Forever Living Products v. Blannter, 1986 WL 969 (D. Arizona 1986) (Not Reported)

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Forever Living Products v. Blannter, 1986 WL 969 (D. Arizona 1986) (Not Reported)

Case: Forever Living Products v. Blannter (1986)

Subject Category: Anti-Trust

Agency Involved: Private Civil Suit

Court: U.S. District Court, Arizona

Case Synopsis: The District Court was asked to determine on summary judgment if Forever Living was liable for anti-trust law violations for prohibiting its distributors from concurrently marketing competing full strength aloe vera products.

Legal Issue: Is a company liable for anti-trust law violations if it prohibits its distributors from carrying competing products?

Court Ruling: The Court found that a company can be liable under the anti-trust laws for prohibiting its distributors from carrying competing products, but that the regular prerequisites in an anti-trust action apply in the MLM industry just like any other. To run afoul of the Sherman and Clayton Acts, a company's actions must result in an injury to competition. Because Forever Living held such a small

segment of the market in question, the court held that it could not exercise its market power to injure competition.

Practical Importance to Business of MLM/Direct Sales/Direct Selling/Network Marketing/Party Plan/Multilevel Marketing: MLM companies can contractually require distributors to not sell certain competing products, but they must be aware of the anti-trust implications of doing so. Without market power in the relevant geographic and product markets, violations of certain aspects of the Sherman or Clayton Acts is unlikely

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No. CIV 84-619 PHX RCB

Forever Living Products, Inc.

v.

May Blatter, and Gary and Debe Pilant, husband and wife.

No. CIV 84-619 PHX RCB

United States District Court; D. Arizona.

Filed April 29, 1986

BROOMFIELD, D.J.

Order, as amended May 9, 1986

*1 This case is before the court on plaintiff's motion for partial summary judgment re: defendant Blatter's counterclaim. The court held a hearing on the motion April 11, 1986, and on the basis of that hearing and the submissions of the parties, [FN1] the court concludes that partial summary judgment should be granted to plaintiff, Forever Living Products ("FLP").

FN1 F.R.C.P. 56(c) states that a motion for summary judgment must be served at least 10 days before the time fixed for the hearing and "the adverse party Prior to the Day of Hearing may serve opposing affidavits". Additional documents, unsupported by affidavits, were filed in this case on the day of the hearing. None of those were taken into consideration by the court in this decision. This case has been at issue since 8/27/84.

Facts

FLP sells a line of beauty and health care products containing substantial amounts of an ingredient known as aloe vera. Sales are made through a direct sales process using a system of independent contractor distributors who in turn engage a series of independent subdistributors, known as a "downline". All distributors and subdistributors receive their marketable products directly from FLP. These distributors are permitted to sell competing beauty and health care products but are precluded, upon pain of termination of their contract with FLP, from soliciting their downline subdistributors to sell competitors' products. Blatter was a distributor who sold several competing lines but has since terminated her relationship with FLP. [FN2]

FN2 Blatter has been declared to have "quit" her employ by a judge previously assigned to this case although she disputes that determination. Whether she quit or was terminated is not important to the instant ruling.

FLP filed its complaint against Blatter and others in April, 1984 and Blatter filed her answer and counterclaim in August. The basis of the counterclaim is that FLP prevented Blatter from using the downline she developed at FLP to sell other than FLP's products. The First Counterclaim to which the summary judgment now before the court is directed alleges violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2) and Section 3 of the Clayton Act (15 U.S.C. § 14).

Law

I. Sherman Act § 1: Restraint of Trade

It is necessary to establish the following elements to prove a violation of Section 1 of the Sherman Act:

(1) An agreement among two or more persons or distinct business entities;

(2) Which is intended to harm or unreasonably restrain competition;

(3) And which actually causes injury to competition.

Kaplan v. Burroughs Corp. [1980-1 TRADE CASES P 63,028], 611 F.2d 286, 290-291 (9th Cir. 1979), cert. denied, 447 U.S. 924 (1980); Gough v. Rossmoor Corp. [1978-2 TRADE CASES P 62,202], 585 F.2d 381, 386 (9th Cir. 1978) cert. denied, 440 U.S. 936 (1979).

To establish the first element of her Section 1 claim, Blatter must show an illegal conspiratorial agreement between FLP and the other distributors. See Monsanto Co. v. Spray-Rite Service Corp. [1984-1 TRADE CASES P 65,906], 104 S.Ct. 1464 (1984). Although Blatter's Opposition to the Motion for Summary Judgment states "[t]here is ample evidence of an agreement among two or more persons or distinct business entities in the instant case," the court has searched the record and finds a lack of any such evidence. The decision is not, however, based on this point.

*2 In order to prove the second and third elements, the Ninth Circuit has held that it is not only necessary to prove that the claimed anticompetitive conduct had an effect on defendant/counterclaimant Blatter's business, but it is also necessary to prove A) the relevant market and B) that there has been an adverse impact upon competition in the relevant market. "Even if sufficient proof of intent and causation are [sic] introduced, the elimination of a single competitor, standing alone, does not prove anticompetitive effect." Kaplan at 291 (citing Gough at 386). "Failure to produce substantial evidence of a relevant market and an injury to competition in that market entitles defendant to [summary] judgment. . . ." Kaplan at 291 (citing Gough at 389).

A. The Relevant Market Area

Defining the market is a two-step process. First, the field in which the plaintiff was engaged must be defined in geographic and distributional terms. Second, the product (or product line) that competes in that field must be determined. Since the parties herein agree on the geographic area, the two determinations may be referred to as defining, respectively, the "distributional market" and the "product market". JBL Enterprises, Inc. v. Jhirmack Enterprises, Inc. [1982-83 TRADE CASES P 65,199], 698 F.2d 1011 (9th Cir. 1983).

1. The Distributional Market: Plaintiff argues that the relevant distributional market is all types of outlets including but not limited to direct sales, drug stores, grocery stores, and health food stores, ("over-the-counter" or "OTC" outlets) which sell health and beauty aids. Defendant Blatter contends that the distributional market is limited to the market in which only direct sales of these products are made. There is no evidence submitted to support defendant's contention. In fact, defendant does not address the issue in her 31 page response. The court finds that the distributional market includes the direct sales market and all OTC outlets in the continental U.S.

2. The Product Market: Defendant contends that the "relevant product market does not consist of any product containing any amount of aloe vera marketed by any source, but, rather, the relevant product market consists of fullstrength aloe vera products marketed through a direct sales organization." Opposition to Plaintiff's Motion For Partial Summary Judgment re: Defendant Blatter's First Counterclaim, pp. 2-3. Once again, although defendant argues at length, there is no evidence in the record to support such a statement. Defendant cannot point to anything which would prove that full strength aloe vera beauty products are not interchangeable with other products of this type. Defendant attempts to distinguish the United States v. E.I. DuPont case [1956 TRADE CASES P 68,369], 351 U.S. 377, 76 S.Ct. 994, 100 L.Ed. 1264 (1956) where the Supreme Court found that cellophane products belonged

in the larger product market of all flexible storage wrap because all such products are reasonably interchangeable, i.e. consumers will generally use one just as readily as another. The DuPont case is indistinguishable from the case presently before the court. Defendant attempts to show, through the affidavit of Edna Hennessee, that FLP products are not interchangeable with other beauty and cosmetic products in the OTC market. "Consumers who purchase FLP products purchase the product not for its basic use as a health care or beauty product, but because they perceive full strength aloe vera products manufactured by FLP as superior to other beauty and health care products." Opposition, p. 5. A similar allegation was made in Ron Tonkin Gran Turismo v. Fiat Distributors [1980-81 TRADE CASES P 63,854], 637 F.2d 1376, (9th Cir. 1981) cert. denied, 454 U.S. 831 (1981). There the 9th Circuit rejected plaintiff's statement that "for 'a sizeable number of customers . . . [o]nly a Fiat, or a Lancia, will do.'" Rather, the court held that the relevant product market was all automobiles in general because the automobile industry has always shown a high cross-elasticity of demand. The same can be said of beauty and health care products. Beauty and health care products have an extremely high crosselasticity of demand and the fact that one product contains more of a single ingredient than any other product manufactured for the same purpose will not alter that result. The court finds that the relevant product market is all beauty and health care products, not full strength aloe vera products.

