SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 2
NASSAU COUNTY

THE NEW YORK RACING ASSOCIATION, INC. and CHARLES HAYWARD,

Plaintiffs,

INDEX No. 021993/09

MOTION DATE: May 10, 2010
Motion Sequence # 005

-against-

NASSAU REGIONAL OFF-TRACK BETTING CORPORATION, DINO AMOROSO, SCIENTIFIC GAMES RACING, LLC and ROBERTS COMMUNICATIONS NETWORK, LLC,

Defendants.

The following papers read on this motion:

Notice of Motion..... X
Affirmation in Support..... X
Memorandum of Law..... XX

Motion, by the defendant Scientific Games Racing, LLC, for an order pursuant to CPLR 3211(a)(7) dismissing the complaint is **denied**.

In this action commenced on October 27, 2009, the plaintiff New York Racing Association ("NYRA") and its President Charles Hayward seek to recover for the unauthorized live transmissions of audio-visual simulcasts of its races on defendant Nassau Regional Off-Track Betting's ("NROTB") website during the 53 day period from January 29th to April 15, 2009. In addition, Hayward seeks to recover for defamation.

In its complaint, NYRA alleges that it operates Aqueduct, Belmont and Saratoga racetracks and that it has proprietary rights and interests in the audio-visual simulcasts of the races there. Therefore, the races at those tracks may be displayed at OTB branches or tele-theaters, on television or on internet websites, only with plaintiff's permission. NYRA alleges that the New York State Racing and Wagering Board ("the Board") regulates NROTB's broadcast of all horse races, as well as live audio-visual simulcasts. It further alleges that in operating NROTB's off-track wagering system in Nassau County, NROTB telecasts live audio-visual simulcasts of races for pari-mutual wagering purposes at its branches and that it provides a website which displays them as well, but again, may do so only with the permission of the Racing Association.

NYRA seeks to recover of the defendant NROTB; the defendant Scientific Games Racing which allegedly provided NROTB with, *inter alia*, technological services including software and hardware for its internet website; and, the defendant Roberts Communications, LLC, which allegedly caused the transmission of NYRA's live audio-visual race simulcasts to NROTB's wagering locations, Nassau County residents' cable televisions, and NROTB's website.

NYRA alleges that NROTB retained Scientific Games Racing in 2007 to provide software and hardware for its internet wagering website and that Scientific Games Racing has in fact done so since NROTB's website was launched in May, 2008. Consequently, Scientific Games Racing allegedly provides NROTB with pari-mutual wagering technology services, including Totalistar, which consists of the complex hardware and software systems that calculate odds and payments, accepts wagers, and processes wagering pools. NYRA alleges that NROTB's website provides users with a variety of services, including the ability to place wagers; view racing information; access handicapping tools; and the ability to select and view race replays, as well as live streaming video of certain races.

NYRA alleges that Roberts Communications Network, LLC transmits live audio and video simulcasts produced by various racetracks to wagering locations, in home television and on the internet. More specifically, it alleges that pursuant to an agreement with NYRA, as a third-party streaming video provider, Roberts had access to its satellite signal which provided audio-visual simulcasts of its races. However, NYRA alleges that Roberts did not have authorization to use its signal to transmit live simulcasts to NROTB's website.

NYRA further alleges that pursuant to a written agreement which was subject to but did not receive Board approval, it would have allowed NROTB to broadcast races at

NROTB branches and tele-theaters as well as on cable television during the pertinent time. It alleges that NROTB sought its approval to offer live audio-visual simulcasts of its races in March, 2008 but that it was denied. NYRA further alleges however that that agreement in any event did not authorize live audio-visual simulcasts of NYRA's races on NROTB's website.

NYRA alleges that despite the lack of an agreement, with respect to audio-visual simulcasts of NYRA's races on NROTB's website, that from January 29, 2009 until April 15, 2009, NROTB in fact broadcasted or transmitted its live audio-visual race simulcasts over NROTB's website which it obtained from Scientific Games Racing and/or Roberts Communications without authorization, thereby misappropriating its live audio-visual race simulcasts in bad faith. More specifically, NYRA alleges that as NROTB's employee or agent, Scientific Games Racing broadcast or transmitted its live audio-visual race simulcasts which it obtained from Roberts to NROTB and its website without NYRA's permission, knowing that NROTB lacked rights to it. Thus, Scientific Games Racing allegedly knowingly and in bad faith aided and abetted NROTB's misappropriation of NYRA's live audio-visual race simulcasts. NYRA similarly alleges that as NROTB's employee or agent, Roberts Communications broadcasted or transmitted its live audio-visual race simulcasts which it obtained from NYRA's satellite signal to NROTB and its website without its permission, knowing that NROTB lacked rights to it. Thus, Roberts Communications also allegedly knowingly and in bad faith aided and abetted NROTB in its misappropriation of NYRA's live audio-visual race simulcasts. Thus, NYRA alleges that by transmitting or broadcasting the live audio-visual race simulcasts without permission, NROTB, Scientific Games Racing and/or Roberts in bad faith misappropriated NYRA's audio-visual race simulcast signal to NROTB's website thereby causing its signal to be received by unintended recipients, including anyone with an internet connection "which is tantamount to international if not global distribution of NYRA's signal," when NROTB at best had authorization to broadcast only within Nassau County.

NYRA alleges that as a result of these broadcasts, pursuant to written notification dated April 15, 2009, it terminated transmission of its live audio-visual race simulcasts to NROTB home viewers who watched them on Cablevision on June 3, 2009. That termination was accompanied by a press release from NYRA's President and Chief Executive Officer Charles Hayward to the effect that NROTB had displayed live audio-visual simulcasts of NYRA races on its website without its authorization.

NYRA further alleges that NROTB brought a breach of contract action against it in June 2009 to recover for that termination of live audio-visual simulcasts of its races on

Cablevision and for defamation against Hayward based upon his statement accusing NROTB of engaging in unauthorized broadcasts of its races. In that action, NROTB alleged that NYRA had in fact agreed to provide in-home live simulcasting to Nassau County cable customers and by directing that those broadcasts be blocked, NYRA had breached its agreement with NROTB. As for the live audio-visual simulcasts on NROTB's website, NROTB maintained that it was not aware of them and that they had been done in error by Roberts Communications Network, which had been hired by its webmaster Scientific Games Racing. NROTBalleged that when it learned about the simulcasts on its website, it put an immediate stop to them. NROTB further alleged that both it and its webmaster Scientific Games Racing informed NYRA that the live website simulcasts were totally unintended accidents; that they expressed their regret; and, that upon NYRA's President's demand, NROTB's President, defendant Dino Amoroso, supplied two written apologies but NYRA nevertheless terminated home Cablevision broadcasts without informing NROTB of its intent to do so. NROTB additionally alleged that NYRA defamed it by announcing that the televised signal from Belmont Park thoroughbred racing had been removed from NROTB's in-home distribution network because "despite repeated demand, NYRA ha[d] to date received no satisfactory explanation from NROTB as to why it deliberately pirated NYRA's signal over the internet" and announcing that "NYRA's racing signal is valuable and proprietary and [it could not] allow it to be pirated by [its] competitors in the industry." In its first cause of action, NROTB sought specific performance. In its second cause of action, NROTB sought damages for breach of contract. In its third cause of action, NROTB sought to recover for defamation. NYRA did not interpose any counterclaims in that action.

In this action, NYRA alleges that NROTB's President defendant Dino Amoroso told a New York Post reporter on July 23, 2004 that NYRA's President Charles Hayward was "a liar and a thief" and that the Post published that statement on July 24, 2004.

In its first, fifth and eighth causes of action, NYRA seeks to recover of NROTB, Scientific Games Racing and Roberts Communications, respectively, for conversion based upon the transmission of live audio-visual simulcasts of its race on NROTB's website.

In its second, sixth and ninth causes of action, NYRA seeks to recover of NROTB, Scientific Games Racing and Roberts Communications, respectively, for unfair competition.

In its third, seventh and tenth causes of action, NYRA seeks to recover of NROTB, Scientific Games Racing and Roberts Communications, respectively, for unauthorized

publication/use of communications in violation of 47 U.S.C. § 605.

In its fourth cause of action, NYRA's President Charles Hayward seeks to recover of NROTB and its President defendant Dino Amoroso for libel and defamation.

When deciding a motion to dismiss a complaint pursuant to CPLR 3211, the court is required to afford the pleading "a liberal construction." **Leon v Martinez**, 84 NY2d 83, 87 (1994), citing CPLR 3026. It must "accept the facts alleged in the complaint as true, accord [the] plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." **Leon v Martinez, supra**, at p. 87-88, citing **Morone v Marone**, 50 NY2d 481, 484 (1980); **Rovello v Orfino Realty Co.**, 40 NY2d 633, 634 (1976); see also, **Mancuso v Rubin**, 52 AD3d 580 (2nd Dept. 2008). "In determining whether a complaint is sufficient to withstand a motion pursuant to CPLR 3211(a)(7), the sole criterion is 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 for dismissal will fall." **Ruffino v New York City Transit Authority**, 55 AD3d 817, 818 (2nd Dept. 2008).

Conversion

Under the traditional construct of the intentional tort of conversion, plaintiff was required to establish "the unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights" **Thyroff v Nationwide Mut. Ins. Co.** (8 NY3d 283, 288-89 [2007]). In **Thyroff**, the Court of Appeals noted that "[c]omputers and digital information are ubiquitous and pervade all aspects of business, financial and personal communication activities" and that "a document stored on a computer hard drive has the same value as a paper document kept in a file cabinet" (Id at 291-92). The court reasoned "that the tort of conversion must keep pace with the contemporary realities of widespread computer use" and expanded the scope of a conversion claim to intangible property in the form of "electronic records that were stored in a computer and were indistinguishable from printed documents." Accordingly, the intangible nature of NYRA's property allegedly converted by the defendants does not require dismissal of NYRA's conversion claim.

In **Thyroff**, the defendant denied the plaintiff "further access to the computers and all electronic records and data" and that "consequently, the plaintiff was unable to retrieve his customer information and other personal information that was stored on the computers." **Thyroff v Nationwide Mut. Ins. Co., supra**, at p. 285. Thus, defendant exercised dominion over the plaintiff's computer stored information to the exclusion of

the owner's rights.

Contrary to defendant's argument, the Court of Appeals suggests in **Thyroff** that plaintiff may maintain an action for conversion where its electronically stored data is misappropriated, regardless of whether plaintiff has been excluded from access to its intangible property. The court noted that it is the information which is stored in the computer that has "intrinsic value," rather than the "physical nature" of the document (Id at 292). Moreover, the court stated that there was "very little practical importance whether the tort is called conversion [or unfair competition] because in either case the recovery is for the full value of the intangible right so appropriated" (Id at 291). Thus, "the lack of a compelling reason to prohibit conversion for redress of a misappropriation of intangible property underscores the need for reevaluating the appropriate application of conversion" (Id).

The court concludes that NYRA may maintain an action for conversion of its live audio-visual simulcast, even though it was not "excluded" from access to the electronic data transmission. Although NROTB's unauthorized transmission of the simulcast may have been unintended, the court must give plaintiff the benefit of the possible inference that the simulcast was intentional. Defendant Scientific Games' motion to dismiss plaintiffs' conversion claim for failure to state a cause of action is **denied**.

Unfair Competition

To sustain a cause of action sounding in unfair competition, "the plaintiff must show that the defendants misappropriated [its] [product], labors, skills, expenditures or goodwill and displayed some element of bad faith in doing so." **Abe's Rooms, Inc. v Space Hunters, Inc.**, 38 AD3d 690, 692-693 (2nd Dept. 2007), citing **Precision Concepts v Bonsanti**, 172 AD2d 737 (2nd Dept. 1991); **Davis & Co. Auto Parts, Inc. v Allied Corp.**, 651 F.Supp. 198 (S.D.N.Y. 1986); **Saratoga Vichy Spring Co., Inc. v Lehman**, 625 F2d 1037, 1044 (2nd Cir. 1980); **Metropolitan Opera Ass'n, Inc. v Wagner-Nichols Recorder Corp.**, 279 App.Div. 632 (1st Dept. 1951); see also, **Electrolux Corp. v Val-Worth, Inc.**, 6 NY2d 556, 557 (1959); **Krinos Foods, Inc. v Vintage Food Corp.**, 30 AD3d 332 (1st Dept. 1996). "The tort functions to protect 'property rights of commercial value . . . from any form of commercial immorality.' " **Bongo Apparel, Inc. v Iconix Brand Group, Inc.**, 18 Misc3d 1108(A) (Supreme Court New York County 2008), quoting **Metropolitan Opera Ass'n. v Wagner-Nichols Recorder Corp.**, 199 Misc 786, 796 (Supreme Court New York County 1950), aff'd., 279 App.Div. 631 (1st Dept. 1951). " 'The general principle . . . evolved from all of the cases is that commercial unfairness will be restrained when it appears that there has been a misappropriation, for the

commercial advantage of one [company] of a benefit or property right belonging to another.' " **Telecom, Intl. Am. Ltd. v AT&T Corp.**, 280 F3d 175, 197 (2d Cir. 2001), quoting **Dior v Milton**, 9 Misc2d 425, 431 (Supreme Court New York County (1956), aff'd., 2 AD2d 878 (1st Dept. 1956).

NYRA alleges that Scientific Games Racing misappropriated live audio-visual simulcasts of its races and participated in their transmission over NROTB's website despite knowing that NROTB lacked authorization for them. Applying the standards of review applicable to a motion pursuant to CPLR 3211(a)(7), NYRA has adequately pled a claim sounding in unfair competition. Defendant Scientific Games' motion to dismiss plaintiffs' claim of unfair competition for failure to state a cause of action is **denied**.

Unauthorized Publication or Use of Communications Under 47 USC § 605:

Section 47 USC 605(a) of the Communications Act of 1934 provides

> No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. NO person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. No person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was intercepted, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication (or any part thereof) or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto.

Since § 605 refers to "radio communications," it applies to communications traveling "through the air," as opposed to "communications by wire," which are covered by 47 U.S.C. § 553 (**Charter Communications Entertainment v Burdulis**, 460 F.3d 168, 172-73 [1st Cir. 2006]). Giving plaintiff the benefit of every possible favorable inference, the

court must assume that the audio-visual simulcasts were transmitted wirelessly, at least in part. Thus, NYRA has stated a legally sufficient claim under 47 U.S.C. § 605.

Defendant Scientific Games' motion to dismiss plaintiffs' claim pursuant to 47 U.S.C. § 605 for failure to state a cause of action is **denied**.

Dated 10 June 2010

Stephen A. Bucaria
J.S.C.

ENTERED
JUN 14 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE