Time Warner Cable Enters. LLC v. Universal Commc'ns Network, Inc., 2016 BL 316191 (Sup. Ct. Sept. 20, 2016) [2016 BL 316191]

Pagination
* BL

New York Supreme Court

TIME WARNER CABLE ENTERPRISES LLC, Plaintiff, -against- UNIVERSAL COMMUNICATIONS NETWORK, INC., Defendants. Index No.: 652407/2015

652407/2015

September 20, 2016, Decided

THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

HON. JEFFREY K. OING, J.S.C.

JEFFREY K. OING

DECISION AND ORDER

JEFFREY K. OING, J.:

Relief Sought

Plaintiff Time Warner Cable Enterprises LLC ("TWC") moves, pursuant to **CPLR 3211(b)** , to dismiss Universal's first and second affirmative defenses.

Factual Background

TWC and defendant Universal Communications Network, Inc. ("Universal") entered into a Channel Lease Agreement (the "Agreement") on December 24, 2013, pursuant to which TWC would distribute Universal's Chinese-language television network, New Tang Dynasty, in Los Angeles, Hawaii and New York (*Id.* at ¶ 15). The term of the Agreement commenced on January 1, 2014 and expired on June 30, 2016 (*Id.* at ¶¶ 14, 22). Universal paid TWC $35,000 upon the commencement of the Agreement, but has not made any further payments since January 2014 (*Id.* at ¶¶ 22, 24). As a result, TWC asserts claims for: (1) breach of contract seeking amounts allegedly due under the Agreement, with interest or, alternatively, (2) *quantum meruit (Id.* at ¶¶ 36, 44).

In its Answer, Universal asserts that TWC controls a "significant, and in some instances, a dominant market share of cable television broadcast services" in New York, a critical market for Universal and New Tang Dynasty (Answer, ¶¶ 76, 102). Universal alleges that TWC abused this market power by refusing to carry NeW Tang Dynasty in New York unless Universal also paid for carriage of New Tang Dynasty in Hawaii and Los Angeles (*Id.* at ¶¶ 94-96, 101-102). In its first two affirmative defenses, Universal asserts that the Agreement is unenforceable because TWC, by requiring Universal to pay for carriage in Los Angeles and Hawaii, made the Agreement an illegal tying arrangement in violation of **section 1** of the Sherman Act (the "Antitrust Defenses"). TWC moves to dismiss the Antitrust Defenses.

Discussion

The interposition of antitrust defenses in contract actions is generally disfavored (Kelly v Kosuga, **358 U.S. 516** , **518** [1959]) due to concerns that "successful interposition of antitrust defenses is too likely to enrich parties who reap the benefits of a contract and then seek to avoid the corresponding burdens" (Viacom Intl. v Tandem Prods., **526 F2d 593** , **599** [2d Cir 1985]). Thus, "a contract which is legal on its face and does not call for unlawful conduct in its performance is not voidable simply because it resulted from an antitrust conspiracy" (X.L.O. Concrete Corp. v Rivergate Corp., **83 NY2d 513** , **518** [1994]).

Antitrust defenses will, however, be upheld in cases where a judgment would result in enforcement of the "precise conduct made unlawful by the [Sherman] Act" (Kelly v Kosuga, **358 U.S. at 520** ; Kaiser Steel Corp. v Mullins, **455 U.S. 72** , **79** [1982]). In other words, where a suit "is based upon an agreement ... which has as its object and effect accomplishment of illegal ends which would be consummated by the judgment sought, the Court will

entertain the defense that the contract in suit is illegal [**[*2]** under the Sherman Act] ... But when the contract sued upon is not intrinsically illegal" such a defense will not lie (Bruce's Juices v Am. Can Co., **330 U.S. 743** , **755** [1947] [emphasis added]).

