SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: C E Ramos PART 53

Index Number : 651444/2010
WORLDHOMECENTER.COM, INC.
vs.
QUOIZEL, INC.
SEQUENCE NUMBER : 002
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

is motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with accompanying memorandum decision and order.

Dated: 10/7/11

CHARLES E. RAMOS J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION
----------X

WORLDHOMECENTER.COM, INC.,

Plaintiff,

-versus-

Index No.
651444/10

QUOIZEL, INC.,

Defendant.

----------X

Charles Edward Ramos, J.S.C.:

In motion sequence 002, the defendant Quoizel, Inc. ("Quoizel") moves pursuant to CPLR 3211(a)(7) to dismiss the amended complaint of the plaintiff Worldhomecenter.com, Inc. ("WHC") with prejudice for failure to state a cause of action.

Background

WHC commenced this action alleging that Quoizel's enforcement of its Internet Minimum Advertised Price policy (the "IMAP") is a violation of New York General Business Law (NYGBL) § 369-a and by extension, NYGBL § 340 (the "Donnelly Act").

As alleged in the amended complaint, WHC is a retailer of home improvement products that sells products and provides assistance to customers via telephone and two websites, "Homecenter.com" and "Supplyhouse.com" (Complaint[1], ¶ 6). Quoizel is a lighting and home accessories manufacturer whose

[1] Amended Complaint, Okin Aff., Exhibit A.

products were regularly advertised and sold on WHC's websites (*Id.* at ¶ 7).

Traditionally, WHC purchased Quoizel products directly from Quoizel, Quiozel's exclusive distributors, and other independent distributors (*Id.* at ¶ 8). Due to the low overhead and maintenance associated with being an online retailer, WHC was able to offer Quiozel's products at steep discounts as compared to traditional "brick and mortar" retailers (*Id.* at ¶ 9).

In late 2007, Quiozel internally implemented the IMAP, which allegedly prohibits any internet retailer, such as WHC, from communicating a price below the IMAP's stated minimum price on Quiozel's products or selling Quiozel's products at a price below the IMAP's stated minimum price (*Id.* at ¶ 15). The IMAP provides that any violation of its terms will result in the termination of a retailer's ability to resell Quiozel's products (*id.*). In enforcing the IMAP, Quiozel has refused to ship and fill orders submitted by WHC, or deal directly with WHC, unless and until WHC complies with the IMAP (*Id.* at ¶ 17).

On September 2, 2010, WHC commenced this action alleging that it has been damaged by Quiozel's enforcement of its IMAP because it is unlawfully being denied the right to sell Quiozel's products at any price the market will bear (*Id.* at ¶ 25).

In late December 2010, Quoizel moved to dismiss the original complaint (MS 001). Thereafter, the parties entered into a

stipulation whereby Quoizel's motion to dismiss was withdrawn, and WHC amended the original complaint. On January 28, 2011, WHC filed its amended complaint (the "Complaint") asserting causes of action for declaratory, compensatory, and injunctive relief for violations of NYGBL §§ 340 and 369-a (Memo. In Supp., p. 3).

In this instant motion, Quoizel now moves to dismiss WHC's Complaint with prejudice pursuant to CPLR § 3211(a)(7).

Discussion

Pursuant to CPLR § 3211(a)(7), a complaint will be dismissed if "the pleading fails to state a cause of action" (CPLR 3211 [a][7]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005]). Generally, it is well settled that on a 3211(a)(7) motion, "the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true" (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172 [1st Dept 2004]). However, the general presumption that the facts pleaded are true does not apply to "allegations consisting of bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration" (*Tal v Malekan*, 305 AD2d 281 [1st Dept 2003], *appeal denied* 100 NY2d 513 [2003]).

WHC's first cause of action for violations the Donnelly Act alleges that Quiozel's IMAP constitutes an unenforceable vertical price fixing contract pursuant NYGBL § 369-a (Complaint, ¶ 37). WHC further alleges that Quiozel's attempted vertical price fixing constitutes a *per se* violation of the Donnelly Act (*Id.* at ¶ 40). As a result of these violations, WHC is seeking over $1 million in damages.

Quiozel counters that NYGBL § 369-a does not render any violating agreements illegal, but merely unenforceable. Consequently a violation of NYGBL § 369-a cannot be the basis for a violation of the Donnelly Act. Furthermore, Quiozel asserts that the IMAP pertains only to advertising, not pricing, as reflected in the terms of IMAP, which provides that "[d]ealers and customers are free to establish their own resale prices whether or not in accordance with IMAP" (Okin Aff., Ex. B).

WHC argues that its Donnelly Act cause of action should be construed under the *per se* analysis instead of the "rule of reason" analysis. To this extent, WHC's papers only advance arguments in favor of the *per se* analysis. (Mem. In Opp., p. 15).

NYGBL § 369-a provides that "[a]ny contract provision that purports to restrain a vendee of a commodity from reselling such commodity at less than the price stipulated by the vendor or producer shall not be enforceable or actionable at law."

In contrast, the Donnelly Act declares illegal and void "[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" (Gen Bus § 340 [1]).

"[T]he Donnelly Act - often called a 'Little Sherman Act' - should generally be construed in light of Federal precedent and given a different interpretation only where State policy, differences in the statutory language or the legislative history justify such a result" (*Anheuser-Busch, Inc. v Abrams*, 71 NY2d 327, 335 [1988]).

