

Williams v Barclays Capital, Inc.
2015 NY Slip Op 30466(U)
March 31, 2015
Supreme Court, New York County
Docket Number: 653785/2012
Judge: Marcy S. Friedman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

_____ x
LINDA GRANT WILLIAMS,

Plaintiff,

– against –

BARCLAYS CAPITAL, INC. and DOES 1-20,

Defendants.

_____ X

Index No.: 653785/2012

DECISION/ORDER

Motion Seq. 001

In this state antitrust action, plaintiff Linda Grant Williams (Williams) alleges that defendant Barclays Capital, Inc. (Barclays) engaged in a conspiracy with investment banks and others not to utilize Williams’ patented airline special facility (ASF) municipal bond structure to finance airline terminal construction.¹ Barclays moves to dismiss the complaint for failure to state a cause of action, pursuant to CPLR 3211 (a) (7).

Background

The relevant facts, as alleged in the complaint, are as follows: Williams, an experienced structured finance attorney, patented an innovative structure for ASF municipal bonds (the structure). (Complaint, ¶ 13.) ASF bonds are used to finance the construction and renovation of airline passenger terminals at airports owned by state and local municipalities. (*Id.*, ¶¶ 19-20.) Traditionally, the municipality issues tax-exempt ASF bonds and then lends the money raised

¹ Another action involving similar allegations against other investment banks is also pending before this court. (See Williams v Citigroup, Inc., Sup Ct, NY County, No. 650481/2010 [Citigroup action].) Williams’ federal action against Citigroup asserting violations of the Sherman Act was dismissed for failure to state a claim. (See Williams v Citigroup Inc., 659 F3d 208, 211 [2d Cir 2011].)

through the bond issuance to the airline tenant for construction or renovation of the terminal.

(Id., ¶ 20.) The municipalities do not, however, guarantee the repayment of principal and interest on the bonds; the borrower airline does. (Id., ¶ 21.) The creditworthiness of the borrower airline is therefore determinative of how the bonds are rated. (Id., ¶ 23.) The financial performance of many airlines is “varied and unpredictable,” leading to lower credit ratings on the bonds and higher interest rates. (Id.) ASF bonds are underwritten by a “small group of investment banks, including Barclays,” which form syndicates to participate in the underwriting. (Id., ¶¶ 26, 41-42.) The fees for the banks are “tied to the credit ratings on the bonds, with lower credit ratings resulting in higher underwriting fees.” (Id., ¶ 27.) The high interest yields from the ASF bonds under this traditional structure are also particularly attractive to large institutional investors, which are clients of the banks. (Id.) The airlines are dependent on the banks for the underwriting process and therefore “have little choice but to accede to those banks’ demands” as to the structure of ASF bonds.² (Id., ¶ 40.)

As further alleged in the complaint, Williams’ structure improves upon the traditional structure by facilitating a “critical change in the criteria by which ASF Bonds are rated”—in particular, by permitting rating “based upon passenger demand for the airport terminal itself, rather than on the performance or credit risk of the airline for whose benefit the terminal is initially constructed or renovated.” (Complaint, ¶ 56.) Through the use of a special purpose entity, among other things, the structure also protects bondholders from possible airline bankruptcies. (Id., ¶¶ 51-52.) As a result, the use of Williams’ structure would “ordinarily” result in “dramatically improved credit ratings,” much lower interest rates, and “very significant savings for the airlines.” (Id., ¶ 56.)

² Williams makes additional allegations defining the relevant market and market power. (Complaint, ¶¶ 29-35, ¶¶ 36-43.) The instant motion is not based on a claim that such allegations are insufficient.

Williams alleges that she “offered” her structure “to several Wall Street banks, including Citigroup, JP Morgan and Goldman Sachs,” and that the banks initially responded favorably. (Id., ¶ 57.) Once the banks realized that the structure would reduce their underwriting fees and harm their large institutional investors, the banks “refused to deal with” Williams and/or to use her structure. (Id., ¶¶ 7, 58.) The banks’ refusal expanded to a boycott to prevent others from utilizing Williams’ structure. (Id., ¶¶ 5-10, 58.)

