

Boston Beer Corp. v Boening Bros., Inc.

2023 NY Slip Op 34428(U)

December 15, 2023

Supreme Court, New York County

Docket Number: Index No. 655582/2021

Judge: Andrew Borrok

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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BOSTON BEER CORPORATION, MANHATTAN BEER DISTRIBUTORS LLC, Plaintiff, - v - BOENING BROTHERS, INC., OAK BEVERAGES, INC., DANA DISTRIBUTORS, INC., DUTCHESS BEER DISTRIBUTORS, GASKO & MEYER, INC. Defendant.	INDEX NO. <u>655582/2021</u> MOTION DATE <u>04/24/2023,</u> <u>06/05/2023</u> MOTION SEQ. NO. <u>005 006</u> DECISION + ORDER ON MOTION
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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 127, 128, 129, 130, 131, 132, 135, 137, 150

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 151, 152, 155, 156, 157, 158, 159, 160

were read on this motion to/for DISMISS.

Defendants’ motion seeking dismissal of the declaration that that Alcoholic Beverage Control Law § 55-c (**ABC 55-c**) Section 7(b) is unconstitutional (Mtn. Seq. No. 005) is granted because the claim is not yet ripe. A justiciable controversy upon which a declaratory judgment may be rendered requires that the plaintiffs in such an action have an interest sufficient to constitute standing to maintain the action and also that the controversy involve *present, rather than hypothetical, contingent or remote*, prejudice to plaintiffs (*Am. Ins. Ass'n v Chu*, 64 NY2d 379, 383 [1985] [emphasis added]). The parties make clear that this is not a facial challenge to ABC 55-c. Indeed, this Court does not see how there could be one. ABC 55-c is a remedial statute which, as Plaintiff’s counsel noted, “provides specifically for a monetary judgment relief [] if the consolidation was not proper or not in good faith” (NYSCEF Doc. No. 60 at 19, lines 6-8). The

remedy fashioned by the New York legislature is tailored to the expressed concern about improper wholesaler consolidations in the beer industry and does not appear to be a penalty in any way. The speculation in the parties' briefs as to how this statutory provision *might* be applied is hypothetical and does not present a current judiciable controversy. Until a damage award is made, there is no basis upon which to seek a declaration of unconstitutionality. (*C.f. Allergan Fin., LLC v Pfizer Inc.*, 67 Misc 3d 1206(A) [Sup Ct 2020], *affd as mod*, 188 AD3d 402 [1st Dept 2020] [declaratory action was ripe because indemnitor refused to reimburse indemnitee for legal defense costs incurred in defending ongoing actions despite contractual agreement to reimburse periodically and prior to final judgment constituted a present controversy]; *see Church of St. Paul and St. Andrew v Barwick*, 67 NY2d 510, 518 [1986] [claim based on an injury which might never occur should be dismissed]; *New York Pub. Interest Research Group, Inc. v Carey*, 42 NY2d 527, 531 [1977].) Stated differently, Plaintiffs bring an as-applied challenge to a statutory provision that has not yet been applied, and indeed may never be applied in this case. What is clear from the statute were it to be applied is that neither side will be deprived of property without due process, including ample opportunity to be heard throughout the legal process, and neither side will be deprived of the right to have a factfinder make an independent determination as to what “the fair market value of the beer wholesaler's business, including distribution rights, which have been lost or diminished as the result of the brewer's actions” is (ABC 55-c[7][b]). To the extent Plaintiffs argue that certain portions of the categories of damages sought are not within the statute's contemplation, this can be developed during discovery. Ultimately, the Court will apply the law. In connection with any evidence adduced in support of damages, the Plaintiffs may certainly argue at that time that application of the statute with respect to those proposed damages would be excessive and thus unconstitutional *once there*

is an actual basis upon which to make that argument. It would then be incumbent on Plaintiffs to demonstrate how a proposed damages amount would be unconstitutional and what damages amount would be appropriate (and not excessive) under the circumstances. But in any event, as discussed above, this as-applied challenge may present a question for tomorrow (as the Court may find that this provision of the statute is not implicated or discovery may reveal on the developed record that damages are not what the Defendants allege), but it certainly is not a question for today.

