STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

GEORGE MILLER BRICK CO., INC.,

Plaintiff,

DECISION AND ORDER
Index No. 1995/01001

v.

STARK CERAMICS, INC.,

Defendant.

Defendant Stark Ceramics moves for reargument of a prior motion, and upon reargument, for an order in limine precluding plaintiff, George C. Miller Brick Company from adducing proof of a resale price maintenance agreement between it and Stark because such would not establish a violation of the Donnelly Act. Stark also moves for reargument of the prior motion in limine to prevent plaintiff from adducing proof of "antitrust injury" in the liability phase of the trial, consisting of evidence that Stark terminated Miller Brick's distributorship in retaliation for having to pay another distributor, Black Brick, $4,000 representing the difference between Miller Brick's original bid and Black Brick's subsequent bid for the Albion Correctional Facility project. Stark further moves in limine to preclude plaintiff from offering any evidence at trial of the participation of another distributer, and the eventual bid winner on the Albion prison project, Black Brick, in the allegedly illegal bid rigging scheme, and to preclude plaintiff from

offering similar evidence of alleged participation by Momack Building Materials in the alleged conspiracy. Finally, Stark moves to preclude plaintiff from offering hearsay statements of Stark, Black Brick, Momack, or other distributors regarding the existence purpose or scope of alleged conspiracy. The background was provided in the court's prior decision, familiarity with which is assumed.

The cornerstone of Stark's current motion is it's argument, raised for the first time in this litigation, that, unlike the Sherman Act, Dr. Miles Medical Center v. John D. Park & Sons Company, 220 U.S. 373 (1911), the Donnelly Act does not proscribe a vertical agreement establishing the minimum price at which a distributor may resell products purchased from its supplier. John D. Park & Sons Company v. National Wholesale Drugists' Assoc., 175 N.Y. 1 (1903); Welch v. Dwight, 40 App. Div. 513 (2d Dept. 1899). See also, Dawn to Dusk, Ltd. v. Frank Brunkhorst Company, 23 A.D.2d 780, 781 (2d Dept. 1965)("Nor is it violative of the statute because it fixes the price to his customers and prohibits the distribution of the goods to any dealers who would resell the goods to plaintiff."); Port Chester Wine & Liquor Shop, Inc. v. Miller Brothers Fruiterers, Inc., 253 App. Div. 188, 194 (2d Dept. 1938)(the Donnelly Act "did not purport to concern itself with vertical price-fixing arrangements based on property rights and good will evidence by a trade name, brand or

mark on a commodity in intrastate commerce"); Marish v. Eastman Kodak Co., 244 App. Div. 295 (2d Dept. 1935), aff'd without opn. 269 N.Y. 621 (1936); Lochner v. American Tobacco Co., 121 App. Div. 443 (2d Dept. 1907), aff'd, 195 N.Y. 565 (1909)("producer may lawfully sell or refuse to sell to any persons; may establish the sale price and terms of sale of its products, and what it may lawfully do itself, it may lawfully delegate to another, and the exercise of such delegated power by the other is as lawful as if exercised by the producer itself").

Stark contends that the New York rule is the more enlightened rule, the federal rule under the Sherman Act under the Dr. Miles Medical Center case having been largely discredited by the courts, Isaksen v. Vermont Castings, Inc., 825 F.2d 1158, 1161-62 (7th Cir. 1987)(Posner, J.), cert. denied, 486 U.S. 1005 (1988), and commentators, Robert Bork, The Antitrust Paradox, 33, 289 (1978). Thus, Stark contends that the court's reliance on Anheuser Busch, Inc. v. Abrahams, 71 N.Y.2d 327 (1988), for the proposition that the Donnelly Act "should generally be construed in light of federal precedent and given a different interpretation only where state policy, differences in the statutory language or the legislative history justifies such a result," id., 71 N.Y.2d at 355, is misplaced to the extent it was employed to uphold the viability of plaintiff's allegations in this case. Stark contends that Dr. Miles is in direct conflict

with over a century's jurisprudence in New York which has, according to Stark, "held:(i) that retail price maintenance agreements pose no threat whatsoever to the competitive process that the Donnelly Act and prior state anti-trust laws were enacted to protect; and (ii) accordingly, that such laws are not intended to and do not regulate such resale price maintenance agreements in any way." Stark's Memorandum of Law, at 8.

