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SUPREME COURT
STATE OF NEW YORK MONROE COUNTY

GEORGE MILLER BRICK CO., INC.,

Plaintiff,

-vs-

INDEX # 1995/01001

STARK CERAMICS, INC.,

Defendant.

APPEARANCES ON SUBMITTED PAPERS:

Attorney for Plaintiff: *Mark Hannabury, Esq.*
Law Offices of Charles W. Rogers, Esq.
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Rochester, New York 14614

Attorney for Defendant: *Thomas B. Cronmiller, Esq.*
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Rochester, New York 14604

DECISION and ORDER

Thomas A. Stander, J.

The Court issued a Scheduling Order on May 27, 2001 pertaining to the scheduling of pre-trial matters. The Plaintiff, George C. Miller Brick Co., Inc. ("Miller Brick") was ordered to file a motion relating to proposed jury instructions, matters *in limine*, and for the purpose of identifying

outstanding issues as to liability. The Defendant, Stark Ceramics, Inc. ("Stark") was directed to serve any responding papers to Plaintiff's motion, as well as any cross-motion identifying issues concerning the measure of damages to which the Plaintiff may be entitled.

In response to this Scheduling Order the Plaintiff submitted "Plaintiff's Requests for Jury Instructions".[1] There is no other motion application by the Plaintiff.

The Defendant, Stark Ceramics, Inc., submits in response to the Scheduling Order a Motion and Proposed Jury Instructions. The Defendant's motion seeks the following relief:

1. Limiting or precluding the Plaintiff from offering any proof at trial with respect to damages beyond the loss of net profits with respect to the sale of Structural Glazed Facing Tile ("SGFT") to Allied Builders, Inc., in connection with the Albion Correctional Facility expansion;

2. Limiting or precluding the Plaintiff from offering any proof at trial regarding the termination of Miller Brick, as a distributor of Stark Ceramics, including any alleged damages flowing therefrom;

3. Denying or disallowing the Plaintiff any damages under the Donnelly Act, including treble damage, costs and attorneys fees;

4. Limiting or precluding the Plaintiff from offering any evidence at trial concerning a "minimum resale price fixing" conspiracy;

5. Limiting or precluding the Plaintiff from offering any evidence at trial concerning a "bid rigging" conspiracy'

6. Limiting or precluding the testimony by Miller Brick's experts, Frank Dorkey, David Christa and Loren Gonzer, at trial;

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1 Plaintiff's submission was due by August 6, 2001. The Request for Jury Instructions was sent with a letter dated August 17, 2001, which was received by the Court on August 21, 2001. Technically this request is untimely; however, the purpose of these documents was to clarify and delineate the remaining issues pending before the Court. Therefore, the Court will accept the late papers.

7. Denying Miller Brick's proposed request for jury instructions, dated August 18, 2001, in their entirety;

8. Granting the jury charges proposed by Stark Ceramics, in their entirety;

9. Bifurcating the trial on the issues of liability and damages;

10. Granting Stark Ceramics leave to submit alternative and/or supplemental jury charges, if necessary;

11. For such other and further relief as the Court deems just.

PROCEDURAL HISTORY

This Court issued a Decision and Order dated November 30, 1999. This Decision and Order denied a motion by Miller Brick for an order of summary judgment that Stark violated New York General Business Law §340, *et.seq.* and that Stark's violation of General Business Law §340 was the proximate cause of damages sustained by the Plaintiff. And it granted the motion of the Defendant, Stark, for summary judgment dismissing the Complaint.

The Plaintiff moved for reargument of the summary judgment motions. By Decision and Order of May 1, 2000 the Court granted leave to reargue the summary judgment motions. Upon such reargument the Court granted summary judgment to Stark dismissing the Complaint of the Plaintiff and denied the motion of Miller Brick for summary judgment.

Upon appeal the Appellate Division of the Fourth Department modified the Decision by denying the motion of the Defendant, Stark, and reinstating the Amended Complaint of the Plaintiff. The Appellate Division also affirmed this Court's denial of the Plaintiff's motion for summary judgment seeking a determination that Stark violated the Donnelly Act as a matter of law. The Appellate Court held that there was a triable issue of fact whether the Defendant violated the Donnelly Antitrust Act. The Court went on to state

> [i]n particular, the distribution agreement, a letter from defendant's representative to the distributors, 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. In addition, the specifics of the telephone conversation between representatives from plaintiff and defendant concerning bidding on the State project are in dispute.

George C. Miller Brick Co., Inc. v. Stark Ceramics, Inc., 281 A.D.2d 960,961 (4th Dept. 2001).

LAW

The Donnelly Act declares the following:

> [E]very contract, agreement, arrangement or combination whereby . . . [c]ompetition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained [is] against public policy, illegal and void.

General Business Law §340. "[A]s construed by State and Federal Courts, the anti-trust laws prohibit only "unreasonable" restraints on trade." Anheuser-Busch, Inc. v. Abrams, 71 N.Y.2d 327,333 (1988).

The Court of Appeals has stated the standard as follows:

> While most trade practices are analyzed under a "rule of reason" standard – that is, it must be shown that under the circumstances there is an unreasonable restraint of trade – some activities are deemed so pernicious to competition that they are found to be per se unreasonable (citation omitted). Among these are price fixing . . .

People v. Rattenni, 81 N.Y.2d 166, 172-73 (1993). At the Federal level, in antitrust actions under the Sherman Act for distributor-termination cases, concerted action to set prices "have been *per se* illegal since the early years of national antitrust enforcement." Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752,761 (1984)(*citing* Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S, 373, 404-409 (1911)). Price-fixing agreements are subject to *per se* treatment. An antitrust Plaintiff claiming concerted price fixing "must present evidence sufficient to carry its burden of proving that there was such an agreement." Monsanto 465 U.S. at 763.

