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Second Circuit Update

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Injunction Against National Hockey League's Transfer of Rangers Team Website to NHL Server Denied Because Seizure of Website Is Not a Naked Restraint

Madison Square Garden L.P. v. National Hockey League, 2007 WL 3254421 (S.D.N.Y. Nov. 2, 2007)

The Southern District of New York recently denied Madison Square Garden L.P.'s ("MSG") attempt to enjoin the National Hockey League (the "NHL") from transferring MSG's Rangers team website to a server primarily run by the NHL. The Court found that seizing MSG's website was not a naked restraint on competition.

Factual Background

MSG owns the New York Rangers hockey team, one of 30 independent member clubs of the NHL. The NHL promotes the common interests of its members and promulgates rules that govern the relationship between the NHL and the member clubs, as well as among the clubs. To strengthen hockey in competition with other sports, the NHL has taken steps to improve the strength of its brand. This strategy seeks to heighten fans' interest in clubs other than their primary hometown teams. In the NHL's view, its website is critical to this endeavor because it encourages and facilitates traffic by fans among various member clubs' websites.

To further these goals, the NHL formed a committee to develop a plan to maximize new media revenues. The committee determined that the best approach would be to migrate each team's website onto a common platform serviced by a single content management system, where each individual club would supply the local content and advertising and the NHL would retain space for national advertising and NHL news.

The committee's rationale for this approach included ensuring minimal quality standards across team websites, enabling greater interconnectivity, facilitating the sharing of local content and saving \$2 million. The new plan also would help attract national sponsors by selling inventory across all club websites, thereby creating the exposure advertisers desired while minimizing transaction costs. The committee's recommendations were circulated to the member clubs and placed on the agenda of an upcoming NHL meeting. MSG objected, claiming that the proposals were tantamount to revenue sharing. However, the other NHL members voted to enact the proposals, called the New Media Strategy.

MSG notified the NHL that it would not migrate its website. The two sides met and, while they were able to reach an accord regarding content, MSG would not comply with the rule requiring its website to be run through a single, NHL-run server, which the NHL considered essential. Once talks broke down, the NHL notified MSG that it would be fined \$100,000 per day that it was not in compliance with the New Media Strategy.

MSG's Complaint

In response to this notice, MSG filed a complaint seeking injunctive relief. The complaint alleged that there was no competitive justification for "seizing" the Rangers website other than to suppress or eliminate competition. Moreover, MSG argued that the New Media Strategy violated antitrust laws because it was not reasonably necessary for the NHL venture and it constituted a "naked horizontal restraint in the absence of a competitive justification."

The Court's Analysis

Although MSG lodged a raft of complaints against the NHL's allegedly anticompetitive approach, the Court focused on a narrower question, namely, whether the NHL may sanction the Rangers for refusing to migrate its website to the NHL-run server, or for operating a rival website, without violating antitrust laws. MSG argued that since the New Media Strategy was blatantly anticompetitive, the Court should declare it unlawful without an elaborate industry analysis.

The "quick look" analysis espoused by MSG is only proper, the Court noted, when the anticompetitive effects of the restraints are obvious. To the contrary, the Court held that the New Media Strategy had several pro-competitive effects. These included the increased scale and standardized layout that would attract national sponsors, the common technology platform that would allow sponsors to reduce transaction costs by centrally negotiating for the intellectual property of all the teams and the fact that the New Media Strategy would assure minimum quality standards across teams' websites, facilitate the sharing of team content and reduce the operational costs of 30 back-office website operations.

Since the Court did not find the New Media Strategy to be a naked restraint, MSG bore the burden of showing that the challenged action had an actual adverse effect on competition as a whole in the relevant market. While MSG alluded to several potential relevant markets, it provided no evidence on the definition of the relevant market, which was MSG's burden. Moreover, even if MSG did carry that burden, the NHL had shown offsetting pro-competitive benefits.

The burden then would shift back to MSG to prove that either the challenged restraint was not reasonably necessary to achieve the NHL's pro-competitive justifications or that those objectives could be achieved in a manner less restrictive of free competition. The Court held that MSG did not meet this burden because the goal of building a league brand is a legitimate, pro-competitive aim of the NHL and the website restrictions it imposed serve the pro-competitive purposes of having league uniformity, facilitating fan navigation, attracting advertisers and preventing individual teams from free-riding off of the NHL's collective efforts. Since MSG did not demonstrate a likelihood of success on the merits, the Court did not reach the question of whether the NHL's fine on the Rangers constituted irreparable harm.

