BUNKER RAMO CORP. v. CYWAN

511 F. Supp. 531 (1981) | Cited 0 times | N.D. Illinois | April 2, 1981

MEMORANDUM OPINION AND ORDER

In this private antitrust action, plaintiff, Bunker RamoCorporation ("Bunker Ramo"), alleges that defendants, UnitedBusiness Forms, Inc. ("UBF") and Edward M. Reif ("Reif"),president of UBF, violated section 2(c) of the Robinson-PatmanAct, 15 U.S.C. § 13(c), by paying bribes and kickbacks todefendant Marvin H. Cywan ("Cywan"), a systems analyst at BunkerRamo's Amphenol Industrial Division, in connection with purportedsales of business forms by UBF to Bunker Ramo. Bunker Ramo alsocharges all the defendants with common law fraud, commercialbribery, conspiracy, and Cywan individually with breach offiduciary duty. Jurisdiction over the federal antitrust claim isasserted pursuant to 15 U.S.C. § 15. The common law counts arebrought pursuant to the doctrine of pendent jurisdiction. UnitedMine Workers of America v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16L.Ed.2d 218 (1966).

Defendants UBF and Reif have moved to dismiss both the federaland state law claims for insufficient pleading of fraud, for lackof subject matter jurisdiction, and for failure to state a claimupon which relief may be granted. Fed.R.Civ.P. 9(b), 12(b)(1),12(b)(6). The Court will first consider the motion to dismiss theRobinson-Patman claim since dismissal of the sole federal causeof action may also result in the dismissal of the pendent claimsfor lack of subject matter jurisdiction. United HousingFoundation, Inc. v. Forman, 421 U.S. 837, 95 S.Ct. 2051, 2064 n.26, 44 L.Ed.2d 621 (1975); United Mine Workers of America v.Gibbs, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218(1966);Fields v. Fidelity General Insurance Co., 454 F.2d 682, 686 (7thCir. 1971).

In its amended complaint, Bunker Ramo alleges that between 1970and 1975 the defendants engaged in a scheme to defraud thecompany of more than $200,000 by falsifying purchase orders,delivery receipts, and invoices for business forms that were paidfor but never delivered. Bunker Ramo claims that at various timesthroughout this six-year period Cywan fraudulently submittedfalse purchase orders for business forms supposedly on order fromUBF and signed forged invoices and delivery receipts indicatingthat UBF had delivered the forms to Bunker Ramo's AmphenolIndustrial Division when in reality no such deliveries were made.It is alleged that UBF prepared and submitted false invoices toBunker Ramo and accepted payment in the amount of $217,763.08 forthese undelivered forms. Cywan supposedly received $16,000 inbribes and kickbacks from UBF for his part in the falsificationof receipts and purchase orders. The amended complaint furthercharges that the defendants fraudulently concealed theiractivities and prevented discovery of the misdeeds until Cywan'sfederal prosecution for income tax evasion in February, 1980,when the scheme was finally brought to light.

It is clear that commercial bribery may constitute a violationof section 2(c) of the Robinson-Patman Act.[1] Grace v. E.J.Kozin Co., 538 F.2d 170, 173 (7th Cir. 1976); Calnetics Corp. v.Volkswagen of America, Inc., 532 F.2d 674, 696 (9th Cir. 1976);Rangen, Inc. v. Sterling Nelson & Sons, 351 F.2d 851, 858 (9thCir. 1965). However, a plaintiff, to successfully invoke section2(c), must allege some competitive injury of the type which theRobinson-Patman Act was designed to protect against. The absenceof competitive injury is fatal to an antitrust claim even thoughthe complaining party may have a valid cause of action cognizablein state court under one or several common law theories.

As envisioned by Congress and interpreted by the courts,section 2(c) is designed to protect and promote competition amongbusinesses competing at the same functional level in themarketing chain. Such competition should be based upon the priceand quality of the goods rather than upon the ability of a buyeror seller to extract or pay, as the case may be, a commission orother compensation to one party or his agent in exchange forfavorable treatment. See Federal Trade Commission v. Henry Broch& Company, 363 U.S. 166, 174, 80 S.Ct. 1158, 1163, 4 L.Ed.2d 1124(1960); City of Gainesville v. Florida Power & Light Co.,488 F. Supp. 1258, 1280-81 (S.D.Fla. 1980). Thus, while a company maybe injured when a supplier bribes an employee of that company inorder to make a sale, the purchaser's injury is not cognizableunder the antitrust laws since it is not a "competitive injury"within the meaning of the statutory framework. Rather, it is thesupplier's competitors who have suffered competitive injury as aconsequence of the bribe and it is they who have standing to sueunder the antitrust scheme. As stated in Computer Statistics,Inc. v. Blair, 418 F. Supp. 1339, 1347 (S.D.Tex. 1976), "aplaintiff who cannot show competitive injury lacks standing tocomplain about payments although they literally fit within thelanguage of the statute." See also Larry R. George Sales Co. v.Cool Attic Corp., 587 F.2d 266, 272 (5th Cir. 1979) ("[o]nly ifPlaintiff was in the same business and in competition with [thedefendants] would he have standing under 15 U.S.C. § 15.");Rangen, Inc. v. Sterling Nelson & Sons, supra, 531 F.2d at 858(". . . the threat to competition posed by suchbribery, brought it within the terms of section 2(c)."); FalstaffBrewing Corp. v. Philip Morris, Inc., 1979-2 Trade Cases ¶ 62,814at 78,738 (N.D.Cal. 1979) ("[w]hether the alleged payments areregarded as commercial bribery or price discrimination, theyafford a basis for a section 2(c) claim by a competitor of thefirm making the payments.") (emphasis added).

In the case at bar, Bunker Ramo, a manufacturer of electronicand mechanical products, does not compete in any sense of theterm with UBF, a distributor of office and business forms. Theirrelationship is one of buyer and seller, and regardless of anycommon law cause of action Bunker Ramo may have against UBF orReif for fraudulent misrepresentation, commercial bribery, orconspiracy to induce a breach of fiduciary duty, the clear importof the cases cited above is that Bunker Ramo's injury is notcognizable under section 2(c) of the Robinson-Patman Act. LarryR. George Sales Co. v. Cool Attic Corp., supra; ComputerStatistics, Inc. v. Blair, supra.[2]

Accordingly, the section 2(c) commercial bribery claim will bedismissed for lack of subject matter jurisdiction.[3] It is soordered.

In the absence of a proper federal claim, the Court declinesto exercise jurisdiction over the pendent state law claims.[4]Courts and commentators generally agree that when a federal claimis dismissed for lack of subject matter jurisdiction, the courtneed not retain the pendent state claims in the absence of anyprejudice to the parties or the commitment of significantjudicial time and effort. See Housing Foundation, Inc. v. Forman,421 U.S. 837, 95 S.Ct. 2051, 2064 n. 26, 44 L.Ed.2d 621 (1975);Fields v. Fidelity General InsuranceCo., 454 F.2d 682, 686 (7th Cir. 1971); S. Schenkier, EnsuringAccess to Federal Courts: A Revised Rationale for PendentJurisdiction, 75 Nw.U.L.Rev. 245, 292-93 (1980).

This case has been pending on our calendar for less than oneyear, and the opinion issued today is the first ruling on amatter of substance since the case was filed. The remaining statelaw claims share a common threshold question regarding theasserted tolling of the applicable state statute of limitationsas a consequence of the defendants' alleged fraudulentconcealment of their acts from 1970 until February, 1980. Thisquestion must be resolved before the merits of the claims forfraudulent misrepresentation, commercial bribery, or breach offiduciary duty may be considered, and it may be just as easilydealt with in state as in federal court. Moreover, in Count V ofthe amended complaint, Bunker Ramo attempts to imply a privateright of action under Ill.Rev.Stat. ch. 38, § 29A-1 (1979), whichmakes it unlawful to offer or confer any benefit upon an employeewithout the consent of the employer with the intent to influencethe employee's conduct with respect to the employer's affairs.The existence of such a private right of action is apparently amatter of first impression in Illinois and it is moreappropriately dealt with initially in the courts of that state.

