

EX PARTE OR LATE FILED

RECEIVED

OCT - 8 1993

MILLER & HOLBROOKE

1225 NINETEENTH STREET, N. W.
WASHINGTON, D. C. 20036

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

TERESA D. BAER
FREDERICK E. ELLROD III
LISA S. GELB
LARRINE S. HOLBROOKE
TILLMAN L. LAY
NICHOLAS P. MILLER
JOSEPH VAN EATON

TELEPHONE (202) 785-0600
FACSIMILE (202) 785-1234

WILLIAM R. MALONE
OF COUNSEL
BETTY ANN KANE*
FEDERAL RELATIONS ADVISOR

*NOT ADMITTED TO THE BAR

October 8, 1993

DOCKET FILE COPY ORIGINAL

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., # 222
Washington, D.C. 20554

Re: AM Stereo (Dkt. No. 92-298)

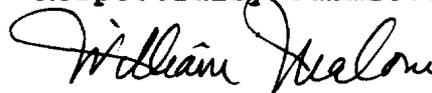
Dear Mr. Secretary:

I submit herewith a copy of the memorandum decision of the Hon. Arthur D. Spatt, U.S.D.J., in Kahn v. Emerson Electric Co., et al., E.D.N.Y. CV 92-3063, dated October 5, 1993. Mr. Kahn's complaint alleges violations of the antitrust laws with respect to AM stereo by Motorola Corporation, one of the co-defendants. NAB is named as a co-conspirator.

Judge Spatt's decision inter alia denies Motorola's motions to dismiss the complaint.

This recent development is relevant to Motorola's "dominance" argument and to Mr. Kahn's application for review of the Commission staff's reverse-FOIA determination, both now before the Commission.

Respectfully submitted,



William Malone
Attorney for Mr. Kahn

Enclosure
cc w/encl:

Hon. James H. Quello
Hon. Andrew C. Barrett
Hon. Ervin S. Duggan
Dr. Thomas P. Stanely
Mr. Julius Knapp
Sheldon M. Guttman, Esq.
Michael Menius, Esq.

No. of Copies rec'd
List ABCDE

013

RECEIVED

OCT - 8 1993

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

-----X
LEONARD R. KAHN,

Plaintiff,

- against -

MEMORANDUM
DECISION
AND ORDER

EMERSON ELECTRIC CO., a Missouri
corporation; HAZELTINE CORPORATION,
a Delaware corporation; and MOTOROLA,
INC., a Delaware corporation; JOHN DOE
CORPORATIONS 1-x; and JOHN DOES 1-x,
individually,

CV 92-3063 (ADS)

Defendants.
-----X

APPEARANCES:

LEONARD R. KAHN
Plaintiff Pro Se
222 Westbury Avenue
Carle Place, NY 11514

BRYAN, CAVE, McPHEETERS & McROBERTS, ESQS.
Attorneys for Defendant Hazeltine, Emerson, and Hansen
245 Park Avenue
New York, NY 10167-0034
By: Michael G. Biggers, Esq.
Loreto J. Ruzzo, Esq.

BRYAN, CAVE, McPHEETERS & McROBERTS, ESQS.
Attorneys for Defendant Hazeltine, Emerson, and Hansen
One Metropolitan Square
211 North Broadway, Suite 3000
St. Louis, Missouri 63102-2750
By: John Michael Clear, Esq.

KIRKLAND & ELLIS, ESQS.
Attorneys for Defendant Motorola
55 East 52nd. Street
New York, NY 10055
By: Terrence J. Galligan, Esq.

KIRKLAND & ELLIS, ESQS.
Attorneys for Defendant Motorola
200 East Randolph Drive
Chicago, Illinois 60601
By: Terri A. Abruzzo, Esq.

SPATT, District Judge.

The plaintiff, Leonard B. Kahn, allegedly one of the creators of AM-stereo, instituted the present action based upon alleged RICO violations and pendent state law claims. On March 10, 1993 the RICO violations were dismissed by the Court, with prejudice. However, the Court permitted the plaintiff to amend the complaint to include proposed allegations of antitrust violations, with pendent state claims.

On April 7, 1993 the plaintiff filed a Third Amended Complaint in accordance with the Court's March 10, 1993 Order. The defendants Emerson Electric Company ("Emerson"), Hazeltine Corporation ("Hazeltine"), and Motorola, Inc. ("Motorola") move to dismiss the Third Amended Complaint. Since the facts surrounding this action were fully set forth in the Court's March 10, 1993 Memorandum Decision and Order, the Court need not refer to the underlying facts again.