Because Stark seeks an order declaring "that the allegations of George C. Miller Brick Company, Inc. ('Miller Brick') of resale price maintenance do not establish a violation of the Donnelly Act[,] and [further] precluding Miller Brick from offering proof of 'antitrust injury' in the liability phase, including evidence of Stark Ceramics' termination of the distribution agreement with Miller Brick," plaintiff describes the motion as, in essence, one for summary judgment, which is both procedural improper in form and untimely under the CPLR. In this, plaintiff is correct. In Scalp & Blade, Inc. v. Advest, Inc., 309 A.D.2d 219 (4th Dept. 2003), the court held that a motion of this type "has a concretely restrictive effect on the efforts of plaintiffs to prove their case against defendants and recover certain damages from them." Id., 309 A.D.2d at 224. Because "the order does not really limit the production of certain evidence . . . , but rather effectively grants defendants partial summary judgment on the critical substantive issue of

what constitutes . . . plaintiffs' causes of action[,] . . . defendants' motion, although labeled one in limine, actually 'was the functional equivalent of a motion for partial summary judgment dismissing the complaint . . .'" Id., 309 A.D.2d at 224 (quoting Roundout Electric v. Dover Union Free School District, 304 A.D.2d 808, 810-11 (2d Dept. 2003)). The court agrees with plaintiff that, if the requested order was issued, it would require outright dismissal of the complaint, and therefore defendant's motion is, in reality, in the nature of one for summary judgment. Such a motion is precluded at this stage of the proceedings because it was filed more that 120 days after the note of issue was filed. Reel v. City of New York, 2 N.Y.3d 648 (2004); Clermont v. Hillsdale Indus., Inc., 6 A.D.3d 376, 378 (2d Dept. 2004).

Additionally, Stark's current position with respect to the legality of the arrangements at issue in this case, conceived and proffered to the court for the first time on the eve of trial in this nearly 10 year old case, is barred by two prior Appellate Division decisions which have established the law of the case. In 2001, the Appellate Division reinstated the complaint against Stark on the ground that "the distribution agreement, letter from defendant's representative to the distributor, and the deposition testimony of the parties raise issues of fact concerning how and when the distributors could bid on projects outside their

territories and whether distributors were intended to bid, if at all, on the State project." George C. Miller Brick Co., Inc. v. Stark Ceramics, Inc., 281 A.D.2d 960 (4th Dept. 2001). Thereafter, in 2003, the Appellate Division reversed my predecessor's decision to apply the rule of reason standard, finding that the complaint, as "limited [in] its theory of liability to a violation of the Donnelly Act based on bid rigging and price fixing," involves the application of "the per se standard" because "price fixing is alleged." Id., 2 A.D.3d at 1341 (4th Dept. 2003). On both appeals, defendant urged the Appellate Division to uphold the rulings of the court below on the ground that the distribution agreements involved in the case in no way violated the antitrust laws of the State of New York. See, id., 281 A.D.2d 960 (defendants/respondents brief, at 9 (maintaining that the core of the illegal agreement alleged by plaintiffs instead "was entirely in accord with the terms of the Distribution Agreement and Bulletins." - - Thus, the only acts taken by Stark Ceramics in relation to the New York State Prison Expansion program were to enforce the terms of its distributorship agreement, resolve conflicts between distributors, and to ultimately terminate Miller Brick pursuant to the terms set forth in the Distribution Agreement.") Moreover, in id., 2 A.D.3d 281 (brief on behalf of Stark Ceramics, Inc., at 14, Stark presented the exact same argument

that it presented originally on the motion now sought to be reargued: "However, in order for a manufacturer's termination of a distributor to fall within the category of per se illegal restrains, [sic] the termination must have been pursuant to a minimum price fixing agreement with at least one other non-terminated distributor." This is, indeed, the same Monsanto argument rejected by the undersigned in its decision and order earlier this year, and was therefore fully rejected also by the Appellate Division in 2003. Implicit in these determinations was a corollary decision that the cases now cited by defendant do not preclude relief on the remaining cause of action to be tried in this case. Accordingly, the determinations by the Appellate Division on each of the indicated appeals is law of the case, thereby requiring denial of Stark's current motion.

As plaintiff contends, the Anheuser-Busch case is precisely on point, in that it rejected the very argument defendant now makes for the first time in this litigation that vertical restraint agreements are legal in this state. In that case, the targets of a grand jury investigation moved to quash a subpoena issued by the attorney general pursuant to an investigation into marketing practices in the beer industry alleged to violate the Donnelly Act. As defendant now maintains on this motion to reargue, the targets of the subpoenas maintained that the vertical territorial and other arrangements at issue in that case

were per se legal and that such legality was "established by 'seven decades of unanimous precedent' and that the Legislature has acquiesced such an interpretation of the Donnelly Act by failing to amend the statute to overrule those decisions." Id., 71 N.Y.2d at 332-33. The cases relied on by the grand jury targets referred to above, id., 71 N.Y.2d at 330 (Points of Counsel), and Judge Bellacosa as the lone dissenter, id., 71 N.Y.2d at 336-39, are the cases Stark now relies upon in its motion for reargument and reconsideration. The majority opinion "conclude[d], however, that the cases cited by petitioners do not conclusively establish, either singly or in combination, a rule of per se legality for vertical territorial arrangements[,] [n]or does the statutory language foreclose the Attorney General's position that such arrangements, if shown to result in an unreasonable restraint of trade under the circumstances, are prohibited." Id., 71 N.Y.2d at 333.

