

**Advanced Global Tech. LLC v Sirius Satellite
Radio Inc.**

2008 NY Slip Op 32355(U)

August 20, 2008

Supreme Court, New York County

Docket Number: 0603680/2006

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EILEEN BRANSTEN

PART 3

Justice

Advanced Global Technology LLC,

INDEX NO. 603680/08

- v -

MOTION DATE 5/14/08

Sirius Satellite Radio Inc..

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1, 2, 3

Answering Affidavits — Exhibits _____

Replying Affidavits _____

4

Cross-Motion: Yes X No

**IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM**

FILED

AUG 22 2008

COUNTY CLERK'S OFFICE
NEW YORK
S.C.

Dated: 8-20-08

Eileen Bransten

HON. EILEEN BRANSTEN

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

-----X
ADVANCED GLOBAL TECHNOLOGY LLC,

Plaintiff,

-against-

SIRIUS SATELLITE RADIO INC.,

Defendants.

Index No. 603680/06
Motion Date: 5-14-08
Motion Seq. No.: 03

-----X
PRESENT: EILEEN BRANSTEN, J.

FILED
AUG 22 2008
COUNTY CLERK'S OFFICE
NEW YORK

Pursuant to CPLR 3211(a)(7), defendant Sirius Satellite Radio ("Sirius") moves to dismiss the Amended Complaint of plaintiff Advanced Global Technology LLC ("AGT"), which solely consists of a claim for tortious interference with prospective business relations. AGT opposes the motion.

Background

AGT distributes and markets radio receivers that receive satellite radio service from non-party XM Satellite Radio ("XM") (Amended Complaint, ¶ 7). Defendant Sirius is a satellite radio service that, at the time of this action, competed with XM. Non-party Kiryung Electronics Co., Ltd. ("Kiryung"), a Korea-based consumer electronics company, is the primary manufacturer of radio receivers that receive Sirius satellite radio service (Amended Complaint, ¶¶ 9 & 10).

On August 16, 2006, AGT allegedly approached Kiryung about developing a receiver capable of receiving high definition (“HD”) radio broadcasts,¹ and the parties allegedly entered into discussions concerning this proposed venture (Amended Complaint, ¶¶ 14, 15, 19, 20-23). On September 26, 2006, an AGT executive and consultant allegedly received an email from H.J. Kwon (“Kwon”), Kiryung’s CEO, stating that Sirius warned Kiryung not to do business with AGT under penalty of losing Sirius’ business (Amended Complaint, ¶ 24). Allegedly, Sirius expressly or implicitly threatened Kiryung that if Kiryung elected to do business with AGT, Sirius would: (i) delay payment or refuse to pay its \$10 - 15 million indebtedness to Kiryung and (ii) cancel its existing orders (Amended Complaint, ¶ 28). Kwon’s email allegedly marked the end of AGT’s relationship with Kiryung (Amended Complaint, ¶ 26).

In a decision dated March 8, 2007, this Court dismissed AGT’s original complaint against Sirius for tortious interference with prospective business relations, concluding that AGT insufficiently alleged that Sirius acted with “wrongful means” or was solely motivated by malice (*Advanced Global Tech. v Sirius Satellite Radio, Inc.*, 15 Misc3d 776, 782 [Sup Ct, New York County 2007]). This Court also denied AGT’s request for leave to amend because amendment would be futile (*Advanced Global Tech.*, 15 Misc3d at 783). On

¹ HD radio broadcasts are digital broadcasts of AM and FM radio stations.

October 2, 2007, the Appellate Division, First Department affirmed the dismissal but granted AGT leave to replead (*Advanced Global Tech. v Sirius Satellite Radio, Inc.*, 44 AD3d 317, 318 [1st Dept 2007] [“The motion court correctly held . . . that [AGT’s] allegations . . . show that Sirius’ interference was neither wrongful nor motivated solely by malice . . .”]). Sirius now moves for an order dismissing the amended complaint for failure to state a cause of action.

Analysis

“It is well settled that on a motion to dismiss a complaint for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]). “Whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law[,] a motion [to] dismiss will fail” (*id.* at 174; *see 511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-52 [2002]). However, “allegations consisting of bare legal conclusions, as well as factual claims [that are] inherently incredible . . ., are not presumed to be true and accorded every favorable inference” (*Gertler v Goodgold*, 107 AD2d 481, 485, 488-89 [1st Dept 1985]; *affd* 66 NY2d

946 [1985]; *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999]; *affd* 94 NY2d 659 [2000]).

A cause of action for tortious interference with prospective business relations requires satisfaction of the following elements: (1) business relations with a third party; (2) the defendant's interference with those business relations; (3) the defendant acting with the sole purpose of harming the plaintiff or using wrongful means; and (4) injury to the business relationship (see *Carvel Corp. v Noonan*, 3 NY3d 182, 190 [2004]; *NBT Bancorp Inc. v Fleet/Norstar Fin. Group, Inc.*, 87 NY2d 614 [1996]; *Guard-Life Corp. v S. Parker Hardware Mfg. Corp.*, 50 NY2d 183 [1980]; *Masefield AG v Colonial Oil Industries*, 2006 WL 346178 [SDNY 2006]).

"Wrongful means" pursuant to the third element constitutes conduct that: (1) amounts to "an independent crime or tort;" (2) has "been taken solely out of malice;" or (3) amounts to "extreme and unfair economic pressure" (*Friedman v Coldwater Creek, Inc.*, 551 F Supp 2d 164, 170 [SDNY 2008]; see *Lawrence v Union of Orthodox Jewish Congregations of Am.*, 32 AD3d 304, 304 [1st Dept 2006]). Though the Court of Appeals has also alluded to other egregious wrongdoing that could potentially satisfy the wrongful means prerequisite, it has expressly declined to delineate precise parameters (*Carvel*, 3 NY3d at 190-91 ["(W)e do not decide today . . . whether there can ever be other instances of conduct which, though not a

crime or tort in itself, was so ‘culpable’ . . . that it could be the basis for a claim of tortious interference with economic relations”]; see *Odrich v Trustees of Columbia Univ. in City of New York*, 9 Misc 3d 1130(A), *5-6 [Sup Ct, New York County 2005] [“Unlawful means or illegal conduct may satisfy the prerequisite of wrongful means for purposes of a claim for tortious interference with prospective business relations”]).

This motion turns on whether AGT has now in its amended complaint adequately pled that Sirius used “wrongful means.” AGT hinges its claim on allegations that Sirius’ conduct was criminal, tortious, or egregious or amounted to extreme and unfair economic pressure. Sirius contends that AGT has still alleged insufficient facts to satisfy the wrongful means prerequisite.

Criminal Conduct

New York Penal Law: Coercion in the Second Degree

AGT first argues that Sirius engaged in coercion in the second degree under Penal Law Section 135.60 by damaging Kiryung’s contract rights with Sirius and by using coercive means that did not “materially benefit” Sirius but instead were for the sole purpose of denying AGT an opportunity to expand its business.

Under New York law,

“[a] person is guilty of coercion in the second degree when he compels or induces a person to . . . abstain from engaging in conduct in which he has a legal right to engage, by means of instilling in him a fear that, if the demand is not complied with, the actor or another will:

...

(2) [c]ause damage to property; or

...

(9) [p]erform any other act which would not in itself materially benefit the actor but which is calculated to harm another person materially with respect to his health, safety, business, calling, career, financial condition, reputation or personal relationships”

(Penal Law § 135.60). The term “benefit” as used in Section 135.60 (9) refers to “any gain or advantage” that flows to the alleged coercive actor (*People v Feldman*, 7 Misc 3d 794, 810 [Sup Ct, Kings County 2005]).

Relying on *People v Spatarella* (34 NY2d 157 [1974]), AGT contends that Sirius put Kiryung in fear that it would damage its own economic relationship or contractual rights with Kiryung. *Spatarella* is distinguishable from this case, however, in that there the defendant allegedly threatened the victim with depriving it of an advantageous business relationship with a third party (*Spatarella*, 34 NY2d at 161-62 [penal law’s definition of property includes not just the tangibles of a business but also the business itself, including at-will business

arrangements]). Here, the alleged advantageous business relationship at risk was a relationship with the alleged threat-maker itself, Sirius.

