

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2009

(Argued: February 4, 2010

Decided: May 27, 2010)

Docket No. 09-1575-cv

- - - - -x

KATEL LIMITED LIABILITY COMPANY,

Plaintiff-Appellant,

- v.-

AT&T CORPORATION,

Defendant-Appellee.

- - - - -x

Before: JACOBS, Chief Judge, POOLER and KATZMANN,
Circuit Judges.

KATEL Limited Liability Company appeals from a judgment entered by the United States District Court for the Southern District of New York (Holwell, J.), dismissing by summary judgment its claims against AT&T Corporation, which allege breach of contract and tortious interference with contractual relations, and seek relief under the International Telecommunications Regulations. We affirm.

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6

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12 York, New York, for Appellee.
13

14
15 DENNIS JACOBS, Chief Judge:
16

17 In 1993 or 1994 (the date is disputed), AT&T
18 Corporation ("AT&T") entered into an International
19 Telecommunications Services Agreement ("Agreement") with
20 KATEL Limited Liability Company ("KATEL"), an international
21 telecommunications carrier, to govern the exchange of phone
22 calls between AT&T in the United States and KATEL in
23 Kyrgyzstan. The essence of the Agreement was that KATEL
24 would build the necessary infrastructure in Kyrgyzstan, and
25 AT&T would use that infrastructure for a fee. The parties
26 began exchanging telecommunications traffic shortly
27 afterward. In 1997, AT&T began sending its
28 telecommunications traffic to Kyrgyztelecom ("KT"), a
29 competitor of KATEL. Soon thereafter, AT&T began using an
30 intermediary service to route its calls to Kyrgyzstan and

1 stopped paying KT; moreover, since it was no longer using
2 KATEL's services, it was not paying KATEL, either.

3 KATEL bought an assignment of rights from KT, and sued
4 AT&T in the United States District Court for the Southern
5 District of New York (Holwell, J.) on March 28, 2002,
6 claiming breach of contract, tortious interference with
7 contractual relations, and an entitlement to fees pursuant
8 to the International Telecommunications Regulations. The
9 district court granted summary judgment to AT&T on all
10 claims, and this appeal is taken from the judgment.

11 We affirm.

12
13 **I**

14 The controversy turns on the interplay between two
15 paragraphs of the Agreement. Paragraph 7 provides, inter
16 alia, that "as soon as KATEL and AT&T establish direct
17 circuits, the parties will begin routing traffic between the
18 Republic of Kyrgyzstan and the United States on these
19 circuits, using the ['indirect'] transit routes via Russia
20 and Turkey only when direct circuits are not capable of

1 carrying the offered traffic."¹ Paragraph 19, entitled
2 "Non-Exclusive Privileges," provides that "[n]othing in this
3 Agreement shall be deemed to restrict or prejudice the
4 rights of either party to enter into similar service
5 agreements with other parties."

6
7 Transmission arrangements. In 1993 or 1994, AT&T and
8 KATEL entered into the Agreement and began sending
9 telecommunications traffic to one another. In early 1997,
10 AT&T contracted with KT to provide international
11 telecommunications services in Kyrgyzstan; at the same time,
12 AT&T stopped sending traffic to KATEL (and has sent none
13 since). But soon thereafter AT&T stopped paying KT for its
14 call termination services. On October 11, 1999,
15 representatives from AT&T, KATEL, and KT met at AT&T's New

¹ Traffic passes "directly" when it originates in the United States on AT&T's infrastructure and "terminates" in Kyrgyzstan on KATEL's infrastructure. AT&T, as the "originating carrier," would then pay an agreed-upon fee to KATEL as the "terminating carrier."

Traffic passes "indirectly" when AT&T originates a call in the United States and sends it to a third-party carrier, which then sends it along to KATEL. AT&T would pay a fee to KATEL, and AT&T and KATEL would each pay half of the fee owed to the third-party carrier.

1 Jersey headquarters. AT&T conceded that it owed money to
2 KATEL or KT or both, but the parties could not resolve the
3 muddle, and KATEL initiated this litigation.