The defendants make the following motions:

- 1) The defendants Emerson and Hazeltine move pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the Third Amended

Complaint for failure to state a claim upon which relief can be granted;

2) The defendants Emerson and Hazeltine move pursuant to Fed. R. Civ. P. 12(b)(1) to dismiss the Third Amended Complaint based upon a lack of subject matter jurisdiction;

3) The defendant Motorola moves pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the Third Amended Complaint for failure to state a claim upon which relief can be granted; and

4) The defendant Motorola moves pursuant to Fed. R. Civ. P. 12(b)(1) to dismiss the Third Amended Complaint based upon a lack of subject matter jurisdiction.

DISCUSSION

Motion to Dismiss:

On a motion to dismiss for failure to state a claim, "the court should not dismiss the complaint pursuant to Rule 12(b)(6) unless it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief'" (Goldman v. Belden, 754 F.2d 1059, 1065 [2d Cir. 1985] [quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)]); see also Branum v. Clark, 927 F.2d 698 [2d Cir. 1991]). In addition, such a motion is addressed solely to the face of a pleading, and "[t]he court's function . . . is not

to weigh the evidence that might be presented at a trial but merely to determine whether the complaint itself is legally sufficient" (Goldman, supra, 754 F.2d at p. 1067).

In assessing the sufficiency of a pleading on a motion to dismiss, it is well settled that the court must accept the allegations of the complaint as true (see LaBounty v. Adler, 933 F.2d 121, 123 [2d Cir. 1991]; Procter & Gamble Co. v. Big Apple Indus. Bldgs. Inc., 879 F.2d 10, 14 [2d Cir. 1989], cert. denied, 493 U.S. 1022 [1990]), and must construe all reasonable inferences in favor of the plaintiff (See Scheuer v. Rhodes, 416 U.S. 232, 236 [1974]; Bankers Trust Co. v. Rhoades, 859 F.2d 1096, 1099 [2d Cir. 1988], cert. denied, 490 U.S. 1007 [1989]).

The Court should also be mindful that under the modern rules of pleading, a plaintiff need only provide "a short and plain statement of the claim showing that the pleader is entitled to relief" (Fed. R. Civ. P. 8[a][2]), and that "[a]ll pleadings shall be so construed as to do substantial justice" (Fed. R. Civ. P. 8[f]).

The Second Circuit has stated that in deciding a motion pursuant to Rule 12(b)(1), the Court must also "accept as true all material allegations in the complaint" (Atlantic Mut. Ins. Co. v. Balfour Maclaine Int'l Ltd., 968 F.2d 196, 198 [2d Cir.

1992] [citing Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)]]. Therefore, the Rule 12(b)(6) standards are applicable to a Rule 12(b)(1) motion.

Additionally, since the plaintiff is proceeding without an attorney, it must give wide latitude to the papers filed by pro se litigants (See Haines v. Kerner, 404 U.S. 519, 520 [1972]. [pro se papers are to be held "to less stringent standards than formal pleadings drafted by lawyers"]]. It is within the above framework that the Court addresses the present motions to dismiss by the defendants Emerson, Hazeltine, and Motorola.

Violations of Patent Law:

The plaintiff alleges in his third cause of action that Motorola has threatened patent infringement suits against major consumer electronics firms, including Sony which is a Kahn licensee, based upon Motorola's Patent No. 4,185,046 (See Third Amended Complaint, at § 93). Kahn seeks to have this Court issue a declaratory judgment stating that all of the patents Motorola is using against competitors to restrain trade are unenforceable (See Third Amended Complaint, at § 95).

"In order to establish subject matter jurisdiction on [a]

declaratory judgment claim[], [the plaintiff] must show that when [he] filed this lawsuit, [he] believed [he] would be sued for patent infringement by [the defendants] . . . The test is an objective one; a purely subjective apprehension, without objective reasons for fearing suit, is insufficient to invoke jurisdiction" (Indium Corp. v. Semi-Alloys, Inc., 611 F. Supp. 379, 381 [N.D.N.Y. 1985], aff'd, 781 F.2d 789 [2d Cir.], cert. denied, 479 U.S. 820 [1986] [emphasis added]). The Indium Corp. decision, in examining the objective apprehension of suit, addressed a motion for summary judgment in which the court examined evidence in addition to the pleadings in a search for material triable issues of fact. Since the present motion is one to dismiss the Third Amended Complaint, the Court must construe all allegations in favor of the plaintiff and accordingly the allegations of an objective apprehension of suit would be sufficient (See LaBounty, supra, 933 F.2d at p. 123).

In evaluating the Third Amended Complaint, the Court notes that the plaintiff alleges that Motorola threatened Sony with an infringement suit. In further support of this allegation, the plaintiff attaches a September 25, 1985 letter from Motorola to Sony which discusses the potential infringement of one of the Sony products on a Motorola patent

(See Plaintiff's Third Amended Complaint, Exh. 33). Although the plaintiff alleges that "Motorola has repeatedly threatened infringement suits", the Third Amended Complaint candidly stated that Motorola "has never filed a suit against any of the threatened parties" (See Third Amended Complaint, at ¶ 94). Since the test is not the commencement of the suit, but rather the objective threat of a suit (see Indium Corp., supra, 611 F. Supp. at p. 381), the complaint sufficiently alleges that Motorola "has repeatedly threatened infringement suits" (see Third Amended Complaint, at ¶ 94), and the complaint must be construed in the light most favorable to the plaintiff, the Court finds that the third cause of action states a claim.

The Sherman Act - Restraint of Trade:

The causes of action concerning restraint of trade is governed by 15 U.S.C. § 1 which states, in relevant part, that "[e]very contract . . . in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal" (15 U.S.C. § 1). According to the Second Circuit, this section "is directed only at joint action, and 'does not prohibit independent business actions and decisions'" (Volvo of North America v. Men's Int'l

Professional Tennis Council, 857 F.2d 55, 70 [2d Cir. 1988] [quoting Modern Home Inst. v. Hartford Accident & Indem. Co., 513 F.2d 102, 108 (2d Cir. 1975)]. In order "[t]o sustain a claim of conspiracy to restrain trade under section 1 of the Sherman Act . . . [the plaintiff] must establish (1) that [the defendant] entered into a 'contract, combination . . . or conspiracy,' and (2) that the conspiracy was 'in restraint of trade or commerce among the several states'" (International Distribution Centers, Inc. v. Walsh Trucking Co., Inc., 812 F.2d 786, 793 [2d Cir.], cert. denied, 482 U.S. 915 [1987]).

The eighth cause of action states that "Motorola's written contract with said named defendant co-conspirators and Motorola's agreements with Harris and with Delco, and its written license agreements with Sanyo and Sony, are contracts, combinations or conspiracies in restraint of trade" (Third Amended Complaint, at ¶ 181). The agreement with Hazeltine and Emerson is effective February 1, 1992 and accordingly the complaint alleges that it is within the four year statute of limitations under this statute (See 15 U.S.C. § 15b).

The defendants argue that the plaintiff failed to state a cause of action based upon many factors, including the failure to establish "antitrust injury", the failure to establish the "anticompetitive" nature of the alleged

agreements between the parties, and the statute of limitations. In evaluating the above arguments, this Court recognizes that the Second Circuit has stated that:

"[i]t is not enough that a plaintiff alleges that it is 'in a worse position that [it] would have been had [defendants] not committed [the acts complained of]' . . . Such a minimal requirement would 'divorce[] antitrust recovery from the purposes of the antitrust laws,' 'which "were enacted for the protection of competition, not competitors."'" (Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 250-51 [2d Cir. 1985] [quoting Brunswick Corp. v. Pueblo Bowl-O-Matic, Inc., 429 U.S. 477, 486, 487-88 (1977)]).

In construing all inferences in favor of the pro se plaintiff, the Court finds that the Third Amended Complaint asserts that there is a written contract and this contract is in restraint of trade (See Third Amended Complaint, at ¶ 181). Further, since the Court finds that the plaintiff alleges that the actions of the defendants "led to a lessening of competition in the AM stereo receiver market" (Third Amended Complaint, at ¶ 183 [emphasis added]), this is more than merely injury to the plaintiff. Accordingly, the Court finds that the eighth cause of action states a claim.

The ninth cause of action also seeks relief pursuant to Section 1 of the Sherman Act. This cause of action asserts that "Motorola . . . engaged in concerted efforts to restrain trade and monopolize at least the three aforesaid AM Stereo

based markets by conspiring with the NAB [National Association of Broadcasters] and EIA [Electronic Industries Association] . . . in restraint of trade" (Third Amended Complaint, at ¶ 186). Although the defendants assert that this cause of action is barred by the statute of limitations because the actions took place in the 1970s and early 1980s, the Court notes that the complaint alleges that "Motorola's conspiracy with NAB and EIA has continued to this day" (Third Amended Complaint, at ¶ 150 [emphasis added]). Therefore, when construing all allegations in favor of the pro se plaintiff, the Court finds that the ninth cause of action states a claim.

The remaining federal antitrust claims assert claims of monopolistic conduct under Section 2 of the Sherman Act.

The Sherman Act - Monopolistic Conduct:

The statute governing a claim of monopolistic conduct is 15 U.S.C. § 2 which states, in relevant part, that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony" (15 U.S.C. § 2). According to the Second Circuit, "[t]he elements of a conspiracy to monopolize are '(1) proof of a concerted action

deliberately entered into with the specific intent to achieve an unlawful monopoly, and (2) the commission of an overt act in furtherance of the conspiracy'" (Walsh Trucking, supra, 812 F.2d at p. 793).

The tenth cause of action states that "Motorola . . . with a specific intent to monopolize the market . . . has attempted to monopolize the AM stereo exciter market in the United States which has led to a lessening of competition in the AM stereo receiver market" (Third Amended Complaint, at ¶ 191 [emphasis added]). Since the plaintiff alleged the "specific intent" element and the overt act in furtherance is described as the confidential settlement agreement discussed above, the Court determines that when construing the allegations in favor of the pro se plaintiff, the tenth cause of action states a claim.

The eleventh cause of action, also asserted pursuant to 15 U.S.C. § 2, alleges that "Motorola . . . and Emerson and Hazeltine . . . engaged in concerted efforts to restrain trade and monopolize the three aforesaid AM Stereo based markets by conspiring and contracting to deprive Kahn Communications Inc. ("KCI") . . . of its exclusive patent license" (Third Amended Complaint, at ¶ 196). The complaint further alleges that "since plaintiff Kahn owns 100% of KCI, is an officer and

employee of KCI and has made outstanding loans to KCI, Motorola's conduct has damaged Kahn and his property KCI" (Third Amended Complaint, at ¶ 197).

Since KCI is not a party to this action, the plaintiff may only assert his rights, in an individual capacity, as an owner and creditor of KCI. In this respect, the Second Circuit has clearly held that a creditor/stockholder does not have standing to assert an antitrust claim based upon an alleged violation of the antitrust laws with respect to the corporation (See Rand v. Anaconda-Ericsson, Inc., 794 F.2d 843, 849 [2d Cir.], cert. denied, 479 U.S. 987 [1986]). Therefore, based upon the plaintiffs failure to have standing to assert such an action, the eleventh cause of action fails to state a claim and the defendants' motion to dismiss this cause of action is granted.

Pendent State Antitrust Law:

The twelfth cause of action asserts a claim for relief pursuant to the pendent New York State antitrust law. The applicable statute states, in relevant part, that:

"Every contract, agreement, arrangement or combination whereby

A monopoly in the conduct of any business, trade or commerce or in the furnishing of any service in this state, is or may be established or

maintained, or whereby

Competition 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 or whereby

For the purpose of establishing or maintaining any such monopoly or unlawfully interfering with 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 any business, trade or commerce or the furnishing of any service is or may be restrained, is hereby declared to be against public policy, illegal and void" (N.Y. Gen. Bus. Law § 340[1]).

Since this cause of action alleges that "Motorola . . . engaged in concerted efforts to restrain trade and monopolize at least three AM stereo based markets by conspiring with the NAB and EIA" (Third Amended Complaint, at ¶ 201) and "Motorola, has carried out this conspiracy, with a specific intent to monopolize AM Stereo markets in New York State" (Third Amended Complaint, at ¶ 203), the Court finds that when construing all allegations in favor of the pro se plaintiff, the twelfth cause of action states a claim.

The thirteenth cause of action asserts a violation of the same state statute by alleging that:

"[t]he actions of Motorola and its named co-conspirators Emerson and Hazeltine . . . engaged in concerted efforts to restrain trade and monopolize the three aforesaid AM Stereo based markets by conspiring and contracting to deprive unnamed plaintiff Kahn Communications Inc. ("KCI") of the benefits of its exclusive patent license" (Third

Amended Complaint, at ¶ 206).

