed six months later pursuant to CPLR 3016 and CPLR 3211(a)(7).

In an order dated June 26, 2018, this court granted ADE leave to renew Gil-Bar's underlying motion to dismiss and, upon renewal, denied the motion to dismiss and granted ADE leave to serve an amended complaint which rectified "the earlier pleading deficiencies by the addition of new facts" which had been discovered in the related action. The amended complaint contains the same causes of action as the original complaint, namely, tortious interference with contract, tortious interference with prospective economic relations, and unfair business practices.

The Instant Motion

Given the Appellate Division's holding in the related action - that Energy Labs did not breach its agreement with ADE - Gil-Bar moves for an order seeking leave to renew its prior motion to dismiss which had previously been denied.

ADE cross-moves for an order seeking leave to file a second amended complaint "evidencing [Gil-Bar's] additional alleged wrongful conduct."

For the reasons that follow, the Defendant's motion is granted and the Plaintiff's cross motion is denied.

The Court's Determination

Defendant's Motion to Dismiss

Tortious Interference with Contract

The amended complaint alleges tortious interference with contract against Gil-Bar as follows:

> Gil-Bar had specific knowledge that ADE had a valid and existing contract with Energy Labs, to wit, the ADE/Energy Labs Agreement.
>
> Upon information and belief, Gil-Bar intentionally and improperly interfered with the ADE/Energy Labs Agreement in order to induce Energy Labs to breach its contractual obligations with ADE.
>
> Upon information and belief, Energy Labs would not have breached its contractual obligations with ADE but for the foregoing conduct engaged in by Gil-Bar.
>
> The acts set forth above, as well as other acts yet to be uncovered, caused injury to ADE, the full extent of which is unknown to ADE at this time.
>
> The acts set forth above, as well as other acts yet to be uncovered, constitute tortious interference with contract (Amended Complaint at ¶¶ 49-53).

A claim of tortious interference with contract requires: 1) the existence of a valid contract between plaintiff and a third party; 2) defendant's knowledge of the contract; 3) defendant's intentional procurement of a breach of the contract without justification; 4) actual breach of the contract; and 5) resulting damages (*Lama Holding Co. v Smith Barney*, 88 NY2d 413 [1996]; (*Nagan Constr., Inc. v Monsignor McClancy Mem. High Sch.*, 117 AD3d 1005, 1006 [2014]).

ADE contends that a defendant's intentional inducement of the third party to "otherwise render performance" of the contract impossible (*see Israel v Wood Dolson Co.*, 1 NY2d 116, 120 [1956]) is sufficient to withstand dismissal of a tortious interference with contract claim even in the absence of an actual breach of the agreement.

Contrary to ADE's contention, the Court of Appeals has consistently held that an actual

breach of contract is required to sustain a cause of action for tortious interference with contract.

According to the Court of Appeals in *Jack L. Inselman & Co. v FNB Financial Co.* (41 NY2d 1078 [1977] [internal citations omitted]):

> In order for the plaintiff to have a cause of action for tortious interference of contract, it is *axiomatic that there must be a breach* of that contract by the other party, a situation not here present. An essential element of the case against FNB, then, is a breach by Guilford. No such breach had occurred and thus the complaint was properly dismissed (emphasis added).

And twenty years later, the Court of Appeals again addressed tortious interference with contract in *NBT Bancorp v Fleet/Norstar Fin. Group* (87 NY2d 614, 620-621, 623-624 [1996]):

> Ever since tortious interference with contractual relations made its first cautious appearance in the New York Reports - decades after the seminal case Lumley v Gye (2 El & Bl 216, 118 Eng Rep 749 [1853]) - our Court has repeatedly linked availability of the remedy with a breach of contract. Indeed, breach of contract has repeatedly been listed among the elements of a claim for tortious interference with contractual relations.
>
> * * *
>
> Our requirement of breach promotes the integrity of contract as well as integrity of the marketplace; it signifies the substantiality of the interest protected, and it conforms with this tort's function as a back-up remedy for breaches of contract.