4 In the meantime, AT&T continued sending direct and
5 indirect traffic to KT until May 2002, at which point it
6 adopted a different method of routing calls into Kyrgyzstan:
7 "refile." Under a refile arrangement, the originating
8 carrier (AT&T) sends the traffic to a third-party carrier,
9 and pays it; the third-party carrier then sends the traffic
10 into the terminating country and pays the terminating
11 carrier. (The FCC has recognized refile as an economically
12 rational way for an international telecommunications
13 provider to structure its business dealings with other
14 carriers. See In re Int'l Settlement Rates, 12 F.C.C.R.
15 19806, 19811-12 (Aug. 18, 1997)). Thus AT&T delivers the
16 calls to the third party and does not deliver the calls to
17 Kyrgyzstan directly or indirectly. In short, AT&T washed
18 its hands of business in Kyrgyzstan.

19
20 Litigation. On March 28, 2002, KATEL sued AT&T in the
21 Southern District of New York. Recognizing that KT might be
22 a necessary party, KATEL unsuccessfully invited KT to join
23 the litigation. To forestall any possible Rule 12(b)(7)

1 motion, KATEL bought an assignment of KT's rights against
2 AT&T (through May 2002). KATEL and KT executed a six-page
3 "Russian Language Assignment," and (on the same day) an
4 "English Language Assignment" that was intended to replicate
5 the Russian Language Assignment and that could be used by
6 KATEL to defeat a Rule 12(b)(7) motion.

7 On September 4, 2003, KT intervened in the KATEL-AT&T
8 lawsuit and moved to compel arbitration against KATEL
9 pursuant to the terms of the Russian Language Assignment.²

10 (KATEL contends that KT's intervention was inspired by
11 AT&T.) AT&T then moved to file an interpleader counterclaim
12 by which it would deposit with the district court the sum of
13 \$1,120,199.04, the amount that all parties agreed was owed
14 to KATEL and/or KT for the period 1997 through May 2002.

15 The court granted AT&T's motion; the parties stipulated that
16 this was the amount owed; and the KATEL-KT litigation was
17 stayed pending the outcome of their arbitration, which was
18 to determine how the interpleaded funds would be divided
19 between them. The arbitrator ultimately ruled that KATEL
20 was entitled to the full amount, and on October 31, 2006,

² KT also brought other claims against KATEL and AT&T. Those claims are not relevant to the issues presented in this appeal.

1 the district court ordered that the funds be disbursed to
2 KATEL.

3 Meanwhile, in the KATEL-AT&T litigation, the parties
4 had filed cross-motions for summary judgment. At oral
5 argument on February 9, 2006, KATEL argued that: (1) AT&T
6 breached the Agreement by failing to adhere to Paragraph 7's
7 requirement that it use KATEL's infrastructure to send calls
8 to Kyrgyzstan; (2) AT&T tortiously interfered with KATEL's
9 business relations with KT; and (3) AT&T owed reimbursement
10 to KATEL for traffic sent by AT&T to Kyrgyzstan--even for
11 periods when AT&T did not use KATEL's equipment or services
12 --by virtue of the International Telecommunications
13 Regulations ("ITRs").

14 In an oral decision, the district court ruled for AT&T
15 on all claims. As to breach of contract, the court
16 concluded that Paragraph 19 makes the Agreement a non-
17 exclusive contract that allows AT&T to use other means to
18 route traffic into Kyrgyzstan; that absent any such
19 obligation to send a specific amount of traffic through
20 Katel, AT&T did not breach the Agreement when it stopped
21 using KATEL's circuits; and that Paragraph 7 concerns how
22 traffic will be routed--not *whether* AT&T is required to

1 offer any traffic to KATEL.

2 As to tortious interference, the district court ruled
3 that the declaration of KATEL principal Ross Jacoby (on
4 which KATEL wholly relied) offered no more than conclusory
5 allegations that AT&T had sought to "drive a wedge" between
6 KATEL and KT. Separately, the court held that AT&T had a
7 reasonable basis to believe that KT rather than KATEL was
8 authorized to do business in Kyrgyzstan, and to act upon
9 that belief.

10 As to the ITRs, the court held that they confer no
11 private right of action.

12 At a status hearing two weeks after this summary
13 judgment ruling, the district court ordered KATEL to submit
14 in writing the nature of any remaining claims it had against
15 AT&T. KATEL responded that its only remaining claim
16 concerned payment it believed AT&T owed for the period
17 January 1, 2000 through April 30, 2001. After some
18 additional discovery, AT&T moved for summary judgment, which
19 the district court granted on the ground that KATEL offered
20 no evidence that AT&T owed anything other than the sum it
21 had already lodged with the court. In addition, the
22 district court denied a motion by KATEL to reopen discovery

1 for the purpose of disclosing Jacoby as an expert witness on
2 the custom and practice of the international
3 telecommunications industry.

4
5 This appeal. KATEL raises five arguments on appeal:

6 (1) AT&T breached the Agreement by not using KATEL's
7 services to terminate calls in Kyrgyzstan; (2) even if AT&T
8 was not in breach, industry custom and practice required
9 AT&T to pay KATEL for calls terminating in Kyrgyzstan; (3)
10 KATEL presented sufficient evidence on its tortious
11 interference claim; (4) the ITRs provide a private right of
12 action; and (5) the district court abused its discretion in
13 denying KATEL's motion to reopen discovery for the purpose
14 of disclosing Jacoby as an expert witness.

15 Analyzing the arguments seriatim, we affirm.

16
17 **II**

18 KATEL contends that AT&T breached the Agreement by
19 sending telecommunications traffic to Kyrgyzstan by means
20 other than the AT&T-KATEL link referenced in Paragraph 7 of
21 the Agreement.

22 Our interpretation of the Agreement is governed by New

1 York law. See Konikoff v. Prudential Ins. Co. of Am., 234
2 F.3d 92, 98 (2d Cir. 2000). Under New York contract law,
3 “the intent of the parties governs.” Crane Co. v. Coltec
4 Indus., Inc., 171 F.3d 733, 737 (2d Cir. 1999) (quoting Am.
5 Express Bank Ltd. v. Uniroyal, Inc., 562 N.Y.S.2d 613, 614
6 (1st Dep’t 1990)). “[W]e ascertain this intent ‘from the
7 plain meaning of the language employed’ in the agreements,
8 rather than from extrinsic evidence.” Crane, 171 F.3d at
9 737 (quoting Tigue v. Commercial Life Ins. Co., 631 N.Y.S.2d
10 974, 975 (4th Dep’t 1995)). In so doing, we must “give full
11 meaning and effect to all of its provisions.” Am. Express,
12 562 N.Y.S.2d at 614; see also Gonzalez v. Norrito, 682
13 N.Y.S.2d 100, 101 (2d Dep’t 1998). “Where the intent of the
14 parties can be determined from the face of the agreement,
15 interpretation is a matter of law and the case is ripe for
16 summary judgment.” Am. Express, 562 N.Y.S.2d at 614.

17 The Agreement provides the terms and conditions that
18 govern business dealings between AT&T and KATEL. Of the two
19 provisions that bear on the present dispute, one gives broad
20 rights that the other (in part) takes away, so that they
21 must be read together: Paragraph 7 provides that the traffic
22 will be routed on the AT&T-KATEL direct circuits (and may be

1 routed indirectly via Russia or Turkey "only when direct
2 circuits are not capable of carrying the offered traffic");
3 but Paragraph 19 says that "either party [may] enter into
4 similar service agreements with other parties." Thus
5 Paragraph 7 can grant no right that requires exclusive
6 dealing. To begin with, nothing in Paragraph 7 requires the
7 parties to do business with one another at all: It is not a
8 requirements contract, and it imposes no minimum volume.
9 Paragraph 7 fixes a preference for direct transmission of
10 telecommunications that go from AT&T and terminate with
11 KATEL, but (particularly in light of Paragraph 19) that does
12 not bar AT&T from sending calls toward Kyrgyzstan other than
13 via KATEL. Rather, as the district court correctly
14 concluded, paragraph 7 describes only how the
15 telecommunications services covered by the Agreement will be
16 provided and does not concern whether telecommunications
17 services so provided are covered by the Agreement.

18 KATEL argues that, under Paragraph 7, its direct
19 circuits are the "primary" means for sending AT&T-originated
20 calls into Kyrgyzstan, and AT&T may route traffic indirectly
21 only if these direct circuits fail. The Agreement itself
22 does not use the word "primary." But, more fundamentally,

1 such an understanding cannot be squared with the right of
2 the parties (under Paragraph 19) "to enter into similar
3 service agreements with other parties." Two "similar
4 service agreements" could not compatibly require two
5 Kyrgyzstani companies to provide "primary" termination
6 services to the same place.³ KATEL's interpretation of the
7 Agreement therefore leads to an illogical result, and we
8 decline to endorse it. Cf. Long Island Lighting Co. v.
9 Allianz Underwriters Ins. Co., 749 N.Y.S.2d 488, 495 (1st
10 Dep't 2002) (avoiding a contractual interpretation that
11 would lead to an illogical result); PNC Capital Recovery v.
12 Mech. Parking Sys, Inc., 726 N.Y.S.2d 394, 397 (1st Dep't
13 2001) (same).

14 Accordingly, we agree with the district court that the
15 Agreement imposed no obligation on AT&T to send traffic to
16 KATEL. It follows that AT&T was not in breach by electing
17 to send traffic to Kyrgyzstan by other carriers and other
18 means.

19

20

³ See The Random House Dictionary of the English Language 1142 (Unabridged ed. 1971) (defining "primary" as "first" or "highest in rank or importance").

1 **III**

2 KATEL next argues that, even if AT&T is not liable for
3 breach of contract, AT&T must nonetheless pay KATEL for all
4 AT&T-originated calls that terminated in Kryrgyzstan.

5 On April 26, 2006, AT&T, KATEL, and KT entered into a
6 stipulation (which took the form of a court order) providing
7 that, for the period January 1997 through May 2002, AT&T
8 owed \$1,120,199.04 for termination services in Kyrgyzstan.
9 AT&T lodged that sum with the district court, to be
10 distributed according to the result of the ensuing KATEL-KT
11 arbitration (which KATEL won in full). But though the payee
12 was in doubt, the sum was rendered certain by the
13 stipulation.

14 "[A] stipulation is generally binding on parties that
15 have legal capacity to negotiate, do in fact freely
16 negotiate their agreement and either reduce their
17 stipulation to a properly subscribed writing or enter the
18 stipulation orally on the record in open court." McCoy v.
19 Feinman, 99 N.Y.2d 295, 302 (N.Y. 2002); see also Calvin
20 Klein Ltd. v. Trylon Trucking Corp., 892 F.2d 191, 194 (2d
21 Cir. 1989). "[C]ourts should not disturb a valid
22 stipulation absent a showing of good cause such as fraud,

1 collusion, mistake or duress[,] or unless the agreement is
2 unconscionable or contrary to public policy[,] or unless it
3 suggests an ambiguity indicating that the words did not
4 fully and accurately represent the parties' agreement."

5 McCoy, 99 N.Y.2d at 302 (internal citations omitted). KATEL
6 has offered no reason why it should not be bound by its
7 stipulation. Accordingly, we hold that through May 2002,
8 KATEL has no entitlement to additional fees from AT&T.

9 Nor is KATEL owed money for events that occurred after
10 May 2002. At that time, AT&T stopped sending international
11 calls directly or indirectly to any carrier in Kyrgyzstan;
12 instead, it exclusively used the refile method of traffic
13 termination. Under refile, AT&T's payment obligation was to
14 a third-party carrier, and that third-party carrier was in
15 turn responsible for paying KATEL, KT, or any other
16 Kyrgyzstani carrier. AT&T had no payment obligation to
17 KATEL (or KT).

18 KATEL suggests that industry custom and practice
19 entitle it to payment. Under New York law, evidence of
20 custom or practice may be admissible only "if the agreement
21 is found to be ambiguous." Milonas v. Pub. Employment
22 Relations Bd., 648 N.Y.S.2d 779, 785 (3d Dep't 1996); see

1 also W. Union Tel. Co. v. Am. Commc'ns Ass'n, C.I.O., 299
2 N.Y. 177, 184 (1949); Polyfusion Elecs., Inc. v. AirSep
3 Corp., 816 N.Y.S.2d 783, 785 (4th Dep't 2006). Moreover,
4 such evidence "should not be admitted to create an ambiguity
5 in an otherwise clear and unambiguous agreement." Milonas,
6 648 N.Y.S.2d at 785. Because the Agreement is unambiguous,
7 there is no occasion to consider evidence of custom or
8 practice.

10 IV

11 KATEL contends that AT&T tortiously interfered with its
12 (KATEL's) business relationship with KT. New York law
13 governs our analysis. See Konikoff, 234 F.3d at 98. "In
14 order to prevail on a cause of action for tortious
15 interference with contractual relations, a plaintiff must
16 establish the existence of a valid contract between
17 plaintiff and a third party, the defendant's intentional and
18 unjustified procurement of the third party's breach of the
19 contract, the actual breach of the contract[,] and the
20 resulting damages." Jim Ball Chrysler LLC v. Marong
21 Chrysler-Plymouth, Inc., 796 N.Y.S.2d 804, 805 (4th Dep't
22 2005).

1 In the district court and again on appeal, KATEL relies
2 principally on paragraph 39 of Jacoby's declaration to
3 substantiate its claim for tortious interference. That
4 paragraph states in full:

5 [T]hroughout the entire history of [the
6 Agreement,] and at least since 1995, AT&T has
7 taken every opportunity to drive a wedge between
8 KATEL and [KT]. By negotiating behind KATEL's
9 back with [KT]--a KATEL Joint Venture participant
10 --AT&T has seriously damaged KATEL's relationship
11 with [KT]. Indeed, KATEL's shareholders,
12 including the Ministry, were forced to vote [KT]
13 out of the joint venture in 1998. By poisoning
14 this relationship with [KT], AT&T created a
15 hostile atmosphere in which KATEL must now conduct
16 business in the Kyrgyz Republic. It has also
17 created tensions between KATEL and [KT]. This
18 relationship is critical to KATEL's well being, as
19 the parties['] networks are interfaced. KATEL's
20 subscribers must have access to [KT]'s subscribers
21 and vice versa. AT&T's actions have also, on more
22 than one occasion, prompted [KT] either to deprive
23 KATEL of access to its equipment, or to extract
24 payments from KATEL of AT&T's debt (which only
25 resulted in a further dispute with [KT] over the
26 scope of the guarantee in the form of the
27 assignment that has also been the subject of
28 litigation before this Court). In sum, AT&T['s]
29 actions in dealing with [KT] have resulted in
30 [KT], KATEL's substantial Kyrgyz participant,
31 severing all partnership ties with KATEL.
32

33 As the district court concluded, this evidence is too
34 conclusory to withstand summary judgment. There is nothing
35 that points to any instance, manner, or method of
36 interference; nor is there a reference to a document,

1 conversation, or communication that would allow an inference
2 of tortious interference. "A party opposing summary
3 judgment does not show the existence of a genuine issue of
4 fact to be tried merely by making assertions that are
5 conclusory. . . ." Major League Baseball Props., Inc. v.
6 Salvino, Inc., 542 F.3d 290, 310 (2d Cir. 2008).

7
8 **V**

9 KATEL argues that the International Telecommunications
10 Regulations ("ITRs") afford it a private right of action
11 against AT&T. This is a matter of first impression for this
12 Court.

13 The ITRs have treaty status and were promulgated by the
14 International Telecommunications Union (the "Union"). S.
15 Treaty Doc. 102-13 (Melbourne 1988). See Cable & Wireless
16 P.L.C. v. FCC, 166 F.3d 1224, 1230 (D.C. Cir. 1999). The
17 Union is a specialized United Nations agency responsible for
18 international telecommunications issues. See ITU TELECOM
19 FAQs, available at <http://www.itu.int/ITUTELECOM/faq.html>.
20 There are currently 191 member states, including the United
21 States and Kyrgyzstan. Id. (follow hyperlink "191 Member
22 States").

1 The United States and Kyrgyzstan both adopted the ITRs.
2 See International Telecommunications Regulations (ITRs),
3 available at <http://www.itu.int/ITU-T/itr/> (follow hyperlink
4 "Status of ratification of ITRs"). The ITRs "establish
5 general principles which relate to the provision and
6 operation of international telecommunication services
7 offered to the public as well as to the underlying
8 international telecommunication transport means used to
9 provide such services." See Int'l Telecomms. Regulations,
10 Art. 1, § 1.1(a).

11 There is a presumption that "treaties do not create
12 privately enforceable rights in the absence of express
13 language to the contrary." Mora v. New York, 524 F.3d 183,
14 201 (2d Cir. 2008) (internal quotation marks omitted); see
15 also id. at 202 n.25 (citing cases from other circuits); id.
16 at 201-02 ("Our precedents recognize a presumption against
17 inferring individual rights from treaties."). If a State
18 that is party to a treaty wishes to create a private right
19 of action, "we would ordinarily expect expression of these
20 obligations to be unambiguous." Id. at 202. "Even when
21 treaties are self-executing . . . the background presumption
22 is that international agreements, even those directly

1 benefiting private persons, generally do not create
2 private rights or provide for a private cause of action in
3 domestic courts." Id. at 200 (quoting Medellin v. Texas,
4 552 U.S. 491, 506 n.3 (2008)).

5 No wording in the ITRs creates a private right of
6 action, and KATEL cites none. Instead, KATEL argues that,
7 because the treaty is binding on the United States (as a
8 member state and signatory to the ITRs), it provides KATEL a
9 private right of action ipso facto. However, membership in
10 the Union is limited to sovereign entities (not private
11 corporations such as KATEL). See Union Const., Art. 2.
12 Furthermore, the Union's Constitution provides for the
13 "Settlement of Disputes" only by "Member States," not by
14 private entities in those member states. Id. at Art. 56.
15 Whether a Member State has rights under the treaty, or is
16 bound by it, says nothing about whether a private party in
17 that Member State has a private right of action. See
18 Medellin, 552 U.S. at 506 n.3.

20 VI

21 KATEL moved to reopen discovery for the purpose of
22 designating Jacoby as an expert witness who would testify

1 that industry custom and practice required AT&T to pay a fee
2 to KATEL for calls terminating in Kyrgyzstan, regardless of
3 whether AT&T had any contractual obligation to make those
4 payments. The district court denied the motion, and our
5 review is for abuse of discretion. See In re Merrill Lynch
6 Ltd. P'ships Litig., 154 F.3d 56, 58 (2d Cir. 1998).

7 In the district court, KATEL argued that discovery
8 should be reopened because "expert disclosure in connection
9 with Mr. Jacoby's proposed testimony [had] not [previously]
10 appear[ed] necessary." See Memorandum of Law in Support of
11 KATEL's Motion to Reopen Discovery at 4. On appeal,
12 however, KATEL abandons that argument and raises for the
13 first time the argument that its failure to designate Jacoby
14 was a result of having to attend to the KATEL-KT
15 arbitration, which lasted years and which was allegedly
16 provoked as part of AT&T's scheme to disrupt the business
17 relations between the two Kyrgyzstani phone companies.

18 An argument raised for the first time on appeal is
19 typically forfeited. See In re Nortel Networks Corp. Sec.
20 Litig., 539 F.3d 129, 132 (2d Cir. 2008). True, this rule
21 is prudential, not jurisdictional, and we may consider a
22 forfeited argument if there is a risk that "manifest

1 injustice" would otherwise result. Id. at 133. But there
2 is no such risk here.

3

4

CONCLUSION

5 For the foregoing reasons, we affirm the judgment of
6 the district court.