Thereafter, Williams entered into an exclusive two-year agreement with Banc of America Securities (BAS) to promote her structure. (Complaint, ¶¶ 60, 62.) That agreement was “cost-free” to BAS unless and until a bond issuance was completed using Williams’ structure, in which event BAS agreed to pay Williams one-fourth of its underwriting fees on the transaction. (Id., ¶¶ 60, 62.) Williams alleges that, because of pressure from the co-conspirators, a few months after BAS entered into its agreement with her, BAS asked her to agree to cancel the agreement. (Id., ¶¶ 62-63.) Williams then turned to a minority-owned investment bank, M.R. Beal & Co. (Beal) to promote her structure. (Id., ¶ 64.) After receiving express and implied threats from Barclays described in greater detail below, Beal “staunchly refused” to promote Williams’ structure. (Id., ¶¶ 67-68.)

Williams alleges that she has been damaged by these actions in that she has been deprived of legal fees and licensing fees that she would have earned by applying her structure, and has also suffered interference with her legal career. (Complaint, ¶11.) Williams also asserts that airlines, passengers, and taxpayers have been damaged as a result of Barclay’s misconduct in preventing issuance of ASF bonds using Williams’ structure because the ASF bond issuances are more expensive under the traditional structure for airlines, municipal airports, and taxpayers who subsidize them. (Id., ¶¶ 12, 88.)

Based on these allegations, Williams asserts four causes of action: violation of the Donnelly Antitrust Act (first cause of action), tortious interference with contract (second cause of action), tortious interference with prospective economic advantage (third cause of action), and violation of New York General Business Law § 349 et seq. (fourth cause of action).

Discussion

It is well settled that on a motion to dismiss addressed to the face of the pleading, “the pleading is to be afforded a liberal construction (see, CPLR 3026). [The court must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (Leon v Martinez, 84 NY2d 83, 87-88 [1994]. See also 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].) However, “the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts.” (Robinson v Robinson, 303 AD2d 234, 235 [1st Dept 2003]; see also Water St. Leasehold LLC v Deloitte & Touche LLP, 19 AD3d 183 [1st Dept 2005], lv denied 6 NY3d 706 [2006].) When documentary evidence under CPLR 3211 (a) (1) is considered, “a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (Leon, 84 NY2d at 88; see also Arnay Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 NY2d 300 [2001].)

The Donnelly Act

The purpose of the Donnelly Act, New York’s antitrust statute (General Business Law § 340 et seq.), is to prevent anti-competitive practices. (Progressive Milk Co., Ltd. v Luna, 126 AD2d 247, 250 [1st Dept 1987].) As held by the Court of Appeals, “the Donnelly Act, having

been modelled on the Federal Sherman Act of 1890, should generally be construed in light of Federal precedent and given a different interpretation only where State policy, differences in the statutory language or the legislative history justify such a result.” (X.L.O. Concrete Corp. v Rivergate Corp., 83 NY2d 513, 518 [1994] [internal quotation marks and citations omitted]; see also State v Mobil Oil Corp., 38 NY2d 460, 463 [1976] [noting that Donnelly Act was enacted short time after federal Sherman Antitrust Act and “has been considered to have been modeled after the Sherman Act”].)

General Business Law § 340 (1) provides, in relevant part, that “[e]very contract, agreement, arrangement or combination whereby . . . [c]ompetition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained . . . is hereby declared to be against public policy, illegal and void.” To state a claim under this section, a plaintiff “must allege both concerted action by two or more entities and a consequent restraint of trade within an identified relevant product market.” (Global Reinsurance Corp.-U.S. Branch v Equitas Ltd., 18 NY3d 722, 731 [2012]; see also Thome v Alexander & Louisa Calder Foundation, 70 AD3d 88, 111 [1st Dep’t 2009], lv denied 15 NY3d 703 [2010].) “[A] restraint-of-trade Donnelly Act violation can only occur when the alleged ‘conspirators’ are in competition with one another or with the plaintiff.” (Benjamin of Forest Hills Realty, Inc. v Austin Sheppard Realty, Inc., 34 AD3d 91, 98 [2d Dep’t 2006], citing Sands v Ticketmaster-New York, Inc., 207 AD2d 687, 688 [1st Dep’t 1994] [same].)

Barclays contends that Williams’ Donnelly Act claim must be dismissed because Williams fails to plead particularized facts regarding the alleged conspiracy. Specifically, Barclays contends that Williams does not name Barclays’ alleged co-conspirators, and does not plead “the date, time or place” of alleged conspiratorial conduct. (D.’s Memo. Of Law in Supp.

at 6-7.) Barclays also contends that Williams fails to plead any “bilateral conduct” by or on behalf of Barclays in furtherance of the alleged conspiracy.³ (Id. at 8.)

The First Department resolved a similar challenge in the Citigroup action. There, Williams alleged that defendants Citigroup, Inc. (Citigroup), Citigroup Global Markets, Inc. (CGM), JP Morgan Chase & Co. (JP Morgan), JP Morgan Securities, Inc. (JPMS), Goldman Sachs & Co. (Goldman), and Does 1-20 conspired to boycott the use of her structure. Specifically, as summarized by this Court (Fried, J., now retired):

“The complaint allege[d] that defendants conspired to terminate or reassign every person in their organizations who had responded positively to the structure, and threatened at least one named smaller investment bank with economic reprisals if it utilized the structure. It further allege[d] that the named defendants successfully pressured Banc of America Securities, Inc. to terminate its license of the structure, and persuaded the Port Authority of New York and New Jersey to withdraw its approval ‘in concept’ of the structure for use at La Guardia Airport. It also allege[d] that defendants erected barriers against the use of the structure by causing lengthy no-call periods to be inserted in ASF bonds they underwrote.”

(Williams v Citigroup, Inc., 2012 WL 2377813, *1 [Sup Ct, NY County, June 19, 2012, No. 650481/2010], mod 104 AD3d 521 [1st Dept 2013].) Based on these allegations, the Court held that the complaint had “sufficiently allege[d] a conspiracy or a reciprocal relationship among defendants to block the use of the structure in ASF underwriting to satisfy the lenient [pleading] standards of New York law.” (Williams, 2012 WL 2377813 at *3 [internal quotation marks and

³ To the extent that Barclays is relying on the defense of the statute of limitations to the Donnelly Act claims, Barclays raised this additional argument for the first time on reply. (D.’s Reply Memo. Of Law at 4; Oral Argument Transcript (Tr.) 33-34.) As Williams did not have an opportunity to respond, the court declines to consider new arguments raised on reply. (See Kennelly v Mobius Realty Holdings LLC, 33 AD3d 380, 381-382 [1st Dept 2006] [“The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds or evidence for the motion”] [internal quotation marks, alteration, and citation omitted].) The court notes parenthetically that in the Citigroup action, Williams pleaded, as she does here, that Barclays interfered with Williams’ relationship with Beal investment bank. (See Citigroup action First Amended Complaint, ¶¶ 117-119; see infra at 8-9.)

citation omitted].) The Court, however, dismissed Williams' claims, holding that she lacked standing to pursue the action as she did not demonstrate that "her injury, loss of legal fees and potential licensing revenues, resulted from an injury to competition in the relevant market and [we]re the type of loss that the claimed violations of the antitrust laws would be likely to cause." (Id. at *5 [internal quotation marks and citations omitted].)

The Appellate Division reversed, holding that, because Williams had "attempted to facilitate competition" with Citigroup and the other defendants, "an attack on her through anticompetitive conduct is sufficient to confer standing." (Williams, 104 AD3d at 521.) The Appellate Division affirmed the Court's finding that Williams had sufficiently alleged a conspiracy, holding that "[a]lthough plaintiff has not pleaded direct evidence of a conspiracy, the allegations, which include statements alleged to have been made by defendants and other market participants, that defendants boycotted the use of plaintiff's structure to issue ASF bonds, are sufficient to raise an inference of conspiracy." (Id. at 522.) The instant action against Barclays was commenced within months of the Appellate Division decision.

Barclays contends that this action is distinguishable from the Citigroup action because Williams does not allege that she presented her structure to or worked with anyone at Barclays "in connection with any bond issuance being underwritten by Barclays," and because she "does not name a single alleged co-conspirator of Barclays" other than the Doe defendants. (D.'s Memo Of Law In Supp. at 10.)

Here, Williams does plead sufficient allegations to support a claim for a conspiracy. Contrary to Barclays' contention, Williams does identify Barclays' co-conspirators as Wall Street banks or investment banks and names Citigroup, JP Morgan, Morgan Stanley, Bear Stearns, and Goldman Sachs. (Complaint, ¶¶ 57, 61.) Williams also alleges that "Barclays and

its co-conspirators have acted collectively to boycott [Williams] and her ASF Bond structure” because they could not have achieved their anticompetitive goals, and kept her structure out of the market, “by acting unilaterally.” (Id., ¶ 7.) Williams alleges that the co-conspirators are competitors and that “without an agreement among Barclays and its bank co-conspirators to boycott [Williams] and her structure, and vigilant enforcement of that agreement, there would be tremendous concern among those banks that one of them would successfully syndicate and underwrite an ASF Bond issuance that utilizes [Williams’] structure in order to improve its position vis-a-vis other ASF Bond underwriters.” (Id., ¶¶ 8, 76.) According to Williams, only “a very limited, tightly knit group of municipal underwriters” underwrite ASF bonds, and a “small group” of investment banks regularly co-underwrite ASF bond issuances. (Id., ¶¶ 26, 30 [alleging that only about one dozen bankers “regularly participate in the issuance of ASF Bonds”].) Those investment banks reciprocate among themselves “by invit[ing] the others to participate in the issuance. . . .” (Id., ¶ 26.)

With respect to actions taken by Barclays, although Williams does not allege that she presented her structure to Barclays, she alleges that Barclays did act in furtherance of the conspiracy. More particularly, Williams alleges that Steve Howard, a Barclays’ employee, told Beal that it should “stop working with [Williams],” and that, should Beal continue to work with Williams, Barclays and its co-conspirators would refuse to participate in any underwriting syndicate that involved Williams’ structure. (Complaint, ¶ 68.) Further, Howard threatened an individual banker at Beal that if he continued to promote Williams’ structure, that banker “would be blacklisted from any future employment by other Wall Street investment banks.” (Id., ¶ 69.) In addition, Williams alleges that Beal was warned that if it participated in a bond issuance utilizing Williams’ structure, Beal would no longer receive minority allocations for underwriting

bonds, a core component of Beal's business. (Id., ¶ 70.) Thereafter, Beal refused to promote or adopt Williams' structure. (Id., ¶ 71.) Williams alleges that Beal's founder told the Beal bankers that "[Wall] Street will snuff [Plaintiff] and her patent out." (Id., ¶ 67 [brackets in original].)

Similarly, Williams alleges that BAS "was being urged by Barclays and its co-conspirators to cease dealing with [her]," and that BAS succumbed to that pressure and terminated the licensing contract with her. (Id., ¶ 62.)

These allegations are substantially similar to the allegations held to be sufficient to state a conspiracy in the Citigroup action. The complaint in that action, of which the court takes judicial notice, alleged that Williams' structure was presented to each of the defendants, CGM, JPMS, and Goldman, and that each defendant ultimately rejected the use of the structure because it would threaten its profits and those of its large institutional clients. (See e.g. Citigroup action First Amended Complaint [FAC], ¶¶ 7-8; see also ¶¶ 72-86 [allegations re: CGM]; ¶¶ 88-95 [allegations re: JPMS]; ¶¶ 99-104 [allegations re: Goldman].) Williams also alleged that the defendants separately took actions internally to stop the use of her structure, such as firing or transferring key employees who supported Williams' structure, and pressuring non-parties, such as Williams' employer, the Port Authority, and Salomon Brothers, not to work with Williams. (Id., ¶¶ 79, 86, 94-95, 98.) Further, Williams alleged that two other investment banks, BAS and Beal, were pressured by unspecified defendants into not working with her. (Id., ¶¶ 110-114 [allegations that BAS was pressured into terminating licensing agreement]; ¶¶ 115-120 [allegations that Beal was pressured into terminating licensing agreement, including allegations, also made in the instant action, regarding threats made by Steve Howard of Barclays].) As in this action, Williams alleged in the Citigroup action that if her structure were implemented just once, the defendants' "ability to fix the prices of ASF Bonds for high-demand airports at

artificially high tax-exempt rates would end, as would their undisputed dominance in the ASF Bond underwriting market.” (Id., ¶ 122. See Complaint, ¶ 7.)

Creative Trading Co. v Larkin-Pluznick-Larkin, Inc. (75 NY2d 830 [1990], adopting Creative Trading Co. v Larkin-Pluznick-Larkin, Inc., 148 AD2d 351 [1st Dept 1989] [Sullivan, J., dissenting]), on which Barclays relies, does not support its contention that the allegations of the complaint are insufficient to state a conspiracy. As held there, a plaintiff in a Donnelly Act action may not maintain the claim “by asserting, in conclusory fashion, the existence of a generalized conspiracy arising out of defendants’ various contracts and arrangements or by referring to unilateral business actions taken by them.” (148 AD2d at 354.) It is not enough to “parrot the words ‘conspiracy and reciprocal relationship’ . . .” (Id. at 355.) Rather, the complaint must “specify[] the dates or places relevant to the alleged conspiracy” and “identify specific participants.” (Id.)

Unlike the plaintiff in Creative Trading Co., Williams is relying not on allegations that Barclays unilaterally boycotted her structure, but rather on allegations that Barclays acted in concert with other named co-conspirators to prevent her entry into the market. (See id. at 356-357 [finding that conspiracy was not sufficiently alleged for purposes of the Donnelly Act where plaintiff alleged that defendant allocated best exhibition space in trade show to competitor-vendors who paid first, but failed to allege that such competitor-vendors conspired to pay first in order to discriminate against plaintiff, or that plaintiff could not have obtained the same premium exhibition space by paying first]. See also LoPresti v Massachusetts Mut. Life Ins. Co., 30 AD3d 474, 475 [2d Dept 2006] [affirming dismissal of Donnelly Act claim where “complaint contained only vague, conclusory allegations insufficient to adequately plead a conspiracy or reciprocal relationship between two or more entities”]; Anand v Soni, 215 AD2d 420, 421 [2d

Dept 1995] [holding that plaintiffs stated conspiracy for Donnelly Act purposes where plaintiffs alleged that defendant medical imaging centers attempted to create a monopoly by persuading radiology equipment manufacturer not to finance equipment sales to competitor plaintiff, threatening defendants' employees that "if they applied for employment with the plaintiffs' businesses they would be terminated and 'blackball[ed],'" and asked insurance carriers not to renew contracts with plaintiffs].)

As in the Citigroup action, Williams has sufficiently alleged bi- or multilateral conduct by conspirators including Barclays. The level of specificity of the allegations in the complaint in the instant action is comparable to that in the Citigroup action. The Citigroup action, like the instant action, recites virtually no conversations between or among the co-conspirators in furtherance of the conspiracy.⁴ Although Barclays also emphasizes the absence in the instant action of any allegation that Williams brought her structure directly to Barclays, as discussed above, the complaint alleges acts on Barclay's part, including a conversation between a Barclay's employee and Beal (*see supra* at 8), which evidences knowledge of and participation in the alleged boycott by Barclays. As the complaint in the Citigroup action has been found to be sufficient, the court also finds that the complaint in the instant action is sufficient, at the pleading stage, to withstand the motion to dismiss.

Tortious Interference With Existing Contract

Williams' cause of action for tortious interference with contract is based on a license agreement between Williams and BAS in which BAS agreed "to work with [Williams] in promoting the use of her patent-pending ASF Bond structure." (Complaint, ¶ 60.) As previously

⁴ In the Citigroup action, Williams related a conversation between employees of Morgan Stanley and Bear Stearns in which they told her they were aware of her BAS contract and that no ASF bond deals would be completed using her structure. (Citigroup action FAC, ¶ 112.) This conversation is repeated in the complaint here. (Complaint, ¶ 61.)

noted (supra at 3), the agreement did not require BAS to pay Williams until BAS actually completed a bond issuance using Williams' structure. The tortious interference cause of action alleges that Barclays "intentionally interfered with the contract between [Williams] and BAS by . . . threatening BAS with exclusion from bond underwriting syndicates if BAS did not cease its attempts to complete an ASF Bond issuance using [Williams'] structure. . . ." (Id., ¶ 94.) It further alleges that "BAS complied with [Barclays'] demand by ceasing its efforts to complete an ASF Bond issuance using [Williams'] structure and ending its license agreement" with Williams. (Id., ¶ 95.)

In moving to dismiss this cause of action, Barclays contends that Williams does not allege that BAS breached the contract. Barclays also points to the allegation in the complaint that shortly after entering into the contract, BAS complained to Williams of the "reputation risk" that BAS' contract with Williams was causing it to suffer, and asked plaintiff to agree to cancel the contract. (D.'s Memo. In Supp. at 11; Complaint, ¶ 60.) In opposition, Williams does not dispute that she agreed to cancel the contract, but contends that BAS breached the implied covenant of good faith and fair dealing by not using "best efforts to find opportunities to use the financing structure" (P.'s Memo. In Opp. at 19), or by ceasing its efforts to complete an ASF bond issuance using Williams' structure. (Tr. at 27-28.)

Although Williams claims that BAS breached the implied covenant of good faith and fair dealing, she acknowledges that the complaint does not plead breach of the implied covenant. (Id. at 39-40.) Even assuming that Williams may now claim such breach, the complaint does not plead allegations which, if proved, would support the tortious interference cause of action.

It is well settled that "[t]ortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract,

defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom." (Lama Holding Co. v Smith Barney Inc., 88 NY2d 413, 424 [1996].)

It is also settled that every contract contains an implied covenant of good faith and fair dealing. (Dalton v Educational Testing Serv., 87 NY2d 384, 389 [1995].) The implied covenant "embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." (ABN AMRO Bank, N.V. v MBIA Inc., 17 NY3d 208, 228 [2011], quoting Dalton, 87 NY2d at 389.) An implied covenant claim may be recognized where a contract provides for a party's exercise of discretion but does not expressly require that the discretion be exercised reasonably. (See e.g. Dalton, 87 NY2d at 392.) An implied covenant claim may also be recognized where a party "exercise[s] a [contractual] right malevolently, for its own gain as part of a purposeful scheme to deprive plaintiffs of the benefits" of the contract. In support of the claim, a party may not merely assert that the opposing party should not be permitted to exercise an explicit contractual right or seek to "create new duties that negate specific rights under a contract" but, rather, must allege "bad faith targeted malevolence in the guise of business dealings." (Richbell Info. Servs., Inc. v Jupiter Partners, L.P., 309 AD2d 288, 302 [1st Dept 2003] [denying motion to dismiss implied covenant claim where complaint alleged that defendant not only exercised contractual right to veto IPO that would have provided plaintiff with funds to repay note, but also entered into secret "bid rigging agreement" to orchestrate plaintiff's default on note, all for the purpose of enabling defendant to purchase plaintiff's stock at artificially low price]. See also Lehman Bros. Intl. v AG Fin. Prods., Inc., 2013 WL 1092888, *3-*4 [Sup Ct, NY County, March 12, 2013, No. 653284/2011] [this court's prior decision summarizing appellate authorities].)

Here, as Barclays correctly argues, Williams does not identify any term of the license agreement that was breached, and represents that she does not claim that the termination was a breach. (Tr. at 27.) She also does not claim that the agreement was other than one at-will. Nor does she claim that BAS exercised a discretionary right under the contract in an arbitrary or irrational manner or acted with “bad faith targeted malevolence.”⁵ Thus, even affording Williams the benefit of all favorable inferences, the court concludes that the tortious interference cause of action is not stated.

Tortious Interference With Prospective Economic Advantage

This cause of action is based on the allegations, discussed above (supra at 8-9), that another investment bank, Beal, worked to present her structure to interested municipalities and that Barclays threatened to exclude Beal from any future bond issuances if it continued to do so. (Complaint, ¶¶ 64-70.) As a result, Beal ceased to promote Williams’ structure. (Id., ¶ 71.)

It is well settled that “the degree of protection” available to a plaintiff for tortious interference with contract “is defined by the nature of the plaintiff’s enforceable legal rights. Thus, where there is an existing, enforceable contract and a defendant’s deliberate interference results in a breach of that contract, a plaintiff may recover damages for tortious interference with contractual relations even if the defendant was engaged in lawful behavior. Where there has been no breach of an existing contract, but only interference with prospective contract rights, however, plaintiff must show more culpable conduct on the part of the defendant.” (NBT Bancorp Inc. v Fleet/Norstar Fin. Group., Inc., 87 NY2d 614, 621 [1996] [internal citations omitted], citing Guard-Life Corp. v Parker Hardware Mfg. Corp., 50 NY2d 183, 193-194 [1980].) Damages for interference with prospective relations may be awarded only where “a

⁵ Indeed, Williams does not allege that BAS is a co-conspirator with Barclays, and does not assert a direct claim against BAS for breach of the implied covenant.

defendant engages in conduct for the sole purpose of inflicting intentional harm on plaintiffs” or where the means employed by the one interfering were “wrongful.” (Carvel Corp. v Noonan, 3 NY3d 182, 190-191 [2004] [internal quotation marks and citations omitted].) “Wrongful means’ include physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure; they do not, however, include persuasion alone although it is knowingly directed at interference with the contract.” (Id. at 191, quoting Guard-Life Corp., 50 NY2d at 191, summarizing Restatement [Second] of Torts, § 768.)

As the First Department held in the Citigroup action, the allegations underlying the Donnelly Act claims are sufficient to demonstrate the culpable conduct on the part of a defendant necessary to state a claim for tortious interference with prospective business relations.

(Williams, 104 AD3d at 522.) This cause of action will accordingly stand.

General Business Law § 349

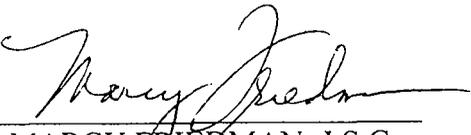
The fourth cause of action alleges that Barclay’s conduct constituted deceptive practices under General Business Law § 349 and, as a result, the public at large was harmed by “forcing them to pay artificially inflated airfares and airline fees.” (Complaint, ¶ 105.) Williams’ allegations may state an indirect harm to consumers caused by Barclays’ actions, but she fails to allege an act or practice by Barclays that was directed at consumers. (See Gaidon v Guardian Life Ins. Co. of Am., 94 NY2d 330, 344 [1999] [“in order to satisfy General Business Law § 349 plaintiffs’ claims must be predicated on a deceptive act or practice that is ‘consumer oriented’”] [internal quotations omitted]; Oswego Laborers’ Local 214 Pension Fund v Marine Midland Bank, 85 NY2d 20, 25 [1995] [“As shown by its language and background, section 349 is directed at wrongs against the consuming public”]; Cruz v NYNEX Info. Resources, 263 AD2d 285, 289-291 [1st Dept 2000] [same].) Therefore, the fourth cause of action must be dismissed.

Accordingly, it is hereby ORDERED that defendant's motion to dismiss is granted to the extent of dismissing with prejudice Williams' second cause of action for tortious interference with contract and fourth cause of action for violation of New York General Business Law § 349; and it is further

ORDERED that the parties shall appear for the previously scheduled compliance conference on April 28, 2015 at 2:30 p.m. in Part 60.

This constitutes the decision and order of the court.

Dated: New York, New York
March 31, 2015



MARCY FRIEDMAN, J.S.C.