The fourth cause of action in the Verified Answer to Amended Complaint with Counterclaims (NYSCEF Doc. No. 133; the **ACC**) alleging improper termination of Defendants' distribution agreements (NYSCEF Doc. Nos. 143-146; the **Distribution Agreements**) and sixth cause of action alleging improper disclosure of confidential information are dismissed because they are duplicative of the ABC 55-c statutory claims. ABC 55-c requires that "beer offered for sale in this state by a brewer to a beer wholesaler shall be sold and delivered pursuant to a written agreement which conforms to the provisions of this section" and provides further that "[s]uch agreement may be cancelled, terminated, materially modified or not renewed for good cause as defined in this section, provided the brewer has acted in good faith" (ABC 55-c[3]). ABC 55-c also operates to prevent private waivers of its statutory requirements, which includes its mandate that distribution contracts conform to the statute (ABC 55-c[11]; *see* ABC 55-c[3]). The Defendants attempt (unsuccessfully) to sidestep ABC 55-c's mandatory application by arguing that the Distribution Agreements only allow ABC 55-c to supersede the contract language in order to "restrict Boston Beer Company's ability to exercise any of its rights" as opposed to expanding them (*see* NYSCEF Doc. No. 144, Sec. 16). The plain language of the statute

forecloses this argument and explicitly enables Boston Beer to terminate the Distribution Agreements in accordance with the statute's provisions. Thus, Plaintiffs can not have simultaneously satisfied ABC 55-c's conditions for termination but nonetheless be in breach of the Distribution Agreements for termination in conformance with ABC 55-c. Defendants' claim for breach of the confidential information provisions of the Distribution Agreements (NYSCEF Doc. No. 144, Sec. 18[f]) also fails for this reason. The ACC itself alleges that Plaintiffs must be using Defendants' proprietary information precisely because such conduct is *acceptable industry practice* whenever brewers transfer distribution rights to successor wholesalers based upon a proper termination (ACC ¶¶175-177), and Defendants acknowledge in their brief that the finding of a proper termination would nullify this breach of contract claim (NYSCEF Doc. No. 158 at 12). The same portion of the ACC describes "proper termination" as a situation "where the terminated wholesaler is paid the fair market value of its distribution rights as well [sic] fair compensation for other damages sustained" (ACC ¶176). This is virtually identical to the language for the statutory damages that are available even in case of a proper termination (*see* ABC 55-c[7][a] ["brewer shall pay the affected beer wholesaler *the fair market value of the distribution rights . . . together with fair and reasonable compensation for other damages sustained*"] [emphasis added to indicate identical language]).

The fifth cause of action in the ACC alleging breach of contract for failure to use reasonable efforts is not ripe for dismissal because the parties separately agreed (unrelated to the termination provisions and not covered by ABC 55-c) that Boston Beer would use reasonable efforts to supply product under the Distribution Agreements, and the Defendants allege that the Plaintiffs have failed to meet their obligation to do so. This is sufficient. Section 2(iii) of the Distribution

Agreements reads, in relevant part: “[Boston Beer shall] use its reasonable efforts to provide Products to Wholesaler to fill Wholesaler's order . . . subject to whatever limitations then exist on Boston Beer Company's production and delivery capacity, it being understood that Boston Beer Company will have no liability for any failure to supply the Product” (NYSCEF Doc. No. 144, Sec. 2[iii]). Plaintiffs argue that the waiver language at the end of the sentence completely relieves Boston Beer of liability for any failure to deliver, even if they fail to use reasonable efforts. This reading would impermissibly fail to give meaning to the obligation as a whole (*see Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 13 NY3d 398, 404 [2009]). Put another way, the language the Plaintiff focuses on means that if the Plaintiffs use reasonable efforts but nonetheless are unable to supply product, they can not be held liable for their failure to do so.

The seventh cause of action in the ACC and the fifth cause of action in Gasko & Meyer, Inc. (**Gasko**)’s Answer to Amended Complaint with Counterclaims (NYSCEF Doc. No. 134; the **GACC**) for tortious interference against Manhattan Beer Distributors LLC (**MB**) are also not dismissed.

