SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JENNIFER G. SCHECTER **PART** IAS MOTION 54EFM

Justice

----------X

TAXI TOURS INC.

Plaintiff,

- v -

GO NEW YORK TOURS, INC.,

Defendant.

----------X

INDEX NO. 653012/2019

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 32-44, 49-51 were read on this motion to/for DISMISSAL.

Plaintiff Taxi Tours Inc. moves to dismiss or stay defendant's counterclaims. The motion is denied.

Background

The parties are competitors in the tourism industry in New York City. Both operate tour buses that navigate various routes around the city and allow passengers to hop on and off their buses at city landmarks. Plaintiff's brand is "Big Bus"; defendant's is "TopView." Plaintiff brought this action on May 21, 2019, asserting causes of action for violation of New York General Business Law (GBL) §§ 349 and 350; unfair competition, defamation per se and injurious falsehood. The court stayed plaintiff's fourth and fifth causes of action due to the parties' agreement to submit those disputes to mandatory alternative dispute resolution, but did not dismiss the remaining causes of action (*see* Dkt. 45 [decision]). The court also ordered the parties to mediate through the Commercial Division ADR Program (*see* Dkt. 29 [order of reference]).

Defendant had previously brought an action against plaintiff and others in federal court on March 29, 2019, captioned *Go New York Tours, Inc. v. Taxi Tours Inc.*, Case No. 19-cv-2832 (SDNY) (Federal Action). The Federal Action included alleged violations of the Sherman Act

(§§ 1 and 2) and New York law claims for violation of the Donnelly Act (state antitrust provision), GBL § 349, unfair competition, tortious interference with contract and tortious interference with prospective business relations. On November 7, 2019, the court dismissed the federal complaint with leave to replead (*Federal Action*, 2019 WL 8435369 [SDNY Nov. 7, 2019]). Specifically, the court concluded that the complaint failed to state a claim for violation of the Sherman Act because inferences of conspiracies were faulty, insufficient or refuted by factual allegations (*id.* at *1-*2). The court noted, moreover, that the parties agreed that "New York antitrust claims are subject to the same analysis as the federal antitrust claims" and "analysis of the Sherman Act claims applies therefore to the New York antitrust claims, as well" (*id.*at n.5).

The second amended complaint contained the same causes of action except for violation of § 2 of the Sherman Act, which was dropped (Dkt. 42). On March 4, 2020, the court dismissed the Sherman Act § 1 cause of action with prejudice and declined to exercise supplemental jurisdiction over the state-law claims (*see* Dkt. 51 [Mar. 4, 2020 order in Federal Action]). The dismissal is being appealed.

Defendant asserts the following counterclaims in this action (Dkt. 31): (1) violations of the Donnelly Act (GBL § 340); (2) tortious interference with contract; (3) tortious interference with prospective business relations; (4) violations of GBL § 349; and (5) violations of GBL § 350. Plaintiff moves to dismiss and/or stay the counterclaims.

Analysis

Dismissal is denied.

Defendant's GBL §§ 349 and 350 counterclaims--like plaintiff's claims, which withstood dismissal--are based on allegations that plaintiff (1) posted fake positive online reviews of Big Bus ("astroturfing") (Answer ¶¶ 38-39); (2) posted fake negative online reviews of TopView (*id.* ¶¶

39-41); (3) falsely described TopView in advertising brochures (*id.* ¶ 42); and (4) misleadingly promoted Big Bus's Multi-Attraction Pass as the "Official New York Pass," among other things (*id.* ¶ 43). The Answer alleges that defendant's customers "were wrongfully diverted" from TopView to Big Bus (*id.* ¶ 44). These alleged acts or practices, including false testimonials, as well as misrepresentations of the origin, nature or quality of the parties' products and services, qualify as deceptive trade practices under GBL § 349 (*see Teller v Bill Hayes, Ltd.*, 213 AD2d 141, 146 [2d Dept 1995]). The Answer sufficiently alleges facts that, when taken as true, permit an inference that plaintiff engaged in consumer-oriented acts or practices that were likely to mislead a reasonable consumer (*see Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 26 [1995]). As Big Bus and TopView are alleged to directly compete for customers (Answer ¶¶ 4-10), defendant also sufficiently alleges it was actually injured by these acts and practices (*see City of New York v Smokes-Spirits.Com, Inc.*, 12 NY3d 616, 623 [2009]). For similar reasons, defendant has also sufficiently pleaded a counterclaim for false advertising under GBL § 350 (*see Koch v Acker, Merrall & Condit Co.*, 18 NY3d 940, 941 [2012]).

There is no basis for dismissing or staying this action based on the appeal of the federal court determination. Currently, there are no ongoing federal proceedings and if that ever changes then discovery from this case can be used in that one.

Because the federal court dismissed the federal antitrust claim with prejudice while this motion was pending, the parties have not properly briefed whether defendant is precluded from maintaining the Donnelly Act claim here (*see* Dkt. 33 at 8; Dkt. 49 [Reply] at 4-6) and whether the tortious interference claims state a cause of action (*see* Dkt. 51; *see also Federal Action*, 2019 WL 8435369 at *2-*3; *Wolberg v IAI North America, Inc.*, 161 AD3d 468, 470 [1st Dept 2018] [contract terminable at will contemplates prospective contractual relations only and there is no cause of action for tortious interference with contract]; *Carvel Corp. v Noonan*, 3 NY3d 182, 189-

190 [2004] [plaintiff must allege "more culpable conduct" than acting in own economic self interest]).

If defendant seeks dismissal at the pleadings stage, it must move to renew with briefing limited to two issues: (1) whether preclusion applies and (2) whether tortious interference claims have been stated. Before briefing proceeds, counsel must meet and confer to see if the parties can agree on the viability or lack thereof of these claims without incurring more cost and can enter into a stipulation. A renewal motion (which must be made by order to show cause--a Word version of which is to be emailed to mrand@nycourts.gov) shall set forth the results of the meet and confer and briefing shall be limited to these legal issues alone there is no need to rehash the facts. Plaintiff must make any renewal motion no later than September 29, 2020. Defendant may oppose no later than October 13, 2020 and plaintiff may reply no later than October 19, 2020.

Accordingly, it is

ORDERED that the motion of plaintiff Taxi Tours Inc. is denied; and it is further

ORDERED that plaintiff shall reply by September 29, 2020 to all claims that remain that are not subject to a pending motion; and it is further

ORDERED that within 30 days of this decision and order, the parties shall attempt to agree upon a schedule for the completion of all fact discovery on the causes of action and counterclaims that have not been stayed, and shall email Michael Rand (mrand@nycourts.gov), to schedule the preliminary conference. A joint status letter will be due by email and e-filing approximately one week before the conference.

9/11/2020
DATE

JENNIFER G. SCHECTER, J.S.C.

CHECK ONE: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION

[ ] GRANTED [ ] DENIED [X] GRANTED IN PART [ ] OTHER