Superior Production Partnership v. Gordon Auto Body Parts Co., Ltd. et al Doc. 110

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Superior Production Partnership, d/b/a PBSI, :

Plaintiff, :

v. : Case No. 2:06-cv-0916

Gordon Auto Body Parts Co., Ltd., et al., : JUDGE SMITH

:

Defendants.

OPINION AND ORDER

This predatory pricing case is before the Court to consider two motions. The first was filed by plaintiff Superior Production Partnership d/b/a PBSI. That motion requests the Court either to compel compliance with, or to clarify, the Court's order of December 2, 2008. The second is an agreed motion to extend the case schedule.

I.

As the Court noted in the December 2, 2008 order, PBSI is in the business of manufacturing and selling replacement hoods for the automobile industry. Its primary claim in this case is that, after it entered that market, Gordon, a competitor in the market, lowered its prices below cost in order to drive PBSI out of the market. The predatory pricing claim relates to four separate types of hoods. PBSI has also asserted a claim involving a fifth hood, designed for a 1997 Ford pickup and having to do with the materials which Gordon used to manufacture that hood.

One of the issues raised by PBSI's prior motion to compel was whether Gordon had produced certain agreements and related documents which were requested by Request #12 of Plaintiff's

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First Request for Production of Documents. That request described the desired documents as those which related or referred to any agreements by and among Gordon and several other entities relating either to the pricing of replacement hoods for trucks, or to the concept of pricing, sharing tooling, or refraining from competition in any product line. In Section I(F), p. 13 of the December 2, 2008 Opinion and Order, the Court described the issue as follows:

> The last discovery issue ... relates to certain agreements between Gordon and its competitors. The parties appear to have a fundamental disagreement concerning the nature of these documents.
>
> PBSI originally requested documents which would show whether there were any agreements among four different companies related either to pricing of hoods, sharing tooling for the production of these hoods, or limiting competition in certain geographic areas. In response, Gordon stated that it had no joint tooling agreements relating to the hoods at issue in this case. In its most recent filing, PBSI asserts that Mr. Pan admitted in his deposition that such agreements do exist and that he had already collected them and given copies to counsel. If that were true, it would not be burdensome for Gordon to produce these same agreements to PBSI.
>
> Gordon asserts in its most recent memorandum that although it is a party to a number of tooling agreements, none of those agreements involve any of the five hoods at issue in this case. There are apparently production agreements which were discussed during the depositions taken in Taiwan, but these are not tooling agreements. Consequently it reiterates that its initial statement concerning the lack of relevant tooling agreements is accurate.

The Court expressed some difficulty in resolving this issue. It credited the deposition testimony cited by Gordon to the effect that no tooling agreements existed for the five hoods at issue in this case. The Court noted, on the other hand, that the original request was not limited to tooling agreements but also

asked for pricing agreements and agreements which might limit competition. The Court assumed, for purposes of its ruling, that the production agreements referred to in Mr. Pan's deposition testimony had been produced, and also assumed, based on the fact that the parties did not specifically address agreements limiting competition in specific geographic areas, that there were none. Based upon these facts and assumptions, the Court ruled that Gordon had no further obligation to produce documents responsive to this request.

In its motion to compel or clarify, PBSI appears to assert that, contrary to the Court's assumption, it did not receive all of the production agreements which had been collected by Gordon. Rather, it received only two production agreements, and two other documents related to those agreements. It has asked Gordon to produce additional production agreements, but, according to the supporting memorandum, Gordon has taken the position that it is not obligated to produce any more documents responsive to Request #12 because the Court accepted its representation that the only tooling agreements in existence are irrelevant, and the Court did not order the production of these additional production agreements. PBSI contends that even production agreements that do not relate directly to the hoods at issue in this case are relevant because they "show Gordon's proclivity to enter into agreements with its competitors," Motion to compel or clarify, at 8, and they may also demonstrate how Gordon was able to recoup any losses occasioned by its alleged predatory pricing of those hoods. Id. at 9. PBSI also claims that there are minutes of meetings where those agreements were discussed and that these minutes should be produced along with the agreements.

Gordon's response confirms the fact that two production agreements which covered the products at issue in this case were both produced at or before Mr. Pan's deposition and discussed in

that deposition. It also confirms that there are no tooling agreements for these hoods. It does not directly address PBSI's assertion that there are other production agreements that pertain to pricing of other products, but does argue that any such agreements are irrelevant and that the Court, by declining to order their production, has already reached this conclusion. Gordon also notes that PBSI did not file a timely motion asking the District Judge to review the December 2, 2008 order and that the instant motion is really a request that the Court reconsider its prior order, rather than either clarify it or compel compliance with it.

In reply, PBSI continues to argue that the Court apparently assumed, incorrectly, that all production agreements referred to by Mr. Pan had been produced - even the ones which do not relate to the hoods in question. It also advance a new argument (which a party ordinarily may not do in a reply brief) - that both the tooling and production agreements must be produced because they were reviewed and relied upon by Gordon's expert in his report. Because the report is dated March 6, 2009, which is after the date of PBSI's initial motion, the Court assumes that this argument was not available to PBSI when it filed that motion.