When considering Donnelly Act violations, courts generally apply the "rule of reason" analysis, which requires a showing of an unreasonable restraint of trade practice under the circumstances (*People v Rattenni*, 81 NY2d 166, 171-172 [1993]).

"The decision to apply the *per se* rule turns on whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output...or instead one designed to increase economic efficiency and render markets more, rather than less, competitive" (*Northwest Wholesale Stationers, Inc. v Pacific Stationery & Printing Co.*, 472 US 284, 289-290 [1985]).

In a recent decision, the United States Supreme Court restricted the use of the *per se* analysis to practices "that would always or almost always tend to restrict competition and decrease output" (*Leegin Creative Leather Prods. v PSKS, Inc.*, 551 US 877, 894 [2007]). Under its reasoning, a practice must result in manifestly anticompetitive effects and be devoid of any redeeming virtue to justify the use of the *per se* analysis (*id.* [internal quotations omitted]).

Furthermore, the court in *Leegin* determined that "[v]ertical agreements establishing minimum resale prices can have either procompetitive or anticompetitive effects, depending upon the circumstances in which they are formed" (*Id.* at 894).

Consequently, this Court must consider WHC's Donnelly Act cause of action under the "rule of reason" analysis, and not, as WHC asserts, under the *per se* analysis. However, WHC only asserts allegations pertaining to its *per se* theory of liability. Moreover, WHC has not cited any persuasive authority, in light of *Leegin*, that supports its theory that a violation of NYGBL § 369-a constitutes a *per se* violation of the Donnelly Act.

In addition, WHC's first cause of action fails to allege the required elements when pleading a cause of action for a violation of the Donnelly Act. "To state a claim under the Donnelly Act, a party must: (1) identify the relevant product market, (2) describe the nature and effects of the purported conspiracy, (3)

allege how the economic impact of that conspiracy is to restrain trade in the market in question, and (4) show a conspiracy or reciprocal relationship between two or more entities"(*Benjamin of Forest Hills Realty*, Inc. *v Austin Sheppard Realty, Inc.*, 34 AD3d 91, 94 [2d Dept 2006]).

Therefore, WHC's complaint must be dismissed because the Complaint is completely devoid of any facts from which a cause of action under the "rule of reason" analysis can be gleaned.

WHC argues in its second cause of action that it is entitled to a declaration that the IMAP is void and unenforceable pursuant to NYGBL § 369-a.

The plain language of the NYGBL § 369-a unambiguously provides that the statute renders certain contracts void and unenforceable, unlike the Donnelly Act, which renders certain contracts and agreements illegal. Clearly, if the legislature intended NYGBL § 369-a to render the subject contracts illegal, it clearly could have done so.

Generally, "[w]here statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used" (*Matter of Fields v New York City Campaign Fin. Bd.*, 81 AD3d 441, 446 [1st Dept 2011] [internal quotations omitted], *lv denied* 2011 N.Y. LEXIS 2181 [2011]).

WHC fails to provide any basis for this Court to enforce an interpretation of NYGBL § 369-a that is contrary to the plain meaning of the statute by determining that Quiozel's IMAP is illegal.

Additionally, NYGBL § 369-a applies to contracts, but the IMAP clearly provides that it "is a unilateral policy decision by Quiozel" and that "Quiozel does not ask for, nor will it accept any assurance of compliance or agreement from a Dealer or Customer regarding IMAP" (*id.*). "A manufacturer's independent acts to set minimum resale prices, without seeking agreement from its retailers, do not amount to a contract" (People v Tempur-pedic Intl., Inc., 30 Misc 3d 986, 994 [Sup Ct 2011] *citing Monsanto Co. v Spray-Rite Serv. Corp.*, 465 US 752, 761 [1984]).

Therefore, WHC's second cause of action is dismissed. The IMAP does not constitute an unenforceable contract under NYGBL § 369-a because it is a unilateral policy enacted by Quiozel.

WHC's third cause of action seeking to enjoin Quiozel from implementing its IMAP must be denied as well because WHC has failed to demonstrate a likelihood of success on the merits.

Despite Quiozel's representations that the IMAP is applicable only to the advertised pricing of Quiozel's products, Brian Okin, president of WHC, attests that Quiozel salespeople

have berated him for advertising and selling Quiozel's products below a certain price point (Okin Aff., ¶ 10).

Furthermore, WHC submits a letter from Quiozel prohibiting any discounts or promotions that would lower the price of its products below the IMAP (Okin Aff., Exhibit M). The language of the letter seemingly supports WHC's contention that Quiozel is applying the IMAP to more than just the advertised price.

Based on this evidence, the Court will permit WHC leave to amend its Complaint to allege facts that would support a "rule of reason" analysis for a cause of action for a violation of the Donnelly Act.

Accordingly, it is

ORDERED that Quiozel's motion to dismiss the amended complaint is granted without prejudice, and it is further

ORDERED and DECLARED that WHC is not entitled to a declaration that Quiozel's IMAP is void and unenforceable pursuant to NYGBL § 369-a, and it is further

ORDERED that WHC is granted leave to serve a second amended complaint so as to replead its causes of action in conformity with this Court's decision herein within thirty (30) days of service of this decision and order with notice of entry. In the event that WHC fails to serve its second amended complaint within such time, leave to replead shall be deemed denied and the action shall be dismissed with prejudice.

This constitutes the decision and order of this court.

Dated: October 7, 2011

ENTER:

J.S.C.

CHARLES E. RAMOS