To establish an agreement or conspiracy to fix prices there must be something more than an inference from highly ambiguous evidence.

> [T]he antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.' (citation omitted).

Monsanto, 465 U.S. at 764, 768.

ISSUES REMAINING IN THIS CASE

The Plaintiff alleges in its Complaint that the actions of Stark constitute bid rigging and price fixing in violation of the Donnelly Act, at §340 of the General Business Law. Specifically, the Plaintiff asserts an antitrust violation based on an alleged agreement that Michael Baklarz, on behalf of Stark, and Joseph Degnan, for Miller Brick, made to rig bids and exchange pricing information among competitors for the New York State prison expansion projects. Plaintiff asserts that this arrangement is the concerted price fixing necessary to demonstrate a violation of the Donnelly Act.

On this motion and submission of proposed jury instructions both parties spend a considerable amount of time arguing over the interpretation of the Decision of the Appellate Division, Fourth Department. In fact, this Court foresaw the interpretation difficulty with the Appellate Division

Decision and for that reason requested the proposed jury instructions well in advance of trial. The Appellate Division Decision holds that a triable issue of fact exists whether Defendant violated the Donnelly Antitrust Act. This is the issue to be tried to the jury.

The Plaintiff states that its claim is for a *per se* violation of the Donnelly Act for vertical price-fixing and bid rigging. The allegations are based on a vertical relationship between a distributor and the manufacturer. Plaintiff concedes that its Complaint is legally insufficient to allege a concerted action on non-price restrictions, which are judged under the rule of reason standard. This concession focuses and narrows the Plaintiff's claim to whether there is a *per se* violation of the Donnelly Act.

Based on the Appellate Division decision and the admissions of the Plaintiff concerning its claims, the triable issue before this Court is whether the Defendant, Stark, violated the Donnelly Antitrust Act. The Plaintiff has the burden of proving that there was an unlawful agreement, arrangement, or conspiracy for price fixing or bid rigging.

TRIAL MOTIONS OF THE DEFENDANT

A. BIFURCATION OF TRIAL

The motion by the Defendant to bifurcate the trial in this matter on the issues of liability and damages is **GRANTED**.

B. PROPOSED JURY INSTRUCTIONS

The proposed Jury Instructions submitted on this motion will be held by the Court until the trial date is scheduled. Both parties shall submit new proposed jury instructions and a proposed verdict sheet based upon this Decision and separating the liability charges and damages charges.

The Court will contact counsel for a pre-trial conference for the purpose of scheduling submission dates for the proposed jury instructions and verdict sheet and to set a trial date.

C. MOTIONS IN LIMINE

The Defendant requests numerous orders limiting or precluding the Plaintiff from offering certain proof at trial. Each request is referenced by the number in the motion.

i. Motions Related to Damages

1. Limiting or precluding the Plaintiff from offering any proof at trial with respect to damages beyond the loss of net profits with respect to the sale of Structural Glazed Facing Tile to Allied Builders, Inc., in connection with the Albion Correctional Facility expansion.
2. Limiting or precluding the Plaintiff from offering any proof at trial regarding the termination of Miller Brick, as a distributor of Stark Ceramics, including any alleged damages flowing therefrom.
3. Denying or disallowing the Plaintiff any damages under the Donnelly Act, including treble damage, costs and attorneys fees.

These motions in limine relate all or in part to the issue of damages. To the extent they address issues of damages, these motions in limine are premature. Motions on damages will be addressed prior to the commencement of any trial on the damages. To the extent #2 seeks limitation of testimony as to the termination of George Miller Brick as a distributor in the liability portion of the trial, that application is GRANTED.

ii. Evidence on Liability

4. Limiting or precluding the Plaintiff from offering any evidence at trial concerning a "minimum resale price fixing" conspiracy.
5. Limiting or precluding the Plaintiff from offering any evidence at trial concerning a "bid rigging" conspiracy.

These motions in limine are DENIED. The Appellate Division, Fourth Department determined that there is a triable issue of fact whether Defendant violated the Donnelly Antitrust Act, which prohibits "every contract, agreement, arrangement or combination" that unreasonably restricts business. The issue at trial is whether there was a *per se* violation of the Donnelly Antitrust Act by the Defendant.

iii. Expert Testimony

6. Limiting or precluding the testimony by Miller Brick's experts, Frank Dorkey, David Christa and Loren Gonzer, at trial

This motion in limine is premature. Issues regarding experts shall be determined at the time of trial.

ORDER

Based upon the papers submitted in support of and in opposition to this motion, the above Decision, and after due deliberation, it is hereby

ORDERED that the motion of Defendant, Stark Ceramics, Inc. for the relief requested is GRANTED, in part, and DENIED, in part; it is further

ORDERED that the motion of Defendant, Stark Ceramics, Inc. to bifurcate the trial in this action on the issues of liability and damages is GRANTED; it is further

ORDERED that the motions in limine of Defendant, Stark Ceramics, Inc. are decided as set forth in the above Decision.

ORDERED that the motion of Defendant, Stark Ceramics, Inc. to deny Plaintiff's proposed request for jury instructions, dated August 18, 2001, in their entirety, and to grant the jury charges proposed by Defendant, in their entirety, are both DENIED, without prejudice; and it is further

ORDERED that both parties shall submit new proposed jury instructions and a proposed verdict sheet based upon this Decision, and separating the liability charges and damages charges, in accordance with a schedule for submission to be set at a conference with the Court.

Dated: May 20, 2002
Rochester, New York

THOMAS A. STANDER
Supreme Court Justice

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