SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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TOWER PROPERTIES LLC, d/b/a NICOLES
a/k/a NICOLES CATERING HALL,

Plaintiff,

-against-

CHALOM ENTERPRISES INC. and LOMA YEHL,

Defendants.

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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. 5512/2016
Motion Date: February 17, 2017

The following papers numbered 1-5 were read on Defendants' motion to dismiss Plaintiff's complaint:

Notice of Motion - Affirmation / Exhibit - Memorandum 1-3

Memorandum in Opposition 4

Reply Memorandum 5

Upon the foregoing papers it is ORDERED that the motion is disposed of as follows:

Plaintiff commenced this action against a competing enterprise and its owner, asserting causes of action for an alleged violation of General Business Law §349 and for tortious interference with contract.[1]

[1]In its motion papers, Plaintiff withdrew additional causes of action for fraud and misrepresentation and for unfair competition, and those claims are accordingly dismissed.

The Allegations of the Complaint

The factual allegations of the complaint are in pertinent part as follows:

4. Chalom owns and operates a bar / restaurant in Highland Falls, New York called Lomas Side Street Saloon ("Lomas").

5. Ms. Yehl is the owner of all or a portion of the stock of Chalom.

6. The Plaintiff operated a catering hall known as "Nicoles" or "Nicoles Catering Hall" in Highland Falls, New York ("Nicoles") between March 2013 and December 31, 2014.

7. On or about June 5, 2013, Ms. Yehl, in her individual capacity and her capacity as an officer of Chalom, contacted the New York State Liquor Authority (the "SLA") and made the following accusations (collectively, the "Accusations") about Nicoles to the SLA: (i) Nicoles serves alcohol to minors; (ii) Nicoles does not have its operator's permit or health department permit; (iii) young patrons from Nicoles were unruly and loud within the Highland Falls neighborhood; (iv) the bar upstairs at Nicoles is illegally being used because the stairway is too narrow; (v) Nicoles does not serve any food and does not have any catered events and (vi) Nicoles is only open on Fridays and Saturdays. Ms. Yehl attempted to conceal her name as the complainant to the SLA and made the Accusations to the SLA anonymously.

8. The Accusations are not true and when Ms. Yehl made the Accusations, she knew, or should reasonably have known, that they were not true.

9. The Plaintiff first learned that Ms. Yehl made the Accusations to the SLA when Ms. Yehl admitted to doing so at a deposition of Ms. Yehl (the "Yehl Deposition") on February 11, 2016 which was conducted in connection with a separate legal action. Prior to February 11, 2016, the Plaintiff was not aware that Ms. Yehl had made the Accusations to the SLA....

10. As a result of the Accusations, on or about October 31, 2014, the SLA commenced an investigation of Nicoles.

11. Because the Accusations were false, the SLA undertook an unnecessary investigation which interfered with its decision making process by investigating non-existent violations.

12. The SLA investigation was detrimental to the public interest because the SLA diverted the attention of the SLA from its normal activities to attend to the false Accusations.

13. To prepare for, and attend, the SLA investigation, the Plaintiff made voluminous copies of various documents, traveled to and from Albany for a meeting with the SLA and invested a significant amount of time preparing for the meeting with the SLA. The Plaintiff first heard about the Accusations in November 2014 and went to a hearing at the SLA in Albany in December 2014.

14. The SLA investigated the Accusations and did not find any of them to be true.

15. Ms. Yehl, in her individual capacity and her capacity as an officer of Shalom, disseminated false information to the Highland Falls police department in calendar years 2013 and 2014 when she told them, among other things, that (i) Nicolas was serving the previous owner's liquor to its customers and (ii) Nicolas was serving alcohol to minors.

16. When Ms. Yehl disseminated the information set forth immediately above to the police, she knew, or should have reasonably known, that they were not true.

17. During calendar year 2013 and/or 2014, Ms. Yehl, in her individual capacity and her capacity as an officer of Shalom, told many of the Accusations, and told other untrue harmful accusations, to various governmental officials, including without limitation the Village of Highland Falls building inspector and fire inspector, the Mayor of Highland Falls and the Mayor's legal counsel, Konstantinos Fatsis....

18. When Ms. Yehl made the Accusations to the government officials set forth immediately above, she knew, or should have reasonably known, that they were not true.

19. During calendar year 2013 and 2014, Ms. Yehl, in her individual capacity and her capacity as an officer of Shalom, told many of the Accusations, and told other untrue harmful accusations, to various members of the public.

20. When Ms. Yehl made the Accusations to members of the public as set forth immediately above, she knew, or should have reasonably known, that they were not true.

21. Ms Yehl took the actions set forth in this Complaint in order to (i) hurt the business of Nicolas and (ii) make sure her business at Lomas was not adversely affected by the opening and operation of Nicolas.

22. Ms. Yehl took the actions set forth in this Complaint with the intent to deceive and for the purpose of inducing others to act upon such actions.

23. As a result of Ms. Yehl's actions set forth in this Complaint, certain potential customers did not go to Nicolas and such potential customers were denied the right to enter into contracts with Nicolas for catered events and over-the-counter alcohol sales.

24. Nicolas incurred damages as a result of the actions of Ms. Yehl set forth in this Complaint.

Defendants' Motion to Dismiss the Complaint

Defendants move to dismiss the Complaint on the grounds that (1) Plaintiff has failed to plead valid causes of action, (2) Plaintiff's claims are barred by the statute of limitations, and (3) the Defendants' communications are privileged.

General Business Law §349

A. The Legal Sufficiency of Plaintiff's Claim

"On a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Agai v. Liberty Mutual Agency Corporation,* 118 AD3d 830, 831-832 (2d Dept. 2014) (citing *Leon v. Martinez,* 84 NY2d 83, 87). *See, 83-17 Broadway Corp. v. Debcon Financial Services, Inc.,* 39 AD3d 583, 585 (2d Dept. 2007).

General Business Law ("GBL") §349 is a consumer protection statute designed to protect against "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." GBL §349(a). Though originally intended to be

enforced by the Attorney General, the statute was amended in 1980 to authorize a private right of action for damages and/or injunctive relief by "any person who has been injured by reason of any violation of this section." *See,* GBL §349(h); *Blue Cross and Blue Shield of N.J., Inc. v. Philip Morris USA Inc.,* 3 NY3d 200, 205 (2004). "To successfully assert a §349(h) claim, a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice." *City of New York v. Smokes-Spirits.Com, Inc.,* 12 NY3d 616, 621 (2009); *North State Autobahn, Inc. v. Progressive Insurance Group Co.,* 102 AD3d 5, 11 (2d Dept. 2012).

Defendants here assert that Plaintiff's cause of action is legally insufficient because (1) the complaint fails to allege consumer-oriented conduct that had a broad impact on consumers at large, and (2) Plaintiff is not suing in its capacity as a consumer and therefore lacks standing to bring a Section 349(h) claim.

1. Consumer-Oriented Conduct

To constitute "consumer-oriented conduct" for purposes of GBL §349, "[the] defendant's acts or practices must have a broad impact on consumers at large (*New York Univ. v. Continental Ins. Co.,* 87 NY2d at 320...)." *See, North State Autobahn, Inc. v. Progressive Insurance Group Co., supra,* 102 AD3d at 12. However, Section 349 plaintiffs are not required to show specific quantifiable harm to the general public, or to identify specific consumers who suffered pecuniary harm as a result of deceptive acts or practices, in order to establish a "broad impact on consumers at large." *Id.,* at 13-15. The Second Department wrote:

> On its face, General Business Law §349(a) declares deceptive conduct unlawful without reference to whether it has actually caused specific pecuniary harm to consumers in general. The statute declares unlawful "[d]eceptive acts or practices in the conduct of any

> business" (General Business Law §349[a]). The requirement that the consumer-oriented conduct be materially misleading limits the availability of Section 349(a) to cases where the deception pertains to an issue that may bear on a consumer's decision to participate in a particular transaction. As such, the statute is limited in its application to those acts or practices which undermine a consumer's ability to evaluate his or her market options and to make a free and intelligent choice. In this sense, the deception itself is the harm that the statute seeks to remedy: "[c]onsumers have the right to an honest marketplace" (Mem. of Governor Rockefeller, 1970 N.Y. Legis. Ann., at 472; *see* Richard A. Givens, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 19, General Business Law §349, at 569 [1988 ed.] ["The Legislature determined ... that consumer deceptions of this sort inherently hurt the public – including both consumers themselves and legitimate business"]).