Tortious interference with contract requires (i) the existence of a valid contract between a plaintiff and a third party, (ii) defendant's knowledge of that contract, (iii) defendant's intentional procurement of the third-party's breach of the contract without justification, (iv) actual breach of the contract, and (v) damages resulting therefrom (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 [1996]). But-for causation must also be alleged (*Burrowes v Combs*, 25 AD3d 370, 373 [1st Dept 2006]; *White Knight of Flatbush, LLC v Deacons of Dutch Congregation of*

Flatbush, 159 AD3d 939, 941 [2d Dept 2018]). It is undisputed that the Distribution Agreements are valid contracts. Defendants allege MB knew of these contracts (ACC ¶¶181-182; GACC ¶¶139), that the contracts were breached (ACC ¶¶55-63; GACC ¶¶129-131), and that damages resulted (ACC ¶¶65; GACC ¶¶126-127). The only real dispute concerns whether the pleadings sufficiently allege that MB intentionally procured Boston Beer's breach. They do. Defendants allege, and Plaintiffs do not contest, that MB signed an indemnification agreement with Boston Beer whereby MB agreed to pay all costs, including fair market value of distribution rights and legal costs, incurred by Boston Beer in connection with termination of the Distribution Agreements (ACC ¶¶8, 94-96; GACC ¶¶151-153). In sum and substance, the Defendants allege that by agreeing to flip the bill for Boston Beer's allegedly improper terminations of the agreements that MB knew about (and wanted terminated), MB induced Boston Beer to breach. In further support, the Defendants allege MB's president stated to one of the Defendants that "Manhattan Beer and Boston Beer have been planning a consolidation in New York for the past five years" (ACC ¶185; GACC ¶172). Put another way, the Defendants contend that but for MB's targeted actions, Boston Beer would not have breached (ACC ¶190; GACC ¶154).

The eighth cause of action in the ACC and sixth cause of action in the GACC¹ for violation of the Donnelly Act are dismissed. To state a Donnelly Act claim, a party must identify a relevant, plausible product market. This is a nuanced analysis, including (i) consideration of all products reasonably interchangeable with respect to use by consumers or the cross-elasticity of demand between the product and substitutes and (ii) looking to the availability of substitutes – *i.e.*, whether two products can be used for the same purpose, and if so, whether and to what extent

¹ Gasko indicates in its brief that its Donnelly Act claim is identical to the other Defendants' and that Gasko therefore relies upon the other Defendants' briefing (NYSCEF Doc. No. 159 at 1).

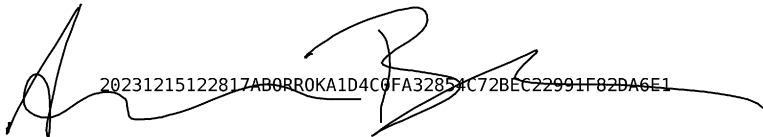
purchasers are willing to substitute one for the other, which would indicate that the products are functionally interchangeable and would form the outer boundaries of a relevant product market. (*Cont. Guest Services Corp. v Intl. Bus Services, Inc.*, 92 AD3d 570, 572 [1st Dept 2012].) The ACC alleges that the relevant product market is the malt beverage market (ACC ¶¶199-200; GACC ¶¶163-165) and refers to a U.S. Department of the Treasury (the **Treasury**) report, which notes that the “Antitrust Division [of the Department of Justice] has found that beer is the relevant product market for analyzing the likely competitive effects” (“Competition in the Markets for Beer, Wine, and Spirits”, February 2022, at 29, n. 109 [available at <https://home.treasury.gov/system/files/136/Competition-Report.pdf>]) and expressed concern, among other things, over price fixing. Putting aside that the report involves beer acquisitions and not the consolidation of wholesale distributors and that the Defendants have failed to articulate the nexus between the two and otherwise articulate how the Report is applicable to the instant facts, the ACC fails to properly allege harm to the market generally (the concern underlying the report) and not merely harm to these particular distributor Defendants. Accordingly, these counterclaims must be dismissed without prejudice.

The Court has considered the parties’ other arguments and finds them unavailing.

Accordingly, it is hereby

ORDERED that Defendants’ motion to dismiss (Mtn. Seq. No. 005) is granted; and it is further

ORDERED that Plaintiffs' motion to dismiss (Mtn. Seq. No. 006) is granted without prejudice as to the eighth counterclaim of the ACC and as to the sixth counterclaim of the GACC and granted with prejudice as to the fourth and sixth counterclaims of the ACC.


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12/15/2023

DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE