

**A.D.E. Sys., Inc. v Gil-Bar Indus., Inc.**

2016 NY Slip Op 33112(U)

September 8, 2016

Supreme Court, Nassau County

Docket Number: 601433-16

Judge: Vito M. DeStefano

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SUPREME COURT - STATE OF NEW YORK

Present:

**HON. VITO M. DESTEFANO,**

Justice

TRIAL/IAS, PART 11  
NASSAU COUNTY

**A.D.E. SYSTEMS, INC.,**

**Decision and Order**

**Plaintiff,**

**MOTION SEQUENCE: 01**

**-against-**

**INDEX NO.:601433-16**

**GIL-BAR INDUSTRIES, INC.,**

**Defendant.**

**The following papers and the attachments and exhibits thereto have been read on this motion:**

Notice of Motion	1
Memorandum of Law in Support	2
Affirmation in Opposition	3
Memorandum of Law in Opposition	4

The defendant moves for an order pursuant to CPLR 3016(b) and 3211(a)(7) dismissing the complaint.

**Background**

On April 1, 2015, the plaintiff, A.D.E. Systems, Inc., and nonparty Energy Labs, Inc. ("Energy Labs") entered into an agreement whereby plaintiff was to become a manufacturers' representative for Energy Labs' products. By letter dated May 21, 2015, Energy Labs terminated the agreement with the plaintiff. According to the plaintiff, the termination constituted a breach by Energy Labs and, hence, plaintiff commenced two related actions, namely *A.D.E. Systems, Inc. v Energy Labs, Inc.* (Index No. 604036/15) and the instant action.

The complaint in the instant action, predicated upon defendant Gil-Bar Industries, Inc.'s procurement of Energy Lab's breach of its agreement with the plaintiff, pleads three causes of action against defendant: tortious interference with contract, tortious interference with prospective economic relations, and unfair business practices. According to the complaint:

Upon information and belief, following the execution of the ADE/Energy Labs Agreement, Gil-Bar engaged in a multifaceted course of conduct to intentionally and improperly procure Energy Labs' breach of the ADE/Energy Labs Agreement.

Upon information and belief, following the execution of the ADE/Energy Labs Agreement, Gil-Bar further engaged in a multifaceted course of conduct to intentionally and improperly interfere with ADE's securing of renewals of the ADE/Energy Labs Agreement which would have been entered into for, at a minimum, for several additional terms.

Upon information and belief, the foregoing conduct engaged in by Gil-Bar after the execution of the ADE/Energy Labs Agreement was directed by Gil-Bar at Energy Labs and constituted criminal conduct and/or an independent tort, fraud(s) and misrepresentation(s). In so doing, Gil-Bar acted with malicious intent.

As alleged above, ADE's ability to conduct discovery in the Energy Labs Action has been materially obstructed and further and additional factual allegations regarding the wrongful conduct of Gil-Bar therefore remain concealed from ADE to date.

In the first cause of action, the plaintiff alleges that the defendant tortiously interfered with the agreement between plaintiff and Energy Labs:

Gil-Bar had specific knowledge that ADE had a valid and existing contract with Energy Labs, to wit, the ADE/Energy Labs Agreement.

Upon information and belief, Gil-Bar intentionally and improperly interfered with the ADE/Energy Labs Agreement in order to induce Energy Labs to breach its contractual obligations with ADE.

The acts set forth above, as well as other acts yet to be uncovered, caused injury to ADE, the full extent of which is unknown to ADE at this time.

The acts set forth above, as well as other acts yet to be uncovered, constitute tortious interference with contract.

In the second cause of action, tortious interference with prospective economic relations, the plaintiff pleads the following additional language:

Upon information and belief, in so doing, Gil-Bar acted with wrongful means or malicious intent to harm ADE.

The acts set forth above, as well as other acts yet to be uncovered, constitute tortious interference with prospective economic relations.

And the plaintiff alleges in the third cause of action, an unfair business practices claim, the following:

Upon information and belief, Gil-Bar engaged in unfair business practices against ADE by procuring and/or attempting to procure Energy Labs not to deal with ADE.

Upon information and belief, Gil-Bar misappropriated ADE's commercial advantage.

The acts set forth above by Gil-Bar were conducted by unlawful means, including fraud, and/or were engaged in without justifiable cause.

The acts set forth above, as well as other acts yet to be discovered by ADE, constitute unfair business practices.

The defendant moves to dismiss the complaint arguing that none of the causes of action are sufficiently pled.

For the reasons that follow, the motion is granted.

## The Court's Determination

### *Tortious Interference with Contract*

The elements of a claim for tortious interference with contract are: 1) the existence of a valid contract between the plaintiff and a third-party; 2) the defendant's knowledge of that contract; 3) the defendant's intentional procurement of the third-party's breach of that contract without justification; 4) actual breach of the contract; and 5) resulting damages (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]; *Foster v Churchill*, 87 NY2d 744, 749–750 [1996]; *MVB Collision, Inc. v Allstate Insurance Co.*, 129 AD3d 1041, 1043 [2d Dept 2015]).

“Although on a motion to dismiss the allegations in a complaint should be construed liberally, to avoid dismissal of a tortious interference with contract claim, a plaintiff must support his claim with more than mere speculation” (*Ferrandino & Son, Inc. v Wheaton Bldrs., Inc., LLC*, 82 AD3d 1035 [2d Dept 2011] quoting *Burrowes v Combs*, 25 AD3d 373 [1<sup>st</sup> Dept 2006]). Here, the plaintiff merely asserted, in a conclusory manner and without the support of any factual allegations, that defendant “[u]pon information and belief, engaged in a multifaceted course of conduct” and “intentionally and improperly interfered with the [agreement] in order to induce Energy Labs to breach its contractual obligations with [plaintiff]” (Complaint at ¶ 34). In this regard, when the allegations in the complaint, as here, are bare legal conclusions unsupported by any factual basis, they are not presumed to be true nor are they accorded every favorable inference (see *Nagan Construction, Inc. v Monsignor McClancy Memorial High School*, 117 AD3d 1005 [2d Dept 2014]; *Breytman v Olinville Realty, LLC*, 54 AD3d 703, 704 [2d Dept 2008]; *Morris v Morris*, 306 AD2d 449 [2d Dept 2003]).

Moreover, the complaint fails to allege that the agreement would not have been breached “but for” defendant’s conduct (*Ferrandino & Son, Inc. v Wheaton Bldrs., Inc., LLC*, 82 AD3d at 1036, *supra* quoting *Burrowes v Combs*, 25 AD3d at 373, *supra* [internal quotation marks omitted]; 68 *Burns New Holding, Inc. v Burns St. Owners Corp.*, 18 AD3d 857 [2d Dept 2005];

*Washington Ave. Assoc. v Euclid Equipment*, 229 AD2d 486 [2d Dept 1996]).

Accordingly, the first cause of action for tortious interference with contact, consisting of conclusory assertions without any factual basis, is dismissed.

*Tortious Interference with Prospective Economic Relations*

“To establish a claim of tortious interference with prospective economic advantage, a plaintiff must demonstrate that the defendant’s interference with its prospective business relations was accomplished by ‘wrongful means’ or that defendant acted for the sole purpose of harming the plaintiff” (*Moulton Paving, LLC v Town of Poughkeepsie*, 98 AD3d 1009, 1013 [2d Dept 2012] quoting *Caprer v Nussbaum*, 36 AD3d 176, 204 [2d Dept 2006]). “‘Wrongful means’ include physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure” (*Guard-Life Corp. v Parker Hardware Mfg. Corp.*, 50 NY2d 183, 191 [1980], quoting Restatement [Second] of Torts §§ 768, Comment e and 767, Comment c). As a general rule, the defendant’s conduct must amount to a crime or an independent tort, as conduct that is neither criminal nor tortious will generally be “lawful” and thus insufficiently “culpable” to create liability for interference with prospective business relations (*Carvel Corp. v Noonan*, 3 NY3d 182, 190 [2004]).

The cause of action to recover damages for tortious interference with prospective economic relations must be dismissed since the plaintiff’s allegations were conclusory without any factual underpinning whatsoever (i.e., defendant’s conduct “constituted criminal conduct and/or an independent tort, fraud(s) and misrepresentation(s)” and defendant “acted with wrongful means or malicious intent to harm [plaintiff]” (Complaint at ¶¶ 29, 43, 44) (*see Hersh v Cohen*, 131 AD3d 1117 [2d Dept 2015] [plaintiffs made only conclusory allegations, which were insufficient to state a cause of action for tortious interference with prospective business relations]; *Monex Financial Services, Ltd. v Dynamic Currency Conversion, Inc.*, 62 AD3d 675 [2d Dept 2009]; *M.J. & K. Co. v Matthew Bender & Co.*, 220 AD2d 488, 490 [2d Dept 1995]).

### *Unfair Business Practices*

In opposition to the branch of defendant's motion to dismiss the third cause of action, the plaintiff argues that the "pleading standards require Plaintiff only to plead facts that support the cause of action" for unfair business practices and plaintiff "has pleaded the facts that support its third cause of action" (Memorandum of Law in Opposition at pp 5-6).

A cause of action for unfair business practices requires a showing of "the bad faith misappropriation of a commercial advantage belonging to another by infringement or dilution of a trademark or trade name or by exploitation of proprietary information or trade secrets" (*Westover Car Rental, LLC v Niagra Frontier Transportation Authority*, 133 AD3d 1321, 1322 [4<sup>th</sup> Dep 2015] quoting *Eagle Comtronics v Pico Prods.*, 256 AD2d 1202, 1203 [4<sup>th</sup> Dept 1998]; *Macy's Inc. v Martha Stewart Living Omnimedia, Inc.*, 127 AD3d 48, 56 [1<sup>st</sup> Dept 2015]).

Here, the allegations set forth in the complaint lack the requisite elements to set forth a cause of action for unfair business practices inasmuch as plaintiff did not allege that the defendant misappropriated its labors, skills, expenditures, or good will or otherwise attempted to capitalize on plaintiff's name or reputation in the business (*Abe's Rooms, Inc. v Space Hunters*,

*Inc.*, 38 AD3d 690, 693 [2d Dept 2007]). The third cause of action is, therefore, dismissed.

**Conclusion**

Based on the foregoing, it is hereby

Ordered that the defendant's motion is granted in its entirety and the complaint is dismissed.<sup>1</sup>

This constitutes the decision and order of the court.

Dated: September 8, 2016

  
Hon. Vito M. DeStefano, J.S.C.

**ENTERED**

SEP 13 2016

NASSAU COUNTY  
COUNTY CLERK'S OFFICE

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<sup>1</sup> At the conclusion of plaintiff's memorandum of law, plaintiff requests leave to amend the complaint in the event the court "deems any portion of the Complaint to be legally insufficient" (Memorandum of Law in Opposition at p 9). Noticeably absent from plaintiff's submission is an amended pleading with any indication of what the proposed amended language is (*see* CPLR 3025[b]).