II.

Before discussing the significance of Gordon's expert witness report, the Court will address the question of whether the prior order contemplated the production of any additional agreements or associated documents as requested by Document Request #12. The short answer is that it did not.

One thing is clear. The Court understood, when making its ruling, that there were tooling agreements relating to parts other than the hoods at issue here. It concluded that these agreements were irrelevant. Thus, there is no clarification needed on that issue, and the order did not obligate Gordon to

produce additional tooling agreements.

The issue about production agreements is less clear. The Court's assumption that some production agreements were produced was correct, and it now appears that the ones produced are the only ones directly related to the production of truck hoods. However, the Court did not address directly the relevance of production agreements for other parts. Having now considered the additional arguments advanced by PBSI concerning the discoverability of these agreements, the Court is not persuaded that it should order their production. To the extent that they might show a "proclivity" to enter into agreements with competitors, the Court thinks it extremely unlikely that PBSI can make a convincing argument that such evidence is admissible under either Fed.R.Evid. 403 or 406, so that the request is not reasonably likely to lead to the discovery of relevant evidence based on that rationale. Further, the argument that these agreements may show how Gordon could have recouped any losses it sustained by underpricing its truck hoods proves too much. Under that theory, every single financial document maintained by Gordon, no matter what it related to, would be relevant because it might show that Gordon was recouping its losses from other parts of its business operation. Nothing which the parties have said about these unproduced production agreements - and little has been said in terms of what subjects they actually cover, or how they relate in time to the period of alleged predatory pricing - makes them more relevant on this subject. Thus, to the extent that the Court did not fully consider these arguments in connection with its prior order, it now considers and rejects them.

III.

That leaves only the question of whether the fact that Gordon has apparently chosen to show some of these agreements to

its expert, and he has produced a written opinion that appears to take them into account, compels a different result. Fed.R.Civ.P. 26(a)(2) provides that expert witness disclosures must include "the data or other information considered by the expert in forming" the opinions expressed in the report. This Court, citing to Regional Airport Authority of Louisville v. LFC, LLC, 460 F.3d 697, 715 (6th Cir. 2006), has held that "the rule was worded specifically to provide the opposing party with access to all materials reviewed or considered by the expert ...." United States v. American Elec. Power Service Corp., 2006 WL 3827509 (S.D. Ohio December 28, 2006). There, the Court ordered production of portions of a report which had been redacted to exclude privileged information because, once that privileged information was disclosed to the expert witness and formed part of the basis of the expert's opinion, it became discoverable notwithstanding the privilege which might otherwise have attached to the document.

The reasoning of the Court's American Elec. Power Service Corp. decision would seem to apply with even more force to documents which are not privileged but merely (at least according to the party refusing to produce them) irrelevant. Additionally, there is some logic to PBSI's argument that it is difficult for a party to contend that documents which it has supplied to its expert, and which are discussed in some detail in the expert's report, are nonetheless irrelevant to the case. The problem with adopting that rationale, and ordering Gordon to produce the documents now, is twofold. First, the argument was presented for the first time in a memorandum to which the Court's rules do not permit a response. Second, it is unclear whether, once this argument surfaced, the parties engaged in the required extrajudicial effort to resolve the issue without involving the Court. Certainly, there is no evidence before the Court which

would indicate that PBSI renewed its request for these documents once the expert report was disclosed, or that Gordon took the position that it had no obligation to produce documents discussed in its expert report. For both these reasons, the Court will not grant relief on the basis of this argument. It does, however, commend both the American Elec. Power Service Corp. decision to the parties, as well as the need to engage in a good faith discussion about whether the documents have now become legitimate subjects of discovery even if they had not been so prior to March 6, 2009. If, following those efforts, the matter remains unresolved, the parties should contact the Court to discuss how to proceed. The Court will hold any revision to the case schedule in abeyance for ten days in order to allow the parties to have the required discussion and to contact the Court for further guidance.

IV.

Based on the foregoing, PBSI's motion to compel or clarify (#95) is denied. The motion to revise the case schedule (#109) is held in abeyance. Within ten days, the parties shall advise the Court either that they have resolved the issue about production of the reports referred to in the expert witness' March 6, 2009 report, or that they need a conference on that issue.

Any party may, within ten (10) days after this Order is filed, file and serve on the opposing party a motion for reconsideration by a District Judge. 28 U.S.C. §636(b)(1)(A), Rule 72(a), Fed. R. Civ. P.; Eastern Division Order No. 91-3, pt. I., F., 5. The motion must specifically designate the order or part in question and the basis for any objection. Responses to objections are due ten days after objections are filed and replies by the objecting party are due seven days thereafter. The District Judge, upon consideration of the motion, shall set aside any part of this Order

found to be clearly erroneous or contrary to law.

This order is in full force and effect, notwithstanding the filing of any objections, unless stayed by the Magistrate Judge or District Judge. S.D. Ohio L.R. 72.4.

/s/ Terence P. Kemp
United States Magistrate Judge