Id., 102 AD3d at 13-14 (emphasis added).

In this case, the complaint alleges that Defendants engaged in a campaign of deceptive and materially misleading acts against Plaintiff, making false accusations – with intent to deceive a broad array of persons and entities including the State Liquor Authority, the Highland Falls mayor, police department, building inspector and fire inspector, and members of the public – that Plaintiff in the operation of its business was engaged in illegal, unsafe and unsavory behavior. The nature of the alleged deception is such that it would unquestionably bear on consumers' decisions whether to patronize Plaintiff's establishment, and undermine their ability to evaluate their options and make a free and intelligent choice.

Insofar as Plaintiff's Section 349 cause of action is predicated on Defendants' misrepresentations to the State Liquor Authority, the claim is quite transparently built on *Securitron Magnalock Corp. v. Schnabolk,* 65 F.3d 256 (2d Cir. 1995), wherein the Second Circuit upheld a Section 349 claim by a business that sustained injury as a result of false information disseminated by a competitor to regulatory agencies. The Second Circuit found that the defendant's conduct resulted in "manifest" harm to the public, writing:

> New York General Business Law §349 prohibits "[d]eceptive acts or practices in the conduct of any business trade or commerce or in the furnishing of any service." Although the statute is, at its core, a consumer protection device [cit.om.], "corporate competitors now have standing to bring a claim under this [statute] ... so long as some harm to the public at large is at issue," [cit.om.]. Section 349 does not expressly provide a right of action by one business competitor against another, but it does provide a "right of action to 'any person who has been injured by reason of any violation of this section.'" [cit.om.]. It is clear that "the gravamen of the complaint must be consumer injury or harm to the public interest." [cit.om.] The critical question, then, is whether the matter affects the public interest in New York, not whether the suit is brought by a consumer or a competitor.
>
> Although appellants argue that "there is absolutely nothing in this record showing that this private commercial dispute between the plaintiff and the defendant was aimed at the public," they concede that "the public might have been incidentally affected by this private commercial dispute." We think that the harm to the public was manifest. The evidence demonstrated that appellants gave false information about the Securitron Magnalock to the BSA, a regulatory agency primarily concerned with the safety of the public. Schnabolk caused the BSA to undertake unnecessary investigations and interfered with its decision-making process by complaining of non-existent "potential danger ... in fire safety situations." His activities in this respect surely were contrary to the public interest.
>
> Also, appellants disseminated false information to HHC in regard to electromagnetic lock installations at the Neponset Health Care Center and may have caused the unnecessary cancellation of an awarded contract. Finally, it was detrimental to the public interest to divert the attention of UL from its normal activities to attend to the false accusations and deceptions of the appellants. The UL stamp of approval is frequently required to assure the safety of electrical equipment and installations in New York.

Securitron Magnalock Corp. v. Schnabolk, supra, 65 F.3d at 264-265 (emphasis added).

The parallels between *Securitron Magnalock* and the case at bar are unmistakable and compelling. In both cases:

(a) The plaintiff is a competitor of the defendant, not a consumer.

(b) The defendant is alleged to have disseminated false information to a regulatory agency concerned with public safety. It can scarcely be disputed that the New York State Liquor Authority is charged with protecting consumers and the public generally from harm in connection with public sale of alcoholic beverages.

(c) The false information disseminated by the defendant bore directly on matters of public safety – here, especially, Defendant's accusations that Plaintiff sold alcohol to minors, that Plaintiff did not have an operator's permit or health department permit, and that Plaintiff's upstairs bar was illegally being used because the stairway was too narrow.

(d) The public at large is alleged to have suffered harm because the defendant diverted the regulatory agency from its normal activities to attend to false allegations, caused the agency to undertake unnecessary investigations, and interfered with the agency's decision-making process by complaining of non-existent problems.

On the issue of "consumer-oriented conduct", there is no meaningful distinction between the case at bar and *Securitron Magnalock Corp. v. Schnabolk, supra.*

By reason of the foregoing, the court concludes that Plaintiff's complaint alleges "consumer-oriented conduct" by Defendants sufficient to plead a claim under GBL §349.

2. Standing - Actual Injury

Once again, GBL §349(h) authorizes a private right of action for damages and/or injunctive relief by "any person who has been injured by reason of any violation of this section." In *North State Autobahn, Inc. v. Progressive Insurance Group Co., supra,* the Second Department expressly held that a business entity that has suffered injury directly caused by a materially misleading or deceptive act or practice of its competitor has standing to sue under GBL §349(h). *Id.,* 102 AD3d at 15-20. The Court commenced:

> Affording a business standing to challenge the deceptive conduct practiced in favor of a competing business is consistent with the legislative history of the 1980 amendments, which, as the Court of Appeals has repeatedly recognized, "support[s] the position that business competitors have standing under the statute" (*City of New York v. Smokes-Spirits.Com, Inc.,* 12 NY3d at 624 n. 3...[citing extensive legislative history].

Id., at 17. Explicitly rejecting the defendant's argument that such standing is limited to situations where the complaining entity is acting as a consumer of goods or services, the Court

continued:

> [B]y conferring on a business competitor standing to challenge deceptive conduct practiced on consumers in its market, the integrity of the market may be maintained by an entity which may have more funds, broader information, and more at stake in the market than any single individual consumer. Such private enforcement of this consumer-protection statute is consistent with the purpose of the 1980 amendments inasmuch as it tends to ease the burden placed on the Attorney General by providing for alternative means of enforcing the substantive measures of consumer protection. So long as the allegedly deceptive conduct is sufficiently consumer-oriented, a business competitor protecting its own interest will ultimately serve to protect the interests of the consuming public.
>
> Turning once more to the plain language of the statute, we note that the right to bring a private action was not limited to those acting in a consumer role, but rather, it was provided to "any person who has been injured by reason of any violation of this section" (General Business Law §349[h]). The complaint here alleged that the unlawful conduct diverted customers to competing businesses resulting in over $5 million in lost business. Inasmuch as we conclude that the plaintiffs have sufficiently alleged that they were directly injured by reason of conduct rendered unlawful by section 349(a), we find no reason to judicially graft an additional requirement onto the statute so as to deprive them of standing based solely on their role in the consumer transaction. Accordingly, we hold that the allegation that the Progressive defendants' deceptive practices diverted the plaintiffs' customers to competing businesses resulting in over $5 million in lost business sales constituted an allegation of a direct injury sufficient to confer standing upon the plaintiffs under General Business Law §349(h).

Id., at 19.

In this case, Plaintiff's complaint alleges that as a result of Defendants' deceptive practices, Plaintiff sustained injury in the form of (1) lost customers, and (2) the time and expense of defending itself in the State Liquor Authority investigation. Lost custom clearly qualifies as direct injury under the rationale of *North State Autobahn, Inc. v. Progressive Insurance Group Co., supra.* Whether the time and expense of defending the SLA investigation qualifies as direct injury need not presently concern the court, as Defendants have not argued

otherwise.[2] Under the circumstances, the court concludes at this juncture that the complaint's allegations with respect to actual injury are legally sufficient to afford Plaintiff standing to assert its GBL §349(h) claim.

3. Conclusion

Therefore, Defendants' motion to dismiss Plaintiff's GBL §349 claim for failure to state a cause of action is denied.

B. Statute of Limitations

"On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) as barred by the applicable statute of limitations, a defendant must establish, prima facie, that the time within which to sue has expired. Once that showing has been made, the burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations has been tolled, an exception to the limitations period is applicable, or the plaintiff actually commenced the action within the applicable limitations period." *Quinn v. McCabe, Collins, McGeough, & Fowler,* 138 AD3d 1085, 1085-86 (2d Dept. 2016).

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[2]In an effort to circumscribe the ambit of GBL §349(h), the Court of Appeals has held that a party whose injury is only indirect or derivative, and not a direct result of the defendant's deceptive practices, lacks standing to bring a Section 349 claim. *See, City of New York v. Smokes-Spirits.com, Inc.,* 12 NY3d 616, 621-624 (2009); *Blue Cross and Blue Shield of N.J., Inc. v. Philip Morris USA Inc.,* 3 NY3d 200, 207 (2004). In the *Smokes-Spirits.com* case, the Court of Appeals construed the Second Circuit's holding in *Securitron Magnalock Corp. v. Schnabolk, supra*, as relating only to the element of "consumer-oriented conduct", and not to the element of "actual injury." *Id.,* 12 NY3d at 623-624. It is unclear from the *Smokes-Spirits.com* Court's opinion whether the Court of Appeals would regard the expense incurred by Plaintiff in defending an investigation undertaken by the Liquor Authority as a result of Defendants' misrepresentations as direct or indirect injury.

The three-year period of limitations for statutory causes of action under CPLR §214(2) applies to claims under General Business Law §349. *See, Gaidon v. Guardian Life Ins. Co. of America,* 96 NY2d 201, 210 (2001). Concerning the accrual of Section 349(h) claims, the *Gaidon* Court held:

> [A] cause of action accrues, triggering commencement of the limitations period, when all of the factual circumstances necessary to establish a right of action have occurred, so that the plaintiff would be entitled to relief [cit.om.]. In an action to recover for a liability created or imposed by statute, the statutory language determines the elements of the claim which must exist before the action accrues [cit.om.].
>
> Here the statute prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service" (General Business Law §349[a]), and affords a right of action to "any person who has been injured by reason of any violation of this section" (General Business Law §349[h]). Thus, accrual of a section 349(h) private right of action first occurs when plaintiff has been injured by a deceptive act or practice violating Section 349 [cit.om.].

Id., 96 NY2d at 210.

Defendants note that the misrepresentations to the State Liquor Authority were allegedly made on June 5, 2013, more than three years prior to the commencement of this action, and argue that Plaintiff's Section 349 claim, insofar as it is predicated on those misrepresentations, is barred by the statute of limitations. However, under the rationale of *Securitron Magnalock Corp. v. Schnabolk, supra*, Defendants' deceptive practice in that regard did not ripen into "consumer-oriented conduct" with a broad impact on consumers at large until the Liquor Authority acted on Defendants' misrepresentations; nor did it cause Plaintiff to sustain actual injury until it was required to expend time and effort to defend the Liquor Authority investigation. Since all the elements of Plaintiff's Section 349 claim did not exist as of June 5, 2013, the claim did not, as Defendants suggest, accrue on that date. Having failed to establish the actual date of accrual,

Defendants have not made a *prima facie* showing that Plaintiff's suit is barred by the three-year statute of limitations.

Defendants' further contention that Plaintiff's Section 349 claim is governed not by a three-year statute of limitations, per *Gaidon v. Guardian Life Ins. Co. of America, supra*, but instead by the one-year limitations period for defamation is without support in law.

Consequently, Defendants' motion to dismiss Plaintiff's GBL §349 cause of action as barred by the statute of limitations is denied.

C. Privileged Communications

1. Absolute Privilege From Liability In Defamation

Citing *Rosenberg v. MetLife, Inc.*, 8 NY3d 359 (2007), Defendants contend that their allegedly defamatory communications with the State Liquor Authority and the Highland Falls police department are (1) absolutely privileged as "communications made by individuals participating in a public function, such as executive, legislative, judicial or quasi-judicial proceedings", and hence (2) "cannot serve as the basis for the imposition of liability in a defamation action." *Id.*, at 365 (quoting *Toker v. Pollak*, 44 NY2d 211 [1978]).

However, (1) Defendants have not established *prima facie* that the communications in question were in fact made as part of "executive, legislative, judicial or quasi-judicial proceedings"; and (2) this is not a defamation action, and Defendants proffer no authority holding that the asserted privilege would immunize them from liability under GBL §349. The court in *Sergeants Benevolent Ass'n Health and Welfare Fund v. Sanofi-Aventis U.S. LLP*, 20 F.Supp.3d 305 (E.D.N.Y. 2014), observes – contrary to Defendants' position – that per *Securitron Magnalock Corp. v. Schnabolk, supra*, "misrepresentations to regulatory agencies can

constitute 'consumer-oriented' acts or omissions" supporting liability under GBL §349. *Id.*, at 334 (emphasis added). In accord with *Securitron*, that court too found that "wrongdoing involv[ing] misrepresentations to a regulatory agency which were calculated to infect the agency's decision making processes in Defendants' favor and to the possible detriment" were potentially actionable under GBL §349. *Id.*