Republic of Congo's Oil Company Is Immune from U.S. Racketeering Charges But Company Executive May Not Be

Kensington Int'l Ltd. v. Itoua, 2007 U.S. App. LEXIS 24354 (2d Cir. Oct. 18, 2007)

The Second Circuit recently held that the Republic of the Congo's state-run oil company is immune from civil racketeering charges pursuant to the Foreign Sovereign Immunities Act (the "FSIA"). However, the Court left open the question as to whether an officer of the company can invoke the FSIA to insulate himself from liability.

Factual Background

In the early 1980s, the Congo borrowed more than \$30 million under several loan agreements. It defaulted on these loans in 1985. Kensington International Limited ("Kensington") subsequently obtained the rights to these loans.

Unable to collect on these debts, Kensington commenced a civil Racketeer Influenced and Corrupt Organizations Act ("RICO") action against Société Nationale des Pétroles du Congo ("SNPC"), the Congo's principal state-run oil company; Bruno Jean-Richard Itoua ("Itoua"), who was the chairman and managing director of SNPC; and BNP Paribas S.A. ("BNP"), a French bank. Kensington claimed that the defendants engaged in a complex web of transactions that diverted oil revenues from the Congo to the pockets of certain Congolese public officials. The funneling of oil revenues to these officials, as opposed to the Congo's treasury, prevented legitimate creditors such as Kensington from seizing the Congo's assets to pay down its lawfully incurred debt.

Procedural Background

SNPC and Itoua moved to dismiss the complaint for, among other reasons, immunity under the FSIA. The Southern District of New York denied their motions in their entirety. The district court found that SNPC's and Itoua's activities fell within the commercial activities exception to FSIA immunity. The commercial activities

exception allows a plaintiff to sue a foreign state "in which the action is based [i] upon a commercial activity carried on in the United States by the foreign state; or [ii] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [iii] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a).

The district court determined that the commercial activities exception applied because more than nine million barrels of "stolen" oil were sold to United States purchasers and multi-million-dollar premium payments were made by the New York branch of BNP. The district court also determined that since Itoua was the managing director of SNPC during the relevant time period, SNPC's acts were imputed to him and his conduct also satisfied the commercial activities exception.

Circuit Court Decision

The Second Circuit reversed the district court's decision with respect to SNPC and remanded with respect to Itoua. The Court held that none of the prongs of the commercial activities exception were applicable to SNPC's activities. The first prong, which applies if the cause of action is "based upon a commercial activity carried on in the United States," is inapplicable because the basis of Kensington's complaint related to SNPC entering into prepayment agreements with BNP whereby BNP would loan SNPC money in return for SNPC's promise to deliver the Congo's oil to BNP at a later date – not the oil shipments to the United States or the premium payments made by BNP's New York branch. Therefore, there was insufficient nexus between the basis of the complaint and SNPC's commercial activities in the United States for the first prong of the commercial activities exception to apply.

The second prong of the commercial activities exception, which allows a plaintiff to commence suit when the action is based on an act performed in the United States in connection with a commercial activity of the foreign state elsewhere, is also inapplicable. The Court noted that this prong related to non-commercial acts in the United States that relate to commercial acts abroad. The Second Circuit reasoned that Kensington's failure to argue that any non-commercial acts performed in the United States by SNPC were the basis of its complaint precluded Kensington from using this prong of the commercial activities exception.

The Second Circuit also determined that the third prong of the commercial activities exception, which applies when the action is based on an act by a foreign state outside the United States relating to a commercial activity that causes a "direct effect" in the United States, is inapplicable. The Court held that the record failed to show that SNPC's execution of the prepayment agreements caused a "direct effect" in the United States. The Second Circuit also concluded that the alleged scheme to steal oil and engage in "straw men" transactions, which allowed BNP to sell the Congo's oil and deliver the proceeds back to certain Congolese officials, did not have a direct effect on the United States.

With respect to Itoua, the Court held that in light of its holding that SNPC's actions did not fall within the commercial activities exception of the FSIA, the district court erred in concluding that Itoua's actions fell within that exception based solely on the fact that he was SNPC's chairman and managing director at the time of the alleged acts. Nonetheless, the Second Circuit noted that it was an open question in the circuit whether individual officials enjoy sovereign immunity under the FSIA. The Court added that the provisions of the FSIA do not expressly include or exclude individual officials.

The Fourth, Sixth, Ninth and District of Columbia circuits allow individuals acting in official capacities to invoke the FSIA. However, the Second Circuit, citing a Seventh Circuit decision, held that there was "not consensus on this issue" and that it had yet to address it. In vacating and remanding the district court's decision with respect to Itoua, the Second Circuit directed the district court to address in the first instance under what circumstances, if any, the FSIA applies to individuals and whether Itoua has demonstrated such circumstances.

Elected School Board Member's Pre-action Discovery of Anonymous Bloggers Denied Because Statements Were Protected Opinion

Matter of Greenbaum v. Google, Inc., 2007 WL 3197518 (N.Y. Sup. Ct. Oct. 23, 2007)

New York State's trial court recently denied an elected school board member's petition to ascertain the identity of anonymous bloggers who allegedly defamed her on an internet website that Google maintains. The

Supreme Court denied the petition because the Court deemed the anonymous commentators' statements to be protected opinion and therefore not defamatory, as the school board official alleged.

Factual Background

Pamela Greenbaum is an elected member of the school board of the Lawrence, Long Island public school system. She opposes the use of public funds for educational programs for private school children within her school district. Google maintains an internet website known as Blogger and Blogspot.com for the hosting of internet blogs. The blog at issue in this matter is posted by Orthomom, which "is devoted to issues within both the Five Towns community of Long Island and the larger community of Orthodox Jewry." Although various commentators post their comments on the blog, the main articles are posted anonymously by Orthomom.

A January 2007 article posted by Orthomom served as the basis of Greenbaum's defamation claim. It criticized Greenbaum's position that public school teachers may teach non-public school students only if the teachers are not being paid with public funds. Specifically, Orthomom concluded with the statement: "Way [for Greenbaum] to make it clear that you have no interest in helping the private school community." Other commentators followed up with: "Pam Greenbaum is a bigot and really should not be on the board," and "Greenbaum is smarter than she seems. Unfortunately, there is a significant group of voters who can't get enough of her bigotry."

Greenbaum brought a pre-action petition for disclosure against Google, alleging that the posted statements painted her as a bigot and an anti-Semite. However, Greenbaum subsequently admitted that the above statements were the only statements at issue and that Orthomom never used the words "anti-Semite" or "bigot." The parties entered into a stipulation that the identity of Orthomom would be released to Greenbaum unless a third party appeared and objected to such production. Subsequently, the persona behind Orthomom moved anonymously for leave to intervene. The motion was granted.

The Court's Analysis

The Court recognized that the New York appellate courts have not articulated standards that should govern applications for the disclosure of the identity of anonymous internet speakers. However, other courts have recognized repeatedly that the First Amendment protects anonymous participation in online forums, as such speech can foster the unfettered and diverse exchange of ideas. Yet the cases also recognize that the right to anonymous speech is not absolute and cannot shield tortuous acts such as defamation.

Against this backdrop, the Court turned to well-settled New York law that holds that, even in instances where constitutional issues are not at stake, the proponent of pre-action disclosure must show that he or she has a meritorious claim and the information sought is material and necessary to the actionable wrong. Therefore, the Court looked to whether the particular words of Orthomom were in fact defamatory.

In doing so, the Court examined the content of the whole communication in addition to its tone and apparent purpose. According to the Court, Orthomom's statements were a matter of interest to her religious community and the general public and were not reasonably susceptible of a defamatory connotation. The statements of both Orthomom and the anonymous commentators were based on a single disclosed fact -- that Greenbaum opposes the use of public funds for programs for Yeshiva students and other full-time private-school students -- the truth of which Greenbaum does not contest. Thus, the statements are opinion and are protected as such. The Court also noted that the Lawrence school district is the site of a highly charged dispute between the public school minority, of which Greenbaum is a part, and the private school majority. To order disclosure of the identity of anonymous posters, the Court noted, would have a chilling effect on such protected political speech.

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