When this allegation is combined with the allegation that "Motorola, has carried out this conspiracy, with a specific intent to monopolize the aforesaid AM Stereo markets in New York State" (Third Amended Complaint, at ¶ 208), the Court determines that the thirteenth cause of action also states a claim.

Pendent State Law Claims:

In addressing the other pendent state law claims set forth in the Third Amended Complaint, the Court notes that in the Court's March 10, 1993 decision the Court stated that upon a review of

"the allegations contained within the proposed complaint in addressing the First, Second, and Fourth causes of action which, in essence, address the contractual agency relationship between the plaintiff Kahn and the defendants Hazeltine and Motorola, the Court finds that there are sufficient allegations to permit the plaintiff to include them within the Third Amended Complaint" (March 10, 1993 Order, at p. 40).

Upon the Court's review of the first, second, and fourth causes of action contained in the Third Amended Complaint and the arguments set forth by counsel for the defendants in opposition to these causes of action, the Court adheres to its prior determination and finds that there are sufficient

allegations to support these contractual causes of action.

The fifth cause of action alleges tortious interference with contract. As stated in the earlier decision, in order to state a claim for tortious interference with a contract, the complaint must allege four factors: (1) the existence of a valid contract between the plaintiff and a third party, (2) the defendant's knowledge of such contract, (3) inducement of a breach, and (4) resulting damage to the plaintiff (See Universal City Studios, Inc. v. Nintendo Co., Ltd., 797 F.2d 70, 75 [2d Cir.], cert. denied, 479 U.S. 987 [1986]). Since the Third Amended Complaint alleges the existence of a contract, the defendants' knowledge of the contract and inducement of the breach, and damages (see Third Amended Complaint, at ¶¶ 112-125), the Court finds that the fifth cause of action states a claim.

In addressing the seventh cause of action for defamation, the Court notes that according to New York law, the "particular words" alleged to be defamatory must be included within the pleading (See N.Y. Civ. Prac. L & R. 3016[a]; see also Gardner v. Alexander Rent-A-Car, 28 A.D.2d 667, 667, 280 N.Y.S.2d 595, 595 [1st Dep't 1967]). Although this cause of action states that there were certain letters which were alleged to be defamatory, the cause of action fails to allege

the "particular words" which are alleged to be defamatory (See Gardner, supra, 28 A.D. 2d at p. 667, 280 N.Y.S.2d at p. 595). Accordingly, the seventh cause of action fails to state a claim and the defendants motion to dismiss this cause of action is granted.

In a similar fashion, the sixth cause of action which alleges fraud, must include the pleading of fraud with specificity (See N.Y. Civ. Prac. L. & R. 3016[b]). In this cause of action, the plaintiff asserts that the fraud consisted of misrepresentations about the contents of the settlement agreement discussed above (See Third Amended Complaint, at ¶¶ 114-20). The alleged misrepresentations were made by Hazeltine's General Counsel to the plaintiff Kahn on the morning of February 3, 1992, in the plaintiff's office in Carle Place (See Third Amended Complaint, at ¶¶ 112-13). Since the complaint alleges in numerous locations that Hazeltine and Emerson were acting together (see, e.g., Third Amended Complaint, at ¶¶ 116-17), the complaint arguably states a claim for fraud against the defendants Hazeltine and Emerson, but not Motorola. Therefore, when construing all allegations in favor of the pro se plaintiff, the motion to dismiss the sixth cause of action is denied as to the defendants Hazeltine and Emerson, and granted as to the

defendant Motorola.

The Court has reviewed all of the other arguments asserted by the defendants in their papers and have found them to be without merit.

CONCLUSION

Based upon the foregoing reasons,

1- The motion by the defendants Emerson and Hazeltine to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(1) is denied;

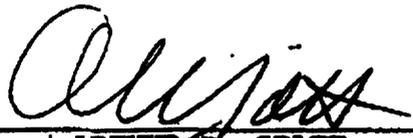
2- The motion by the defendants Emerson and Hazeltine to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) is granted as to the seventh and eleventh causes of action and denied as to all other causes of action;

3- The motion by the defendant Motorola to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(1) is denied; and

4- The motion by the defendant Motorola to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) is granted as to the sixth, seventh, and eleventh causes of action and denied as to all other causes of action.

SO ORDERED.

Dated: Uniondale, New York
October 5, 1993



ARTHUR D. SPATT
United States District Judge