Here, Universal argues that enforcement of the Agreement would serve to sanction an illegal restraint of trade because "any payment obligations that [Universal] might have under the Agreement, arise from TWC's inherently coercive and facially illegal tying of the New York, Hawaii, and Los Angeles markets" (Opp. Br. at pp. 15-16): In support of this argument, Universal relies on Big Top Stores, Inc. v Ardsley Toy Shoppe, Ltd., **64 Misc 2d 894** [Sup Ct, Westchester County 1970], aff'd sub nom. Big-Top Stores v Ardsley Toy Shoppe, **36 AD2d 582** [2d Dept 1971] In that case, plaintiff, a franchisor of toy stores, entered into a franchise agreement with defendant. The franchise agreement expressly required defendant to purchase at least 90% of its merchandise from plaintiff (***Id*** .). It further provided that if defendant purchased merchandise for his store elsewhere he was to pay plaintiff 15% of the cost of these purchases (**Id. at 897**). Defendant failed to purchase 90% of its merchandise from plaintiff and did not pay the 15% fee (**Id. at 898**). In response, plaintiff sued demanding, inter alia, the 15% fee (**Id. at 899**). Defendant interposed an affirmative defense that the franchise agreement was unenforceable because it was an unlawful tying arrangement (**Id. at 901**). Supreme Court agreed and dismissed plaintiff's complaint (**Id. at 905**).

Universal's reliance on Big Top is misplaced. In Big Top, the contract at issue expressly created the illegal tying arrangement and the penalty for violating this arrangement. Here, by contrast, the Agreement provides only that TWC will carry New Tang Dynasty in New York, Los Angeles and Hawaii, and does not contain any provision predicating carriage of New Tang Dynasty in New York on carriage in Los Angeles and Hawaii.

In light of this distinction, a more apt comparison is American Broadcasting-Paramount Theatres; Inc. v American Mfrs. Mutual Insurance Co., **42 Misc 2d 939** [NY Sup Ct 1963], aff'd, **20 AD2d 890** [1st Dept 1964]). In that case, defendants breached a contract in which they agreed to sponsor a television program on 130 stations on plaintiff's television network. Defendants asserted, as an affirmative defense, that the contract was unenforceable because it was part of an "illegal tie-in," as plaintiff had required defendant "to sponsor the show on 35 stations they did not want in order to get the sponsorship on 95 stations that defendants did want" (**Id. at 942**). Supreme Court found that the contract was valid on its face and did not create a restraint forbidden by the Sherman Act and, as a result, defendant's antitrust affirmative defense was insufficient (***Id*** .).

As in Americah Broadcasting, the Agreement here is, on its face, a valid economic transaction that does not memorialize the tying alleged by defendant or otherwise violate antitrust laws. Accordingly, defendant's Antitrust Defenses must be dismissed (New York Stock Exch., Inc. v Goodbody & Co., **42 AD2d 556** , **556** [1st Dept 1973]abrogated on other grounds **[*3]** Banque Indosuez v Pandeff, **193 AD2d 265** [1st Dept 1993]).

Accordingly, it is

ORDERED that plaintiff's motion to dismiss defendant's first and second affirmative defenses is granted, and they are hereby dismissed; and it is further

ORDERED that counsel shall appear for a status conference in Part 48 on October 19, 2016 at 11 a.m.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 9/20/16

/s/ Jeffrey K. Oing

HON. JEFFREY K. OING, J.S.C.

General Information

Judge(s)	Jeffrey K. Oing
Related Docket(s)	652407/2015 (N.Y. Sup.);
Topic(s)	Contracts
Industries	Television
Date Filed	2016-09-20 00:00:00
Court	New York Supreme Court
Parties	TIME WARNER CABLE ENTERPRISES LLC, Plaintiff, -against- UNIVERSAL COMMUNICATIONS NETWORK, INC., Defendants. Index No.: 652407/2015

Time Warner Cable Enters. LLC v. Universal Commc'ns Network, Inc., No. 652407/2015, 2016 BL 316191 (Sup. Ct. Sept. 20, 2016), Court Opinion

Direct History

1 **Time Warner Cable Enters. LLC v. Universal Commc'ns Network, Inc., No. 652407/2015, 2016 BL 316191 (Sup. Ct. Sept. 20, 2016)**
motion to dismiss granted, order entered

Case Analysis

No Treatments Found

Table Of Authorities (11 cases)

1 Cited , Quoted — X.L.O. Concrete Corp. v. Rivergate Corp., 83 N.Y.2d 513, 611 N.Y.S.2d 786, 634 N.E.2d 158 (1994)

The interposition of antitrust defenses in contract actions is generally disfavored (*Kelly v Kosuga* , **358 U.S. 516** , **518** [1959]) due to concerns that "successful interposition of antitrust defenses is too likely to enrich parties who reap the benefits of a contract and then seek to avoid the corresponding burdens" (*Viacom Intl. v Tandem Prods.* , **526 F2d 593** , **599** [2d Cir 1985]). Thus, "a contract which is legal on its face and does not call for unlawful conduct in its performance is not voidable simply because it resulted from an antitrust conspiracy" (*X.L.O. Concrete Corp. v Rivergate Corp.* , **83 NY2d 513** , **518** [1994]).
...

2 Cited — Indosuez v. Pandeff, 193 A.D.2d 265, 603 N.Y.S.2d 300 (App Div, 1st Dept 1993)

As in *Americah Broadcasting* , the Agreement here is, on its face, a valid economic transaction that does not memorialize the tying alleged by defendant or otherwise violate antitrust laws. Accordingly, defendant's Antitrust Defenses must be dismissed (*New York Stock Exch., Inc. v Goodbody & Co.* , **42 AD2d 556** , **556** [1st Dept 1973] *abrogated on other grounds Banque Indosuez v Pandeff* , **193 AD2d 265** [1st Dept 1993]).
...

3 Cited , Quoted — Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 102 S. Ct. 851, 70 L. Ed. 2d 833, 109 LRRM 2268, 2 EBC 2353 (1982)

Direct History Summary	
Caution	0
Negative	0
Total	0

Case Analysis Summary	
Positive	0
Distinguished	0
Caution	0
Superseded	0
Negative	0
Total	0

Authorities Summary	
Positive	9
Distinguished	1
Caution	0
Superseded	0
Negative	1
Total	11

Table Of Authorities (11 cases)

Antitrust defenses will, however, be upheld in cases where a judgment would result in enforcement of the "precise conduct made unlawful by the [Sherman] Act" (*Kelly v Kosuga* , **358 U.S. at 520** ; *Kaiser Steel Corp. v Mullins* , **455 U.S. 72** , **79** [1982]). In other words, where a suit "is based upon an agreement ... which has as its object and effect accomplishment of illegal ends which would be consummated by the judgment sought, the Court will entertain the defense that the contract in suit is illegal [under the Sherman Act] ... But when the contract sued upon is not *intrinsically illegal* " such a defense will not lie (*Bruce's Juices v Am. Can Co.* , **330 U.S. 743** , **755** [1947] [emphasis added]).

...

4 Cited , Quoted — Viacom Int'l Inc. v. Tandem Productions, Inc., 526 F.2d 593 (2d Cir. 1975)

The interposition of antitrust defenses in contract actions is generally disfavored (*Kelly v Kosuga* , **358 U.S. 516** , **518** [1959]) due to concerns that "successful interposition of antitrust defenses is too likely to enrich parties who reap the benefits of a contract and then seek to avoid the corresponding burdens" *(* *Viacom Intl. v Tandem Prods.* , **526 F2d 593** , **599** [2d Cir 1985]). Thus, "a contract which is legal on its face and does not call for unlawful conduct in its performance is not voidable simply because it resulted from an antitrust conspiracy" (*X.L.O. Concrete Corp. v Rivergate Corp.* , **83 NY2d 513** , **518** [1994]).

...

5 Prior Overruling — New York Stock Exch., Inc. v. Goodbody & Co., 42 A.D.2d 556, 345 N.Y.S.2d 58 (App Div, 1st Dept 1973)

As in *Americah Broadcasting* , the Agreement here is, on its face, a valid economic transaction that does not memorialize the tying alleged by defendant or otherwise violate antitrust laws. Accordingly, defendant's Antitrust Defenses must be dismissed (*New York Stock Exch., Inc. v Goodbody & Co.* , **42 AD2d 556** , **556** [1st Dept 1973] *abrogated on other grounds* *Banque Indosuez v Pandeff* , **193 AD2d 265** [1st Dept 1993]).

...

6 Cited — Matter of Big-Top Stores, Inc. v. Ardsley Toy Shoppe, Ltd., 36 A.D.2d 582, 318 N.Y.S.2d 924 (App Div, 2d Dept 1971)

Here, Universal argues that enforcement of the Agreement would serve to sanction an illegal restraint of trade because "any payment obligations that [Universal] might have under the Agreement, arise from TWC's inherently coercive and facially illegal tying of the New York, Hawaii, and Los Angeles

Table Of Authorities (11 cases)

markets" (Opp. Br. at pp. 15-16): In support of this argument, Universal relies on *Big Top Stores, Inc. v Ardsley Toy Shoppe, Ltd.* , **64 Misc 2d 894** [Sup Ct, Westchester County 1970], *aff'd sub nom. Big-Top Stores v Ardsley Toy Shoppe* , **36 AD2d 582** [2d Dept 1971] In that case, plaintiff, a franchisor of toy stores, entered into a franchise agreement with defendant. The franchise agreement expressly required defendant to purchase at least 90% of its merchandise from plaintiff (***Id*** .). It further provided that if defendant purchased merchandise for his store elsewhere he was to pay plaintiff 15% of the cost of these purchases (**Id. at 897**). Defendant failed to purchase 90% of its merchandise from plaintiff and did not pay the 15% fee (**Id. at 898**). In response, plaintiff sued demanding, *inter alia* , the 15% fee (**Id. at 899**). Defendant interposed an affirmative defense that the franchise agreement was unenforceable because it was an unlawful tying arrangement (**Id. at 901**). Supreme Court agreed and dismissed plaintiff's complaint (**Id. at 905**).

...

7 Distinguished — Big Top Stores, Inc. v. Ardsley Toy Shoppe, Ltd., 64 Misc. 2d 894, 315 N.Y.S.2d 897 (Sup. Ct. 1970)

Here, Universal argues that enforcement of the Agreement would serve to sanction an illegal restraint of trade because "any payment obligations that [Universal] might have under the Agreement, arise from TWC's inherently coercive and facially illegal tying of the New York, Hawaii, and Los Angeles markets" (Opp. Br. at pp. 15-16): In support of this argument, Universal relies on *Big Top Stores, Inc. v Ardsley Toy Shoppe, Ltd.* , **64 Misc 2d 894** [Sup Ct, Westchester County 1970], *aff'd sub nom. Big-Top Stores v Ardsley Toy Shoppe* , **36 AD2d 582** [2d Dept 1971] In that case, plaintiff, a franchisor of toy stores, entered into a franchise agreement with defendant. The franchise agreement expressly required defendant to purchase at least 90% of its merchandise from plaintiff (***Id*** .). It further provided that if defendant purchased merchandise for his store elsewhere he was to pay plaintiff 15% of the cost of these purchases (**Id. at 897**). Defendant failed to purchase 90% of its merchandise from plaintiff and did not pay the 15% fee (**Id. at 898**). In response, plaintiff sued demanding, *inter alia* , the 15% fee (**Id. at 899**). Defendant interposed an affirmative defense that the franchise agreement was unenforceable because it was an unlawful tying arrangement (**Id. at 901**). Supreme Court agreed and dismissed plaintiff's complaint (**Id. at 905**).

...

