Amsterdam Tobacco Co, Inc. v Harold Levinson Assoc., LLC.
2024 NY Slip Op 31715(U)
May 14, 2024
Supreme Court, Kings County
Docket Number: Index No. 502413/2018
Judge: Leon Ruchelsman

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. 502413/2018

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, May 14, 2024

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PRESENT: HON. LEON RUCHELSMAN Motion Seq. #3

The plaintiff has moved seeking to dismiss the defendant's first affirmative defense. The defendant has opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As recorded in prior orders, the plaintiffs commenced this action against the defendant. The plaintiffs are agents or wholesalers licensed by the New York State Tax Department authorized to sell cigarettes in the state. The complaint alleges the defendant HLA violated the Cigarette Marketing Standards Act [hereinafter CMSA] Tax Law §§483-489 by offering impermissible rebates which resulted in "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 [NYSCEF Doc. No. 2]). The defendant interposed affirmative defenses including that the defendant "has at all times priced its cigarettes consistent with lawful practice under the CMSA, including by pricing its cigarettes in good faith to meet its competitors' prices, pursuant to N.Y. Tax Law Article 20-A §486" (see, Answer: DEFENSES ¶1 [NYSCEF Doc. No. 78]). The plaintiff has now moved seeking to dismiss that affirmative defense on the grounds there is no evidence the defense applies. As noted, the defendant opposes the motion.

Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations as true, whether the party can succeed upon any reasonable view of those facts (Perez v. Y & M Transportation Corporation, 219 AD3d 1449, 196 NYS3d 145 [2d Dept., 2023]). Further, all the allegations are deemed true and all reasonable inferences may be drawn in favor of the party asserting the claims (Archival Inc., v. 177 Realty Corp., 220 AD3d 909, 198 NYS2d 567 [2d Dept., 2023]). Whether the defense will later survive a motion for summary judgment, or whether the party will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, Lam v. Weiss, 219 AD3d 713, 195 NYS3d 488 [2d Dept.,

2023]).

§486 of the Tax law is an exception to the prohibitions against selling cigarettes below mandated minimum prices. It states that "any retail dealer may advertise, offer to sell, or sell cigarettes at a price made in good faith to meet the price of a competitor who is selling the same article at cost to him as a retail dealer. Any agent or wholesale dealer may advertise, offer to sell or sell cigarettes at a price made in good faith to meet the price of a competitor who is rendering the same type of services and is selling the same article at cost to him as an agent or as a wholesale dealer, as the case may be" (id).

The plaintiff argues there are two reasons that defense is inapplicable in this case. First, there are no other competitors who sold cigarettes at prices below the minimums calculated by the statute and consequently the defendant had no other competitors upon which to rely in charging its prices. Further, even if such lower-priced competitors existed the defendant specifically admitted that it never attempted to ascertain the prices of other competitors and thus could not have possibly charged lower prices in "good faith" required by the exception.

The exception permits any distributor such as the defendant, in good faith, to match prices of a competitor who is selling the same goods at cost. The good faith requirement applies to the establishment of its prices. The regulations accompanying the CMSA

confirm this understanding. The regulation states that "any agent or CMSA wholesale dealer may advertise, offer to sell or sell cigarettes at a price made in good faith to meet the price of a competitor who is rendering the same type of services and is selling the same article at cost to such competitor as an agent or as a CMSA wholesale dealer, whichever the case may be" (see, 20 NYCRR §87.2(a)). Thus, the good faith requirement does not demand the defendant conclusively determine the prices of competitors and that without such proof of competitor prices the defendant will never be able to demonstrate it acted in good faith when it established its own prices. Rather, the defendant must maintain a good faith belief a competitor has lawfully established such prices and can therefore match those prices. The plaintiff argues that since the defendant "did not try to find out" whether any competitors were selling the goods at their cost no good faith is possible (see, Memorandum of Law, page 9 [NYSCEF Doc. No. 81]). However, that requirement would not amount to mere good faith. That would mean the defendant had conclusively established the competitor's prices. The statute does not demand such a rigorous level of certainty but only requires the defendant act in good faith. Indeed, it is difficult to ascertain how the defendant could obtain such information about its competitors. The plaintiff suggests the defendant could have asked retailers. A review of the definitions of such costs demonstrate that asking the retailers is

really unavailing. Tax Law §486(b)(2) states that "in the absence of proof of the price of a competitor, the cost of the retail dealer or the cost of the agent or wholesale dealer, as the case may be, which is established pursuant to section four hundred eighty-three of this article, may be deemed the price of a competitor within the meaning of this section" (id). Tax Law §483(b)(1)(A) defines the cost of the agent and Tax Law §483(b)(2)(A) defines the cost of the wholesale dealer. Thus, the cost of the agent is "the basic cost of cigarettes plus the cost of doing business by the agent as evidenced by the accounting standards and methods regularly employed by said agent in his determination of costs for the purpose of federal income tax reporting for the total operation of his establishment, and must include, without limitation, labor, including salaries of executives and officers, rent, depreciation, selling costs, maintenance of equipment, delivery costs, interest payable, all types of licenses, taxes, insurance and advertising expressed as a percentage and applied to the basic cost of cigarettes" (Tax Law §483(b)(1)(A)). The cost of a wholesale dealer means "the basic cost of cigarettes plus the cost of doing business by the wholesale dealer as evidenced by the accounting standards and methods regularly employed by said wholesale dealer in his determination of costs for the purpose of federal income tax reporting for the total operation of his establishment, and must include, without

limitation, labor, including salaries of executives and officers, rent, depreciation, selling costs, maintenance of equipment, delivery costs, interest payable, all types of licenses, taxes, insurance and advertising expressed as a percentage and applied to the basic cost of cigarettes, plus the cost of doing business by the agent with respect to sales of cigarettes to wholesale dealers" (Tax Law §483(b)(2)(A)). It is highly unlikely any retailer will possess the information necessary to support the cost of the prices of the defendant's competitors as outlined in the statute. Further, the retailer would be under no obligation to share the information even if the retailer had full knowledge of the wholesaler's finances. Of course, the precise nature of this good faith requirement, what criteria the defendant based it on and how the defendant determined the price are surely questions that must be explored through discovery. The plaintiff is entitled to probe the defendant's stated belief it engaged in good faith and is also permitted to try and expose the good faith as nothing more than an end-run around the minimum price requirements. The plaintiff seeks to avoid all this discovery by asserting that, essentially, discoverable material, must be affirmatively pled within the defense itself. There is no such burden at this juncture. The defense of good faith is no different than any other allegation that is asserted, which is deemed true, absent a specific statutory pleading requirement to the contrary. The defendant is entitled to

assert they acted in good faith. They will be required to substantiate that good faith and perhaps defend it at trial. At the pleading stage the defendant need not present any further evidence in support of this defense.

Furthermore, the plaintiff argues the defendant cannot establish this good faith claim because there are no written dispensations from the tax authority granting any competitor the right to sell goods for low prices so the defendant really had no basis to do so as well. The plaintiff argues that "CMSA Section 486(b)(2) requires the [sic] that the cigarette seller seeking to lower its prices to a customer below the CMSA formula minimum price needs to come forward with proof of a competitor's price that is below the formula minimum, which must be at or above the competitor's "cost of the agent" or "cost of the wholesale dealer." (see, Memorandum of Law, page 8 [NYSCEF Doc. No. 81]). That is surely true and as noted is the burden that is borne by the defendant. However, the plaintiff then argues that "under the CMSA, a competitor can have such a price only if it has received special permission from the Tax Department. If the Tax Department has not given the special permission, then there is no price to meet and there is no proof that can be provided" (id). The plaintiff does not support its argument that the only way in which a dealer of cigarettes can obtain the right to sell below the established minimums is by receiving permission from the Tax Department. In fact Tax Law §486 simply states that "any agent or

wholesale dealer may advertise, offer to sell or sell cigarettes at a price made in good faith to meet the price of a competitor..." (Id). The statute permits any dealer to determine, based upon good faith, that the price may be lowered to compete with competitors who have similarly lowered prices. The good faith allowance permeates the exception and rejects any prior approval that must be maintained prior to engaging in any lower prices. To be sure, any good faith reliance is tempered by the private right of action that has prompted this lawsuit (see, Tax Law §484(b)(1)) or fines that may be imposed by Tax Law §484(a)(5)(A)-(C)). Thus, the defendant may assert good faith for its actions but is cautioned that it faces consequences in terms of litigation and fines if such good faith cannot be substantiated.

In truth, the plaintiff is really arguing that the statutory scheme could not possibly allow a dealer, such as the defendant in this case, to essentially self-certify its conduct by charging lower prices. However, that is precisely the allowance afforded by the statute. As noted, that allowance is tempered by the fines the defendant faces if the good faith proves unsupported.

Therefore, the defendant has presented an adequate defense and consequently the motion seeking to dismiss the affirmative defense is denied.

So ordered.

ENTER:

DATED: May 14, 2024
Brooklyn NY

Hon. Leon Ruchelsman
JSC

KINGS COUNTY CLERK
FILED
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