B. Injury to Competition in the Relevant Market

*3 The only evidence before the court on FLP's share of the relevant market [FN3] was submitted by FLP. The uncontroverted affidavits of Winifred Edwards and Cliff Evarts establish that FLP had a market share of .13% in 1982, FLP's peak production year. Evarts Aff., p. 3-4. The court finds that .13% is not a significant share of the beauty and health care products market and therefore the alleged restraints could not as a matter of law have the requisite adverse effect on competition.

FN3 Figures were submitted on the market defined above, i.e., all beauty and health care products distributed by direct sales and in OTC outlets throughout the continental U.S.

Defendant/counterclaimant argues extensively that there is a submarket of the relevant market which consists of full-strength aloe vera products. Brown Shoe Co. v. U.S. [1962 TRADE CASES P 70,366], 370 U.S. 294 (1962) establishes the criteria for the determination of a submarket. Of the factors to be considered, only one is applicable to this case: distinct customers. FLP does not have unique production facilities; there has been no showing of peculiar characteristics and uses; FLP may have distinct prices which are not changed because of what other health care and beauty product manufacturers may do, but the pressures of supply and demand did have an adverse impact on the sales of FLP products, which is in effect the same thing as changing prices to conform to market demand; the same can be said for sensitivity to price changes; there is an insufficient showing that FLP employs specialized vendors-in fact the downline or pyramid sales method is fairly common around the country.

Blatter argues that FLP does have distinct customers. "The purchasers of FLP products are persons who perceive the benefits of the Aloe Vera plant to be extremely beneficial. These customers would not be misled by products which contain only a small percentage of aloe vera as an ingredient and are willing to

pay the premium for full-strength aloe vera products." Opposition, p. 9. First, the evidence in support of this statement is insufficient to establish a claim that there is a submarket for full strength aloe vera products within the beauty and health care market. Second, the issue is not whether customers can be satisfied with less than full strength aloe vera, but are they. There is no evidence before this court that customers are not satisfied with less than full strength aloe vera products. Therefore, the court finds that there is not a submarket within the larger market of all beauty and health care products sold by direct sales and through direct sales in the continental U.S.

II. Sherman Act § 2: Monopoly & Attempt to Monopolize

The offense of monopolization rests upon the willful acquisition or maintenance of monopoly power in the relevant market. General Business Systems v. North Am. Philips Corp. [1982-83 TRADE CASES P 65,177], 699 F.2d 965, 971 (9th Cir. 1983) (Citations omitted). "The threshold consideration in establishing market power is the relevant market. A firm cannot impose monopoly prices if buyers are free to purchase a competitor's goods. Thus, all products that are reasonably interchangeable and so can be said to compete with each other for the same buyers' dollars, are included in the market definition." Id. at 972.

*4 The relevant market has already been established and the evidence presented establishes that FLP does not have monopoly power in that market.

In order to state a claim for attempted monopolization under section 2, Blatter must allege (1) specific intent to control prices or destroy competition in the relevant market, (2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose, and (3) a dangerous probability of success. Foremost Pro Color v. Eastman Kodak Co. [1983-1 TRADE CASES P 65,239], 703 F.2d 534, 543-44 (9th Cir. 1983). Blatter has simply made blanket allegations unsupported by any evidence which would show FLP attempted to monopolize the market. Summary judgment shall be granted for plaintiff/counterdefendant on Sherman Act § 2 claim.

III. Clayton Act § 3:

Section 3 of the Clayton Act, 15 U.S.C. § 14, states that

It shall be unlawful for any person engaged in commerce to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor where the effect is to substantially lessen competition or tend to create a monopoly in any line of commerce.

Blatter's Clayton Act claim is premised on the same allegation as the Sherman Act claims: that she "has been unable to market competing products and maximize the profitability of her downline as a result of the enforcement of FLP's prohibition on the solicitation of downline distributors for the purpose of

marketing competing products." The Clayton Act does not redress this claim. It only precludes FLP from contracting with its distributors on the condition that they not distribute competing products. There is no dispute that May Blatter was able to distribute competing products. In fact, she did distribute competing products. Therefore, there is no merit to Blatter's Clayton Act claim.

It Is Ordered granting plaintiff's motion for summary judgment;

It Is Further Ordered awarding plaintiff attorneys fees pursuant to A.R.S. § 12-341.01. Defendant/counterclaimant may file its opposition as to the amount to which plaintiff is entitled within 20 days and plaintiff may reply within 10 days hereafter. The hearing on the amount will be held contemporaneous with the trial of this cause.