In sum, the parties will not be prejudiced by continuing thislitigation in state court now that the sole federal claim hasbeen disposed of on the motion to dismiss. Accordingly, thependent claims against UBF, Reif, and Cywan are dismissed withoutprejudice to a subsequent action in state court.[5] It is soordered.[6]

1. Section 2(c) of the Robinson-Patman Act states as follows:

(c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

2. Our disposition of the motion to dismiss on standing groundsrenders unnecessary any discussion of whether Bunker Ramo hasadequately alleged the requisite connection with interstatecommerce under section 2(c) and whether the action is otherwisebarred by the four-year statute of limitations notwithstandingthe allegations of fraudulent concealment.

3. Grace v. E.J. Kozin Co., 538 F.2d 170 (7th Cir. 1976), the solecase relied upon by Bunker Ramo in opposition to defendants'motion to dismiss, is distinguishable from the case at bar. InGrace, the plaintiff was the trustee in bankruptcy for S.I.Greene Company, a competitor of the defendant Kozin in thewholesale frozen seafood market. Kane, Greene's

vice-presidentand sales manager, arranged for Greene to purchase substantialquantities of seafood from Kozin as an agent in sales tocustomers other than Greene. In connection with these sub rosaarrangements, Kozin agreed to pay Kane one-half the profits fromthe sales to Greene and other customers procured by Kane. Thecourt of appeals concurred in the district court's finding "thatKozin and Kane had embarked upon a joint enterprise whereby theypurchased seafood products and resold them to Greene and othercompanies." 538 F.2d at 173. The court found the requisitecompetitive injury to sustain a cause of action under section2(c) in Greene's loss to Kane of commissions from the jointventure with Kozin to which Greene would have been entitled hadit rather than Kane participated in the enterprise. The courtfurther found that:

the net effect of Kozin's bribery was indirect price discrimination with regard to the prices charged Greene by suppliers potentially common to Kozin and Greene. Thus, because of Kane's interest in the transactions, Greene acquired goods at a price higher than that paid by Kozin or than that which would have been paid by Greene purchasing independently or as Kozin's equal partner. This injury is entitled to redress under Section 2(c).

587 F.2d at 174.

In the case at bar, Bunker Ramo and UBF were not competitors orpotential joint venturers in the business form market so thatUBF's arrangement with Cywan did not deprive Bunker Ramo ofpotential commissions or sales in new markets. Furthermore,Bunker Ramo and UBF do not share common suppliers and thecomplaint, even as amended, does not contain any allegation thatBunker Ramo would have been able to acquire business forms at acheaper price absent the payments to Cywan. The key factor inGrace was that Greene and Kozin were competitors and thusGreene's competitive injury was cognizable under the antitrustlaws. The lack of competition between Bunker Ramo and UBFdistinguishes the two situations and dooms Bunker Ramo'sRobinson-Patman Act claim on the ground that it lacks standing tocomplain of the illegal payments to its employee in federalcourt.

4. Although Cywan has not filed a motion to dismiss the amendedcomplaint as it relates to him, the Court may dismiss the stateclaims against Cywan for lack of subject matter jurisdiction onits own motion pursuant to Fed.R.Civ.P. 12(h)(3). Choudhry v.Jenkins, 559 F.2d 1085, 1091 (7th Cir. 1977).

5. As Professor Moore has noted, "ordinarily a judgment dismissingan action or otherwise denying relief for want of jurisdiction,venue, or related reasons does not preclude a subsequent actionin a court of competent jurisdiction on the merits of the causeof action originally involved." 1B Moore's Federal Practice ¶0.405[5] at 659 n. 13 (2d ed. 1980).

6. In light of the Court's disposition of this matter on themerits, plaintiff's pending motion to vacate the earlier orderstaying discovery is moot.