8 Cited — Am. Broadcasting-Paramount Theatres, Inc. v. Am. Mfrs. Mut. Ins. Co., 20 A.D.2d 890, 251 N.Y.S.2d 906 (App Div, 1st Dept 1964)

Table Of Authorities (11 cases)

In light of this distinction, a more apt comparison is *American Broadcasting-Paramount Theatres; Inc. v American Mfrs. Mutual Insurance Co.* , **42 Misc 2d 939** [NY Sup Ct 1963], *aff'd* , **20 AD2d 890** [1st Dept 1964]). In that case, defendants breached a contract in which they agreed to sponsor a television program on 130 stations on plaintiff's television network. Defendants asserted, as an affirmative defense, that the contract was unenforceable because it was part of an "illegal tie-in," as plaintiff had required defendant "to sponsor the show on 35 stations they did not want in order to get the sponsorship on 95 stations that defendants did want" (**Id. at 942**). Supreme Court found that the contract was valid on its face and did not create a restraint forbidden by the Sherman Act and, as a result, defendant's antitrust affirmative defense was insufficient (***Id*** .).

...

9 Discussed , Quoted Am. Broadcasting-Paramount Theatres, Inc. v. Am. Mfrs. Mut. Ins. Co., 42 Misc. 2d 939, 249 N.Y.S.2d 481 (Sup. Ct. 1963)

In light of this distinction, a more apt comparison is *American Broadcasting-Paramount Theatres; Inc. v American Mfrs. Mutual Insurance Co.* , **42 Misc 2d 939** [NY Sup Ct 1963], *aff'd* , **20 AD2d 890** [1st Dept 1964]). In that case, defendants breached a contract in which they agreed to sponsor a television program on 130 stations on plaintiff's television network. Defendants asserted, as an affirmative defense, that the contract was unenforceable because it was part of an "illegal tie-in," as plaintiff had required defendant "to sponsor the show on 35 stations they did not want in order to get the sponsorship on 95 stations that defendants did want" (**Id. at 942**). Supreme Court found that the contract was valid on its face and did not create a restraint forbidden by the Sherman Act and, as a result, defendant's antitrust affirmative defense was insufficient (***Id*** .).

...

10 Cited , Quoted Kelly v. Kosuga, 358 U.S. 516, 79 S. Ct. 429, 3 L. Ed. 2d 475 (1959)

The interposition of antitrust defenses in contract actions is generally disfavored (*Kelly v Kosuga* , **358 U.S. 516** , **518** [1959]) due to concerns that "successful interposition of antitrust defenses is too likely to enrich parties who reap the benefits of a contract and then seek to avoid the corresponding burdens" (*Viacom Intl. v Tandem Prods.* , **526 F2d 593** , **599** [2d Cir 1985]). Thus, "a contract which is legal on its face and does not call for unlawful conduct in its performance is not voidable simply because it resulted from an antitrust conspiracy" (*X.L.O. Concrete Corp. v Rivergate Corp.* , **83 NY2d 513** , **518** [1994]).

...

Table Of Authorities (11 cases)

..

Antitrust defenses will, however, be upheld in cases where a judgment would result in enforcement of the "precise conduct made unlawful by the [Sherman] Act" (*Kelly v Kosuga* , **358 U.S. at 520** ; *Kaiser Steel Corp. v Mullins* , **455 U.S. 72** , **79** [1982]). In other words, where a suit "is based upon an agreement ... which has as its object and effect accomplishment of illegal ends which would be consummated by the judgment sought, the Court will entertain the defense that the contract in suit is illegal [under the Sherman Act] ... But when the contract sued upon is not *intrinsically illegal* " such a defense will not lie (*Bruce's Juices v Am. Can Co.* , **330 U.S. 743** , **755** [1947] [emphasis added]).

...

11 Cited , Quoted Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 67 S. Ct. 1015, 91 L. Ed. 1219 (1947)

Antitrust defenses will, however, be upheld in cases where a judgment would result in enforcement of the "precise conduct made unlawful by the [Sherman] Act" (*Kelly v Kosuga* , **358 U.S. at 520** ; *Kaiser Steel Corp. v Mullins* , **455 U.S. 72** , **79** [1982]). In other words, where a suit "is based upon an agreement ... which has as its object and effect accomplishment of illegal ends which would be consummated by the judgment sought, the Court will entertain the defense that the contract in suit is illegal [under the Sherman Act] ... But when the contract sued upon is not *intrinsically illegal* " such a defense will not lie (*Bruce's Juices v Am. Can Co.* , **330 U.S. 743** , **755** [1947] [emphasis added]).

...