To be sure, neither *Securitron Magnalock Corp.* nor *Sergeants Benevolent Ass'n Health and Welfare Fund* explicitly address the issue of privilege. Nevertheless, those cases lend support to the view that, while Defendants may be immunized from liability in defamation for their alleged misrepresentations made to the State Liquor Authority, those same misrepresentations may nevertheless constitute deceptive consumer-oriented acts or practices giving rise to liability under GBL §349. In any event, this court has located no authority to the contrary.

2. The *Noerr-Pennington* Doctrine

Defendants also invoke the *Noerr-Pennington* doctrine.

> Pursuant to the *Noerr-Pennington* doctrine, "citizens who petition the government for governmental action favorable to them cannot be prosecuted under the antitrust laws" [cit.om.]. "Although the *Noerr-Pennington* doctrine initially arose in the antitrust field, the courts have expanded it to protect First Amendment petitioning of the government from claims brought under Federal and State Law" [cit.om.]. The motives of the person petitioning the government for relief are irrelevant – the *Noerr-Pennington* doctrine applies even if the petitioners acted with selfish motives or "anticompetitive intent" [cit.om.].

Singh v. Sukhram, 56 AD3d 187, 191-192 (2d Dept. 2008).

Assuming that Defendants' approach to the State Liquor Authority is conduct of the type protected by the *Noerr-Pennington* doctrine, there is a "sham" exception to *Noerr-Pennington*

protection.

> The "sham" exception to the *Noerr-Pennington* doctrine comes into play when the party petitioning the government is not at all serious about the object of the petition, but does so merely to inconvenience its competitor, or to preclude or delay its competitor's access to governmental processes [cit.om.]....The "sham" exception to *Noerr-Pennington* encompasses situations in which persons use the governmental process – as opposed to the outcome of that process – as an anticompetitive weapon [cit.om.]. A classic example is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license, but simply in order to impose expense and delay. A "sham" situation involves a defendant whose activities are not genuinely aimed at procuring favorable governmental action at all, not one who genuinely seeks to achieve his governmental result, but does so through improper means [cit.om.].

Alfred Weissman Real Estate, Inc. v. Big V Supermarkets, Inc., 268 AD2d 101, 109 (2d Dept. 2000).

The "sham" exception to the *Noerr-Pennington* doctrine has both objective and subjective elements. *See, Singh v. Sukhram,* 56 AD3d at 192; *Octane Fitness, LLC v. Icon Health & Fitness, Inc.*, 134 S.Ct. 1749, 1757 (2014); *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 60-61 (1993).

> The objective element requires that the defendant's conduct must be objectively baseless with no reasonable expectation of success [cit.om.]. The subjective element requires that the defendant act, not with the intent of influencing governmental action, but rather with the intent to "interfere directly with the business relationships of a competitor" [cit.om.].

Singh v. Sukhram, supra (citing *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., supra*). "In other words, the [defendant] must have brought baseless claims in an attempt to thwart competition (*i.e.*, in bad faith)" to forfeit *Noerr-Pennington* protection. *See, Octane Fitness, LLC v. Icon Health & Fitness, Inc., supra.*

Concerning the objective baselessness of Defendants' conduct, the complaint alleges that the accusations against Plaintiff made by Defendants to the State Liquor Authority were not true;

that the Authority investigated and found them to be untrue; that defendant Yehl knew or reasonably should have known at the time she made those accusations that they were untrue; and that she made them with the intent to deceive the Authority. Assuming the truth of the complaint and according Plaintiff the benefit of every possible inference, one may readily infer that Defendants' conduct was undertaken with no reasonable expectation of success.