In the absence of any breach of the Agreement between ADE and Energy Labs, ADE's claim that Gil-Bar tortiously interfered with the Agreement must fail (*see Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 [1996] [no allegation that Bankers Trust in fact breached its contract with Lama and thus claim by Lama that Smith Barney tortiously interfered with Lama's agreement with Banker's Trust was dismissed]; *Water Works Realty Corp. v Cytryn*, 263 AD2d 540 [2d Dept 1999] [plaintiff's failure to allege an actual breach of contract warranted dismissal of tortious interference claim]).

Tortious Interference with Prospective Economic Relations

In the second cause of action, ADE alleges tortious interference with prospective economic relations as follows:

26. Upon information and belief, Gil-Bar further knew that the valid ADE/Energy

Labs Agreement had been entered into by ADE and Energy Labs on or about April 1, 2015.

27. Upon information and belief, following the execution of the ADE/Energy Labs Agreement, Gil-Bar engaged in a multifaceted course of conduct to intentionally and improperly procure Energy Labs' breach of the ADE/Energy Labs Agreement.

28. Upon information and belief, following the execution of the ADE/Energy Labs Agreement, Gil-Bar further engaged in a multifaceted course of conduct to intentionally and improperly interfere with ADE's securing of renewals of the ADE/Energy Labs Agreement which would have been entered into for, at a minimum, for several additional terms.

29. Upon information and belief, this course of conduct included, but was not limited to, a series of communications between Joseph Sbarra, the president and owner of Gil-Bar, and Steve Murphy, the regional sales manager of Energy Labs who oversaw the region in which ADE was acting as its representative.

30. Upon information and belief, the foregoing communications began at least as early as December 2014 and continued through and including May 2015, to wit, both prior to and during the contractual term of the ADE/Energy Labs Agreement.

31. Upon information and belief, the foregoing communications consisted of, among other things, in-person meetings, telephone conversations, emails, and text messages.

32. By way of illustration and not limitation, and in addition to other acts yet to be uncovered:
(a) That on or about January 8, 2015 at 9:50 AM, Steve Murphy sent an email to Energy Labs president Ray Irani, which provided in pertinent part as follows: "I spoke with Joe Sbarra [Gil-Bar's president] yesterday . . . . In my previous communication with Joe, I had told him of our urgency in making a decision due to the pressure we were getting from a potential new rep ADE . . . . Joe told me that he has a ton of work at the moment and could not make a commitment to ELI for at least 3 to 4 months. This puts us in a tight position with a [sic] only a couple of options 1) - we could string [then current representative] SRS along for this time (3 or 4 months) period and tell ADE that we've decided to go in a different direction - this is unfortunate as I think ADE is a good rep . . . or 2) tell Gil-Bar we can't wait and move forward with ADE. If you're willing to wait on Gil-Bar, I would suggest I put together a conference call with Joe next week . . . so you can hear from the horse's mouth what he has to say w/r/t a commitment to ELI and then make the final decisions based on that."

(b) That on or about January 15, 2015 at 2:30 PM, Steve Murphy sent an email to

Energy Labs president Ray Irani, with carbon-copy to Joseph Sbarra, which provided in pertinent part as follows:

"I've messaged and spoke to Joe [Sbarra] several times so I believe he knows what level of commitment we're looking for . . . . The intent of the call was to nail down the commitment - knowing it will be 3 to 4 months off allowing time for Gil-Bar to finish up on current work but also allowing us to release ADE to look for another Custom Air Handler line."

(c) That on or about May 8, 2015 at 10:01 AM - some five weeks into ADE's contract, and two weeks prior to Energy Labs' purported termination of ADE - Steve Murphy sent an email to Energy Labs' president Ray Irani which provided in pertinent part as follows:

"Just spoke to Joe. He's anticipating he will like what he sees next week and will likely commit to us. He wants a commitment from us at the same time as well i.e.. termination of ADE and Newton-Metallo. I told him I thought this is a good possibility . . . . If Joe is all in - this should bring huge $$ . . . ."

33. Upon information and belief, the contractual negotiations for a Manufacturers Representative Agreement between Energy Labs and Gil-Bar commenced while ADE was still Energy Labs' representative.

34. Upon information and belief, the Manufacturers Representative Agreement between Energy Labs and Gil-Bar became effective at or about the time of Energy Labs' purported termination of the ADE/Energy Labs Agreement.

35. Upon information and belief, Energy Labs would neither have terminated the ADE/Energy Labs Agreement, nor deprived ADE's securing of renewals under the ADE/Energy Labs Agreement, but for the foregoing conduct engaged in by Gil-Bar.

36. Upon information and belief, the foregoing conduct engaged in by Gil-Bar to obtain Energy Labs' commitment to terminate ADE was calculated by Gil-Bar to apply economic pressure and/or was for the purpose of harming ADE.

37. Upon information and belief, the foregoing conduct engaged in by Gil-Bar and Energy Labs after the execution of the ADE/Energy Labs Agreement constituted criminal conduct and/or an independent tort, fraud(s) and misrepresentation(s). In so doing, Gil-Bar acted with malicious intent.

* * *

61. Upon information and belief, in so doing, Gil-Bar acted with wrongful means or

malicious intent to harm ADE.

62. The acts set forth above, as well as other acts yet to be uncovered, caused injury to ADE, the full extent of which is unknown to ADE at this time.

63. The acts set forth above, as well as other acts yet to be uncovered, constitute tortious interference with prospective economic relations (Amended Complaint at ¶¶ 57-63).

To state a cause of action "for tortious interference with business relationships, a plaintiff must show that the defendant interfered with the plaintiff's business relationships either with the sole purpose of harming the plaintiff or by means that were unlawful or improper" (*Nassau Diagnostic Imaging and Radiation Oncology Associates, P.C. v Winthrop–University Hospital*, 197 AD2d 563, 563-564 [2d Dept 1993]). "Although his status as a competitor does not protect the interferer from the consequences of his interference with an existing contract, it may excuse him from the consequences of interference with prospective contractual relationships, where the interference is intended at least in part to advance the competing interest of the interferer, no unlawful restraint of trade is effected, and the means employed are not wrongful" (*Guard–Life Corp. v Parker Hardware Mfg. Corp.*, 50 NY2d 183, 190–191 [1980] [where the injured party and interfering party are "business competitors," the injured party must establish that the interfering party employed wrongful means to state a claim for tortious interference with prospective contractual relations]; *Carvel Corp. v Noona*, 3 NY3d 182, 192-93 [2004] [where a defendant acts in its own economic self-interest, the standard applicable to a tortious interference claim is whether the defendant employed "wrongful means" or committed "egregious wrongdoing]). "Wrongful means" include "physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure" (*Guard–Life Corp. v Parker Hardware Mfg. Corp.*, 50 NY2d at 191, *supra*). Wrongful means do not include "persuasion alone [even if] it is knowingly directed at interference with [a known] contract" (*Carvel Corp. v Noona*, 3 NY3d at 192-93, *supra*; *NBT Bancorp Inc. v Fleet/Norstar Financial Group, Inc*, 87 NY2d at 624, *supra*).

ADE's allegations that Gil-Bar's "interference" with the ADE / Energy Lab's relationship was "for the purpose of harming ADE", done with "malicious intent" and constituted "criminal conduct and/or an independent tort", fraud and misrepresentation, are conclusory and, thus insufficient to withstand dismissal. Having failed to sufficiently allege that Gil-Bar's "interference" was "with the sole purpose of harming" ADE "or by means that were unlawful or improper", the cause of action for tortious interference with prospective business relations is dismissed (see *Nassau Diagnostic Imaging and Radiation Oncology Associates, P.C. v Winthrop–University Hospital*, 197 AD2d at 563-564, *supra*; *Krinos Foods, Inc v Vintage Food Corp.*, 30 AD3d 332 [[1st Dept 2006] [plaintiff's allegation that defendant interfered with plaintiff's business relations with the supplier in order "to advance its own competing interests in gaining profits from the sale of [the supplier's] products" is insufficient to show that defendant

used the "wrongful means," e.g., "physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure," necessary to state a cause of action for tortious interference with business relations]; *see also Out of the Box Promotion, LLC v Koschitzki*, 55 AD3d 575, 577 [2d Dept 2005] [alleged conduct not "solely malicious" since actions were "motivated, at least in part, by economic self-interest"]).

Unfair Business Practices

Unfair business practices is the nature of the third cause of action in the amended complaint:

> Upon information and belief, Gil-Bar engaged in unfair business practices against ADE by procuring and/or attempting to procure Energy Labs not to deal with ADE.
>
> Upon information and belief, Gil-Bar misappropriated ADE's commercial advantage.
>
> Upon information and belief, Gil-Bar misappropriated ADE's aforementioned labors, skills, and/or expenditures.
>
> The acts set forth above by Gil-Bar were conducted with bad faith.
>
> The acts set forth above by Gil-Bar were conducted by unlawful means, including fraud, and/or were engaged in without justifiable cause.
>
> The acts set forth above, as well as other acts yet to be uncovered, caused injury to ADE, the full extent of which is unknown to ADE at this time.
>
> The acts set forth above, as well as other acts yet to be uncovered, constitute unfair business practices (Amended Complaint at ¶¶ 67-73).

A cause of action for unfair business practices requires a showing of "the bad faith misappropriation of a commercial advantage belonging to another by infringement or dilution of a trademark or trade name or by exploitation of proprietary information or trade secrets" (*Westover Car Rental, LLC v Niagra Frontier Transportation Authority*, 133 AD3d 1321, 1322 [4th Dep 2015] quoting *Eagle Comtronics v Pico Prods.*, 256 AD2d 1202, 1203 [4th Dept 1998]; *Macy's Inc. v Martha Stewart Living Omnimedia, Inc.*, 127 AD3d 48, 56 [1st Dept 2015]).

Here, the allegations set forth in the amended complaint as to Gil-Bar's unfair business practices are conclusory and, as such, insufficient to defeat Gil-Bar's motion (see *Abe's Rooms,*

Inc. v Space Hunters, Inc., 38 AD3d 690, 693 [2d Dept 2007]).[1]

Nor can it be said that ADE's business was injured by Gil-Bar's use of unlawful means or done without justifiable cause (*see* discussion *supra*; *Duane Jones Co. v Burke*, 306 NY 172, 190 [1953] [an injury to a person's business by "procuring others not to deal with him, or by getting away his customers, if unlawful means are employed, such as fraud or intimidation, or if done without justifiable cause, is an actionable wrong"]).

Plaintiff's Cross Motion

ADE's motion to amend the amended complaint is denied inasmuch as the amendment is "palpably insufficient" (*see Bashian & Farber, LLP v Syms*, 167 Ad3d 561 [2d Dept 2018]; *Maldonado v Newport Gardens, Inc.*, 91 SD3d 731 [2d Dept 2012]; *Trystate Mechanical, Inc. v Macy's Retail Holdings, Inc.*, 94 AD3d 1097 [2d Dept 2012]).

Conclusion

Based on the foregoing, it is hereby

Ordered that the Defendant's motion seeking leave to renew Plaintiff's prior motion which resulted in an order of this court dated June 26, 2018 which permitted Plaintiff leave to file an amended complaint and vacated a prior order (dated September 8, 2016) which dismissed the original complaint, is granted and, upon renewal, the Plaintiff's motion is denied and the amended complaint is dismissed; and it is further

Ordered that the Plaintiff's cross motion seeking leave to file a second amended complaint is denied,

This constitutes the decision and order of the court.

Dated: March 1, 2021

ENTERED
Mar 05 2021
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Hon. Vito M. DeStefano, J.S.C.

[1] The court notes the more stringent standard applicable on a motion to dismiss with the more liberal standard applicable to motions for leave to amend (*Lucido v Mancuso*, 49 AD3d 220 [2d Dept 2008] [discussing the difference in relevant standards]). A finding by the court that an action is meritorious for the purpose of allowing an amended filing does not preclude subsequent evaluation under an elevated standard required by CPLR 3211 (*see A.L. Eastmond & Sons, Inc. v Keevily, Spero-Whitelaw, Inc.*, 107 AD3d 503, 503 [1st Dept 2013]).