Moreover, without reaching whether the economic relationships or contractual rights in this case are in fact property, the court notes that AGT only alleges that Sirius threatened to withhold payment or cancel existing orders. It is well accepted that parties in a contractual business relationship may use their contract as a bargaining tool without rendering such conduct criminal in and of itself (*cf Center Cadillac v Bank Leumi Trust Co. of NY*, 808 F Supp 213, 231 [SDNY 1992] [“[T]he use of economic fear as leverage to drive a hard bargain in an ordinary commercial relationship will not support a RICO claim based on extortion”], *affd* 99 F3d 401 [2d Cir 1995]; *US West Fin. Svcs., Inc. v Tollman*, 786 F Supp 333, 338-39 [SD NY 1992] [concluding that even if there was a threat to breach an enforceable contract, such threat was not unlawfully coercive because any damages could be redressed in a breach of contract action], *rearg denied* 1992 WL 58863 [SDNY 1992]; *Thyssen Inc. v S.S. Fortune Star*, 777 F2d 57, 63 [2d Cir 1985]). Additionally, AGT has not alleged any facts detailing how Sirius’ threat had any impact on Kiryung’s rights as to any contract it had with Sirius.

AGT has also insufficiently alleged that Sirius engaged in coercion in the second degree by threatening to perform an act that does not in itself materially benefit Sirius.

Sirius' effort to keep its competitor, XM, at a distance by leveraging its contractual relationship with Kiryung clearly provides Sirius with "gain or advantage," specifically, the benefit of not having its primary manufacturer in close contact with the competition. Indeed, as Justice Moskowitz discussed in the March 8, 2007 decision, economic self-interest motivated Sirius' conduct (*Advanced Global Tech.*, 15 Misc3d at 782-83; see *Advanced Global Tech.*, 44 AD 3d at 318). Significantly, AGT has not alleged that Sirius obtained no gain or advantage, and the statement that "any 'benefit' derived to Sirius from such interference was indirect, attenuated and not material" (Amended Complaint, ¶ 37) is unsupported by any specific factual allegations. In particular, AGT's allegations do not set forth how it is an immaterial benefit to Sirius to keep its manufacturer from closely dealing with its competitor's marketer.

As AGT has insufficiently alleged how Sirius' conduct amounted to either a threat to damage property pursuant to Penal Law Section 135.60 (2) or a threat to perform an act that would not be materially beneficial to Sirius pursuant to Section 135.60 (9), the motion to dismiss the tortious interference claim to the extent it is based on coercion in the second degree is granted.

Korean Criminal Law

AGT also alleges that Sirius engaged in conduct that is criminal under Article 314.1 of the Criminal Code of Korea, which governs coercive business practices, and Articles 23 and 67 of the Monopoly Regulation and Fair Trade Act of Korea, which govern the restraint of trade and criminalize such conduct, respectively.

“Foreign . . . penal laws . . . will not be enforced in New York” (*Moscow Fire Ins. Co of Moscow, Russia v Bank of New York & Trust, Co.*, 161 Misc 903, 921 [Sup Ct, New York County 1937], *affd* 253 App Div 710 [1st Dept 1937], *lv dismissed* 278 NY 709 [1938]; *cf Wisconsin v Pelican Ins. Co.*, 127 US 265, 289-90 (1888) [“By the law of . . . the United States the penal laws of a country do not reach beyond its own territory except when extended by express treaty or statute to offenses committed abroad by its own citizens; and they must be administered in its own courts only, and cannot be enforced by the courts of another country”]).

Similarly, “[t]he statutes of a foreign state have no effect beyond the limits of the sovereignty from which the authority of such a statute is derived . . .” (*Moscow Fire Ins. Co.*, 161 Misc at 920). Enforcement in New York “is permitted, if at all, only because of comity which exists between states and nations Comity, however, is inapplicable when contrary to public policy or prejudicial to the interests of the state or nation whose courts are

asked to respect it . . .” (*Moscow Fire Ins. Co.*, 161 Misc at 920; *see also Loucks v Standard Oil Co. of New York*, 224 NY 99, 112 [1918]).

AGT brought this action in New York. Because New York courts will not define the scope of or enforce the criminal laws of Korea, the cause of action is insufficiently pled to the extent it relies on the allegation that Sirius committed a crime under Korean criminal law.

Furthermore, even if Korean law were enforceable in New York, AGT has failed to allege that Sirius has engaged in criminal coercion or the unlawful restraint of trade under New York law (*see pp. 5-7 supra* and *pp. 9-11 infra*). It would therefore be contrary to the public policy of this state to permit a lower threshold for pleading such claims when they are based on foreign penal laws and statutes. AGT’s attempt to support its allegation that Sirius engaged in tortious interference with prospective business relations by alleging a violation of Korean laws therefore fails.

Independent Tort

New York General Business Law § 340

AGT next argues that Sirius’ conduct “constitutes an agreement to restrain business trade and commerce in New York State” in violation of Section 340 of the General Business Law (Amended Complaint, ¶ 38).

Under Section 340 of the General Business Law, known as the Donnelly Act,

“1. Every contract, agreement, arrangement or combination whereby

A monopoly in the conduct of any business, trade or commerce or in the furnishing of any service in this state, is or may be established or maintained, or whereby

Competition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained or whereby

For the purpose of establishing or maintaining any such monopoly or unlawfully interfering with the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state any business, trade or commerce or the furnishing of any service is or may be restrained, is hereby declared to be against public policy, illegal and void”

(General Business Law § 340 [1]).

“A party asserting a violation of the Donnelly Act is required to (1) identify the relevant product market; (2) describe the nature and effects of the purported conspiracy; (3) allege how the economic impact of that conspiracy is to restrain trade in the market in question; and (4) show a conspiracy or reciprocal relationship between two or more entities” (*Newsday, Inc. v Fantastic Mind, Inc.*, 237 AD2d 497, 497 [2d Dept 1997]).

“Identification of a relevant market ‘must include all products that are reasonably interchangeable and all geographic areas in which such reasonable interchangeability

occurs” (*Lopresti v Massachusetts Mut. Life Ins. Co.*, 5 Misc 3d 1006(A), *3 [Sup Ct, Kings County 2004], *affd* 30 AD3d 474 [2d Dept 2006]). However, “[c]ourts have recognized the right of a company ‘to select a person with whom it does business and to refuse to deal or continue to deal with anyone for reasons sufficient to itself’ A single concern may choose who it wishes to deal with [without violating the Donnelly Act] as long as its decision is not the result of a combination with others to destroy competition so far as the whole relevant product market is concerned . . .” (*Lopresti*, 5 Misc at *3).

AGT has insufficiently alleged that Sirius violated the Donnelly Act. Specifically, AGT has failed to identify the relevant product market, including substitute AM/FM radio receiving devices, and makes only one-sided allegations that Sirius’ conduct, not Sirius and Kiryung’s joint conduct, amounts to a conspiracy. Indeed, there was no agreement or arrangement between the two to form a “monopoly” to interfere with AGT’s free exercise of business. Specifically, there are no allegations that AGT was prevented from seeking an alternate HD radio receiver manufacturer either in Korea or elsewhere. Moreover, Kiryung had the freedom to refuse to manufacture HD radio receivers for AGT, and AGT has not alleged that Kiryung’s refusal was the result of an arrangement with Sirius “to destroy competition so far as the whole relevant product market is concerned” (*Lopresti*, 5 Misc at *3; *see Simon and Son Upholstery, Inc. v 601 West Assocs. LLC*, 2003 WL 22231540, * 4

[Sup Ct, New York County 2003] [“[A]ntitrust laws are concerned with acts that harm competition, not competitors”]).

AGT has therefore failed to allege that Sirius employed wrongful means by violating New York’s Donnelly Act.

Extreme and Unfair Economic Pressure

“[E]xtreme and unfair economic pressure” may constitute wrongful means (*Carvel*, 3 NY3d at 192-93; see *Friedman*, 551 F Supp 2d at 172; *Hassan v Deutsche Bank*, 515 F Supp 2d 426, 431 [SDNY 2007]).

Though, “[t]he case law does not reveal any precise definition of ‘extreme and unfair’ economic pressure,” an examination of case law is instructive (*Friedman*, 551 F Supp 2d at 172). New York courts have not found extreme or unfair economic pressure when: (1) defendant distributed products to competitors of its franchisees (*Carvel*, 3 NY3d at 192-93); (2) one party urged another to raise defendant’s contract prices or cancel the contract (*Masefield AG*, 2006 WL 346178, *9); or (3) defendant sent a letter to an employer’s customers urging them to boycott the employer unless the employer fired plaintiff (*Lawrence*, 32 AD3d at 305).

The Appellate Division, First Department suggested that the extreme and unfair economic pressure standard may have been satisfied after defendant withheld consent to a

lease assignment in order to obtain \$9 million from plaintiff (*New Stadium LLC v Greenpoint-Goldman Corp.*, 44 AD3d 449 [1st Dept 2007] [concluding that plaintiff sufficiently alleged extortion and stating that this alleged conduct may also “amount to the sort of extreme and unfair economic pressure considered wrongful under *Guard-Life . . .*”]).

Case law governing economic duress further illuminates the sort of economic pressure that can result in liability. When there is an adequate remedy at law, courts have refused to impose liability on parties merely for threatening to breach a contract or withhold performance, even if such conduct would result in financial ruin (see *US West*, 786 F Supp at 338-39 [a “threat to breach a contract by withholding performance can constitute economic duress (or coercion) if the threatened breach will result in irreparable harm,” but the complaining party must show lack of adequate remedy at law]; *Sosnoff v Carter*, 165 AD2d 486, 492 [1st Dept 1991]; *Business Incentives Co., v Sony Corp. Of Am.*, 397 F Supp 63, 69 [SDNY 1975]).

Moreover, “[m]ere hard bargaining positions, if lawful, and the press of financial circumstances not caused by defendant, will not be deemed duress. The alleged duress must be proven to have been the result of defendant’s conduct and not of plaintiff’s own necessities” (*Business Incentives, Co.*, 397 F Supp at 69; see *US West*, 786 F Supp at 339 [concluding that by not collecting money from readily available sources, the complaining

party created its own financial difficulties and therefore could not claim that the other party's threat was unlawfully coercive]).

Here, Sirius allegedly impressed upon Kiryung that it would withhold payment for amounts due and cancel existing orders if Kiryung agreed to manufacture IID radio receivers for AGT. Sirius had a legitimate economic interest in discouraging its main distributor from entering into a business relationship with a company that distributes and markets XM satellite radio receivers (*Advanced Global Tech.*, 44 AD 3d at 318). Even with the additional facts alleged, it is clear that "normal economic interest" motivated the alleged conduct, and thus, Sirius' behavior was not egregious, extreme, or unfair.

AGT's allegation that Sirius' conduct threatened the viability of Kiryung as a going concern is also insufficient to render Sirius' conduct sufficiently wrongful. Even if the threat could financially ruin Kiryung, AGT has not alleged that Kiryung did not have an adequate remedy at law: Kiryung could still bring a breach of contract action against Sirius if Sirius ultimately made good on its threat and failed to pay Kiryung. Nor has plaintiff alleged that through any wrongful conduct, Sirius created a situation such that Kiryung was dependent on it for its ongoing survival. The position that Sirius took with Kiryung, though potentially harsh, was not "wrongful" within the meaning of the third element of a claim for tortious interference with prospective business relations to allow for the cause of action to proceed.

Egregious Conduct

Finally, AGT argues that Sirius' conduct satisfies the wrongful means requirement because its alleged violation of its own Code of Ethics fits into the "egregious wrongdoing" category that the Court of Appeals left undefined in *Carvel* (*see Carvel*, 3 NY3d at 189).

New York courts refrain from imposing liability on a party solely based on that party's violation of its internal policies (*see De Kwiatkowski v Bear, Stearns & Co.*, 306 F3d 1293, 1311 [2d Cir 2002] [explaining that treating "house rules" as predicates for liability would be against public policy because it would discourage companies from adopting internal standards that are higher than the law requires]).

Taking AGT's allegations as true, Sirius' violation of its own Code of Ethics is insufficient to satisfy the wrongful conduct prong of a tortious interference with prospective business relations claim. The amorphous and lofty standards that Sirius adopted in its Code of Ethics, including to "conduct business in accordance with . . . the highest ethical standards" and "adher[e] to . . . the spirit of applicable laws . . . fairly" (Amended Complaint, ¶¶ 43, 44) are above and beyond those recognized by New York law. As such, even assuming it is possible to inquire into whether Sirius' conduct was consistent with "the highest ethical standards" and the "spirit of applicable laws," it would be greatly detrimental to the marketplace to allow such self-imposed standards to serve as the benchmarks for "wrongdoing" and potential liability (*see NBT Bancorp*, 87 NY2d at 624 ["The requirement

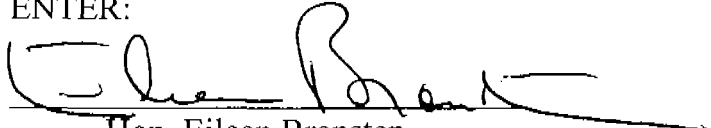
of wrongful means where only prospective rights are threatened honors free and lawful competition and accords an appropriate level of protection to a plaintiff's interest").

Accordingly, it is

ORDERED that Sirius Satellite Radio, Inc.'s motion to dismiss Advanced Global Technology LLC's amended complaint is granted; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: August 20, 2008
New York, NY

ENTER:

Hon. Eileen Bransten

FILED
AUG 22 2008
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