Concerning the Defendants' subjective bad faith, the complaint alleges that defendant Yehl's false and baseless accusations were made with intent to deceive the State Liquor Authority and for the purpose of hurting Plaintiff's business and making sure her own business was not adversely affected by competition from Plaintiff. As the Second Department observed in *Alfred Weissman Real Estate, Inc. v. Big V Supermarkets, Inc., supra*, a "classic example" of the "sham" exception to *Noerr-Pennington* is "the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license, but simply in order to impose expense and delay." *Id.*, 268 AD2d at 109. Here, similarly, the thrust of Plaintiff's claim is that Defendants made frivolous accusations of serious misconduct, violative of the terms under which Plaintiff was granted a liquor license, to the licensing agency governing Plaintiff's business. If, as Plaintiff alleges, Defendants' accusations were completely baseless, then Defendants can have had no expectation of achieving the revocation of Plaintiff's license. They succeeded nonetheless in putting Plaintiff to considerable trouble and expense, and, inasmuch as Defendants' accusations are alleged to have been made as part of a broader campaign directed at an array of government officials and the public generally, their bad faith intent simply to thwart competition may readily be inferred.

The court accordingly concludes that Plaintiff's allegations are sufficient at this juncture to invoke the "sham" exception to the *Noerr-Pennington* doctrine.

3. Conclusion

Consequently, Defendants' motion to dismiss Plaintiff's GBL §349 claim on the purported ground that their communications are privileged is denied.

D. Conclusion

In view of the foregoing, Defendants' motion to dismiss Plaintiff's GBL §349 cause of action is denied.

Tortious Interference With Contract

"Tortious 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 Company v. Smith Barney Inc.*, 88 NY2d 413, 424 (1996) (emphasis added). *See, Ferrandino & Son, Inc. v. Wheaton Builder, Inc., LLC,* 82 AD3d 1035, 1036 (2d Dept. 2011). Thus, a claim for tortious interference with contractual relations fails absent an enforceable contract and an actual breach of contract. *See, id.*; *NBT Bancorp Inc. v. Fleet/ Northstar Financial Group, Inc.,* 87 NY2d 614, 620-621 (1996); *Guard-Life Corporation v. S. Parker Hardware Manufacturing Corp.,* 50 NY2d 183, 195-196 (1980); *Mayo, Lynch and Associates, Inc. v. Fine,* 148 AD2d 425 (2d Dept. 1989).

Plaintiff, having pleaded none of the elements of a cause of action for tortious interference with contract, attempts to recast its complaint as one for tortious interference with prospective business relations. "To establish a claim for tortious interference with prospective

business advantage, a plaintiff must demonstrate that, '(a) the plaintiff had business relations with a third party; (b) the defendant interfered with those business relations; (c) the defendant acted with the sole purpose of harming the plaintiff or by using unlawful means; and (d) there was resulting injury to the business relationship'." *North State Autobahn, Inc. v. Progressive Insurance Group Co., supra*, 102 AD3d 5, 21 (2d Dept. 2012) (emphasis added). *See also, Sukow v. Eagle Realty Holdings, Inc.,* 52 Misc.3d 1215(A) at *2 (Sup. Ct. Suffolk Co. 2016) (same). "[A] general allegation of interference with customers without any sufficiently particular allegation of interference with a specific contract or business relationship" is insufficient to support a claim for tortious interference with prospective business relations. *See, McGill v. Parker,* 179 AD2d 98, 105 (1st Dept. 1992). *See also, Cablevision Systems Corp. v. Communications Workers of America District 1,* 131 AD3d 1082, 1084-85 (2d Dept. 2015) (affirming dismissal of claim of tortious interference with prospective business relations, citing *McGill v. Parker, supra*).

Here, as in *McGill v. Parker, supra*, Plaintiff makes only a general allegation of interference with customers, and fails to allege that Defendants interfered with any specific business relationship between Plaintiff and a third-party. Under the cited authority, the Plaintiff's allegations are insufficient to plead a claim for tortious interference with prospective business relations. Consequently, Plaintiff's caused of action therefor must be dismissed.

It is therefore

ORDERED, that Defendants' motion to dismiss Plaintiff's complaint is granted in part and denied in part, and it is further

ORDERED, that "Count Two", "Count Three" and "Count Four" of Plaintiff's Complaint are dismissed, and it is further

ORDERED, that Defendants' motion is otherwise denied.

The foregoing constitutes the decision and order of the court.

Dated: March 26, 2017 ENTER
Goshen, New York

HON. CATHERINE M. BARTLETT, A.J.S.C.

HON. C. M. BARTLETT
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE