Amsterdam Tobacco Co, Inc. v Harold Levinson Assoc., LLC.
2018 NY Slip Op 31911(U)
August 3, 2018
Supreme Court, Kings County
Docket Number: 502413/18
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8
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AMSTERDAM TOBACCO CO, INC.,
DONOHUE CANDY AND TOBACCO CO, INC.,
KINGSTON CANDY & TOBACCO CO, INC.,
MOUNTAIN CANDY & CIGAR CO, INC.,
AND SUNRISE CANDY & TOBACCO CORP,
Plaintiffs,

Decision and order

- against -

Index No. 502413/18

HAROLD LEVINSON ASSOCIATES, LLC.,
CORE-MARK MIDCONTINENT, INC.,
MCLANE/EASTERN,INC.,MCLANE/MIDWEST, INC.,
PLAINFIELD TOBACCO AND CANDY CO, INC.,
d/b/a RESNICK DISTRIBUTORS AND CONSUMER
PRODUCT DISTRIBUTORS, INC.,
d/b/a J. POLEP DISTRIBUTION SERVICES,

Defendants,

August 3, 2018
---x
PRESENT: HON. LEON RUCHELSMAN

The defendant Harold Levinson Associates LLC [hereinafter 'HLA'] has moved seeking to dismiss the complaint on the grounds it fails to state any cause of action. The plaintiffs oppose the motion. Papers were submitted by the parties and arguments held. After removing all the arguments, this court now makes the following determination.

The plaintiffs in this case are all licensed by the New York State Tax Department as agents or wholesalers authorized to sell cigarettes in the state. According to the complaint, the defendant HLA, also a licensed agent and wholesaler, has violated the Cigarette Marketing Standards Act [hereinafter CMSA] Tax Law §§483-489. That act generally prohibits cigarette

agents from selling cigarettes below set minimum prices. Indeed, the complaint alleges one cause of action, namely violations of CMSA, specifically Tax Law §484 by "offering to sell and selling cigarettes at less than the minimum prices set by the CMSA, and doing so with the intent to injure competitors or destroy or substantially lessen competition" (see, Complaint, ¶156). The complaint asserts HLA has offered rebates or other incentives to its customers which has the effect of reducing the cost of the cigarettes below the minimum rate.

The defendant has now moved seeking to dismiss the complaint on the grounds it fails to state a cause of action. The defendant presents two arguments why the complaint must be dismissed. First, they argue that pursuant to Tax Law §486 they are permitted to offer such rebates when in good faith they are merely competing with other competitors who are selling cigarettes below the minimum price. Additionally, they argue that offering rebates does not thereby violate the CMSA in any event since only the actual sale of cigarettes below cost is illegal not the offer of rebates.

Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the complaint as

true, whether the plaintiff can succeed upon any reasonable view of those facts (Davids v. State, 159 AD3d 987, 74 NYS3d 288 [2d Dept., 2018]). Further, all the allegations in the complaint are deemed true and all reasonable inferences may be drawn in favor of the plaintiff (Dunleavy v. Hilton Hall Apartments Co., LLC, 14 AD3d 479, 789 NYS2d 164 [2d Dept., 2005]).

The CMSA (Tax Law §486(b)(1)) states that a retailer may sell cigarettes "at a price made in good faith to meet the price of a competitor" who is selling the same product (id). The CMSA further enumerates two ways in which an agent may calculate its cost of doing business, the actual cost method or the default minimum method (see, Tax Law 483(b)(1)(A),(b)(1)(B)). The plaintiff concedes HLA may be allowed to offer the rebates to satisfy the 'meeting competition' exception of §486, however, must present "proof of a competitor's price at or below the statutory minimum" and without such proof any rebate offered is thus statutorily below the minimum price and illegal (see, Plaintiff's Memorandum of Law, page 7). The plaintiff further argues that the 'meeting competition' exception is never available if the competition's prices are illegal. Therefore, HLA could not offer the rebates to compete with illegally low prices. HLA counters that it has no way of knowing the 'cost of doing business' method utilized by such competitors and

therefore the prices actually offered by HLA were "good faith" prices in efforts to satisfy the 'meeting competition' exception. There are no cases in New York examining the parameters of the 'meeting competition' exception in this context, but similar statutes and statutes in other jurisdictions can prove useful.

Preliminarily, it is well settled that an exception contained within a statute expressly exempts certain conduct from the operation of the statute (Rowell v. Janvrin, 151 NY 60, 45 NE 398 [1896]). A proviso, on the other hand is language that conditionally suspends its operation. These archaic distinctions are primarily utilized in criminal prosecutions. Thus, for example, where a criminal statute exempts certain conduct as criminal, the prosecution must affirmatively negate the applicability of the exception. However, if an exception is enacted later in a statute or in a subsequent statute it is termed a proviso which the prosecution need not negate to make out a prima facie case of criminal conduct (see, People v. Gill, 37 Misc2d 24, 952 NYS2d 700 [Supreme Court Appellate Term 2012]). Applying these principles, HLA argues the plaintiff in this case bears the burden of negating the 'meeting competition' exception. The plaintiff, on the other hand, insists the 'meeting competition' exception is an affirmative defense which

cannot be the basis upon which to dismiss a complaint. The entire resolution of this issue cannot rest upon the "murky contours" of the exception/proviso distinction. Indeed, in People v. Davis, 13 NY3d 17, 884 NYS2d 665 [2009] the court explained the main function of interpretative rules is to discern the intent of the statute and these distinctions should be disregarded "if necessary to give effect to the legislature" (id). Thus, the precise label given to the various sections of a statute "is not determinative" (id) of its true nature.

Therefore, the court cannot grant a motion to dismiss on these grounds and will necessarily examine the 'meeting requirement' exception as well as the good faith arguments presented.

The plaintiff contends HLA has violated the CMSA because it failed to satisfactorily establish the price of its competitors to permit below minimum sales and thus did not act in good faith. The most comprehensive statutory scheme which most closely resembles the CMSA in regard to the 'meeting competition' exception and the good faith underpinnings of the exception is the Robinson-Patman Act (15 USC §13) which generally prohibits price discrimination in various goods. The law additionally permits low prices in good faith to meet the low prices of competitors. In examining this statute courts

have held that bad faith can be inferred where a low price is made merely to harm a competitor (Cadigan v. Texaco Inc., 492 F2d 383 [9th Cir. 1974]). Concerning whether a competitor's low prices are even lawful Cadigan (supra) explained that "a defendant need not prove the actual lawfulness of his competitor's price in order to secure the protection of the proviso" (id). The court further noted that good faith asserting the 'meeting competition' exception would be undermined only if the defendant knew the price being met was unlawful or if it was inherently unlawful. Again, in Standard Oil Co., v. Brown, 238 F2d 54 [5th Cir. 1956] the court held the good faith standard did not require the defendant to prove its competitor's reduced price was lawful and hence deviating from the minimum price was likewise lawful. The court noted there was no such duty and that "it is apparent that such a requirement would practically destroy the value of the proviso, for the legality vel non of the competitor's prices depends on many facts, including what it might be doing to meet low prices of its competitors. The inquiry into these collateral issues would be endless" (id, at Footnote 7). Thus, there is no due diligence requirement as urged by the plaintiff requiring the defendant to verify if the competitor's prices are legal and likewise the defendant does not have to file a Freedom of

Information request to discover the cost method of competitors (see, Plaintiff's Memorandum of Law, page 16, Footnote 6).

Next, the plaintiff argues the defendant's application of good faith is unduly broad basing it upon general market competition and not upon specific competitors. The plaintiff asserts that the 'meeting competition' exception "does not focus on the generalized notion that a market may or may not be competitive. It focuses specifically on the transactions that violate the minimum price rule, and asks with respect to each whether 'a competitor who is rendering the same type of services and is selling the same article at cost to him as an agent' is selling the article at the same below-minimum price as the defendant and further asks whether the defendant has 'proof of the price of a competitor'" (see, Plaintiff's Memorandum of Law, pages 16,17). Therefore, the plaintiff argues that generalized assertions of competition do not justify reliance upon the meeting competition exception. However, that is an unduly narrow application of the exception. Reliance upon cases interpreting the federal anti-price discrimination law are similarly inapt. That law prohibits price discrimination to different purchasers. The law contains an exception, as noted, where such price discriminations are made in 'good faith' to meet a

competitor's low price. While that federal law and the CMSA both employ a 'good faith' exception, they target very different conduct and consequently any comparisons between the two, concerning the scope of the exception, is of limited utility. For example, in Federal Trade Commission v. A.E. Staley Manufacturing Co., 324 U.S. 746, 65 S.Ct. 971 [1945] the Supreme Court analyzed the scope of the 'good faith' exception as it pertains to the price discrimination statute. In that case the respondent, a seller of glucose with a warehouse in Decatur Illinois, charged various purchasers on a delivered price basis with the lowest price being for delivery to Chicago purchasers. However, the respondent also determined that Chicago was a base point price upon which all other prices were computed by adding freight from Chicago to the point of delivery. Therefore, a price originating from Decatur as well as a delivered price to all places where the freight from Decatur was less that the freight from Chicago included an unearned freight. This unearned freight discriminated against purchasers where the freight from Decatur was less than the freight to Chicago. The court rejected the argument this pricing system was done in good faith to compete with other sellers because the 'good faith' exception placed the "emphasis on individual competitive

situations, rather than upon a general system of competition" (id). The court stressed that the good faith exception rejected attempts to "justify delivered prices which discriminate in favor of buyers in Chicago and at points nearer, freightwise, to Chicago than to Decatur, by a pricing system involving phantom freight and freight absorption" (id). Thus, the court held there was no competitive reason that justified the price distinctions, hence they were not established in good faith. A careful analysis of that case reveals it has no applicability to the CMSA at all. The CMSA permits the lowering of prices to match those of competitors, when such lowering is made in good faith. There is no requirement the 'good faith' exception to the CMSA must be accompanied with a precise list of competitors as opposed to a generalized assertion of competition. The generalized marketplace and higher delivery prices that doomed the respondent in Staley (supra) has no persuasive value when examining the 'good faith' exception of the CMSA. Therefore, since it has been amply demonstrated that HLA lowered its prices to compete with others, such conduct constituted good faith.

Defendant next argues that in any event the plaintiff has failed to allege the rebates offered constituted conduct

prohibited by the CMSA, namely "to advertise, offer to sell, or sell cigarettes at less than cost" (Tax Law §484(a)(1)). The defendant asserts that since offering rebates is distinct from the acts proscribed by the statute, namely actively lowering the price, the complaint fails to state a cause of action. It should be noted that many other jurisdictions prohibit, in addition to the lowering of prices below the minimum price, the offering of rebates to achieve the same net result (see, Ark.Code Ann. §4-75-708)(a-c)[Arkansas], NJSA 56:7-20(d)[New Jersey], Minn Stat §325D.33 subd. 3[Minnesota]). Thus, conduct that is not specifically prohibited cannot be included within the statute's reach. The courts may not second guess the Legislature's policy decision, notwithstanding the merit of such inclusion (People v. Qian, 35 Misc3d 647, 941 NYS2d 456 [Queens Court Supreme County 2012]). The court is aware that allowing HLA to offer rebates might have the same net effect as prohibited conduct under the CMSA. To extent such a reality exists it must be addressed by the Legislature.

Nor does the NYCRR demand a contrary result. 20 NYCRR 82.5 is entitled 'Unlawful Acts of a CMSA Retail Dealer' and thus exclusively governs conduct applicable to retail dealers. 20 NYCRR 82.5(2) states that it is unlawful for such retail

dealer to "induce or attempt to induce or to procure or attempt to procure any rebate or concession of any kind or nature whatsoever in connection with the purchase of cigarettes (see Part 84 of this Title for rebates and concessions)" (id). Indeed, 20 NYCRR 84.1 is entitled 'Rebates and Concessions' and states that "as indicated in Part 82 of this Title, it is unlawful and a violation of article 20-A of the Tax Law for any agent, CMSA wholesale dealer, chain store or CMSA retail dealer, with the intent to harm competitors or competition or to avoid taxation, to advertise, offer to sell or sell cigarettes at less than cost. Any evidence of an offer of a rebate in price, or giving of a rebate in price, an offer of a concession, or giving of a concession of any kind or nature whatsoever in connection with the sale of cigarettes in New York State is prima facie evidence of such intent" (id). While Tax Law §484 does prohibit any "agent, wholesale dealer or retail dealer, with intent to injure competitors or destroy or substantially lessen competition...to advertise, offer to sell, or sell cigarettes at less than cost..." Part 82 only governed, by its express terms, retail dealers. Thus, the prohibition "of an offer of a rebate in price, or giving a rebate in price" contained within 20 NYCRR 82.5 must necessarily only refer to

a retail dealer. Indeed, the opening sentence of 20 NYCRR 84.1 which states that "as indicated in Part 82 of this title" such prohibitions also include wholesale dealers and chain stores is hard to reconcile because Part 82 included no such additional vendors. In any event, the utility of 20 NYCRR 84.1 as a basis to find violations of the CMSA is of limited value since the Department of Taxation and Finance which promulgated those rules has been equivocal in its application of this rule. As the court stated in Lorillard Tobacco Co., v. Roth, 99 NY2d 316, 756 NYS2d 108 [2003] the Department believes that "the determination of whether a retailer has improperly 'procured' a rebate or concession 'on behalf of a purchaser...depends on the facts of a specific sale" (id). Therefore, there is no *per se* violation whether a rebate is involved.

Therefore, based on the foregoing, HLA's conduct did not violate the CMSA. Consequently, the motion seeking to dismiss the complaint is granted.

So ordered.

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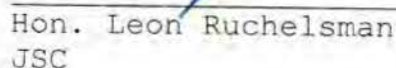

DATED: August 3, 2018
Brooklyn NY

Hon. Leon Ruchelsman
JSC