This case involves much more than a simple vertical territorial arrangement, although plaintiff clearly alleges that such a vertical territorial arrangement existed. In addition, plaintiff alleges that the territorial arrangement included a key element of price fixing and that such price fixing was enforced by enforced bid rigging and, in addition, termination of a distributer who not only bid outside its territory but undercut the distributer assigned to that territory. Plaintiff claims to

be the victim of the scheme after having been forced by Stark to agree to it. As the Court of Appeals has held, the Donnelly Act reaches such conduct even if the conspiracy is wholly vertical, i.e., supplier/manufacturer and distributer. Creative Trading Co. v. Larkin-Pluznick-Larkin, Inc., 148 A.D.2d 352, 354-357 (1st Dept. 1989)(Sullivan, J., dissenting), revd. on dissenting opn below, 75 N.Y.2d 830 (1990)(the Donnelly Act reaches "competing distributors who conspire among themselves and with a supplier to terminate a fellow distributor for selling at a discount," citing United States v. General Motors Corp., 384 U.S. 127, 86 S.Ct. 1321)(emphasis supplied). See also, A.D. Bedell Wholesale Co., Inc. v. Philip Morris Inc., 272 A.D.2d 854 (4th Dep't 2000), noted in, 103 N.Y. Jur. 2d Trade Regulation § 19, which cited Creative Trading Co. v. Larkin-Pluznick-Larkin, Inc., supra, and involved a vertical restraint with no horizontal components. Even the leading New York treatise on the subject acknowledges that the Donnelly Act would apply in these circumstances, although the author speculates that the Court of Appeals might prefer a rule of reason standard to the per se standard in light of the cases cited by Stark. Robert L. Haig, Commercial Litigation in the New York State Courts §79:20, at 1267-68 (2d ed. 2005). In this case, the 2003 Appellate Division decision forecloses any argument on that score.

And even that does not describe the end of plaintiff's

allegations in this case. Ultimately, this is not solely a "resale price maintenance" case of the kind upheld by the cited New York decisions under the Donnelly Act. As pointed out in plaintiff's memorandum of law, resale price maintenance cases "typically describe those situations where a manufacturer specifies a minimum price list for its product line and prohibits its distributors from underselling one another by lower than that price." Id. at 6-7 n.3. According to plaintiff, "Stark did not have a 'resale price maintenance' policy in the traditional sense[;] [i]nstead, Stark had a bid rigging policy that fixed the price for prison expansion project sales at a certain level," and a termination policy when one distributer, i.e., plaintiff, attempted to undersell (i.e., underbid) on a project. Accordingly, if plaintiff proves its case, defendant will be found guilty of bid rigging under the Donnelly Act. Cf., People v. Swartz, 160 A.D.2d 964 (2d Dept. 1990).

Finally, Stark's contention that the doctrine of collateral estoppel precludes it from proving that Black Brick and Momack participated in the alleged illegal scheme, is without merit. First, the dismissal of Black Brick from the complaint does not create a preclusion except insofar as Black Brick's potential liability to plaintiff is concerned. Plaintiff's purpose in proving the circumstances surrounding Black Brick's ultimate award of the bid in question, and the participation of Momack, is

not for the purpose of establishing their liability. Rather, such evidence is adduced for the purpose of showing that Stark was part of the conspiracy with plaintiff, one of its many New York distributers. Such evidence, under the theory pursued by plaintiff, described in the Appellate Division decisions and the this court's February Decision and Order in this case, will not require any special interrogatories to the jury as to their participation. The only question the jury will be asked to answer is whether Stark participated with the plaintiff in the alleged scheme, and they may surely consider on relevancy grounds Stark's contemporaneous arrangements with other similarly situated distributers in upstate New York in making that determination. Thus, as plaintiff contends, the issue is not one of issue preclusion under the collateral estoppel doctrine, but whether as law of the case, Black Brick's dismissal from the complaint, which went unappealed, can preclude plaintiff's effort to show that defendant was part of a conspiracy with it by reference to evidence that other distributors similarly situated, except as to territory, had a similar arrangement. Nothing in the law of the case doctrine directs a court to preclude the proffered evidence, and, accordingly, the motion is denied.[1]

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[1] Stark's current position is ironic, given that it argued on the original motion that the charged conspiracy between it and plaintiff could not be shown under Monsanto absent proof that defendant also agreed on similar terms with its other non-terminated distributers. That motion proceeded, and was decided,

The balance of defendant's motion seeking preclusion of hearsay evidence is denied inasmuch as there is no specification of what is sought to be excluded.

CONCLUSION

Defendant's motion is denied in its entirety.

SO ORDERED.

KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: May __, 2005
Rochester, New York

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on the assumption that plaintiff had no other proof of the agreement between it and Stark. This motion was brought in response to plaintiff's assurances after the court's decision that, indeed, it had such other proof.

The court also rejects Stark's argument that it had insufficient discovery of such proof. Plaintiff provided interrogatory answers identifying the "other distributers" as having been involved in the conspiracy and, in any event, it is no secret who Stark's upstate distributers were and their respective territories.