F I LED
United StQtes Court -of ApPlZal
Tenth Circuit

rrsu STA'J'KS CUURT U~' APPEALS

July 26, 2005

FOR THE TENTH CI RCUIT

PATRICKFI R
Clerk

MEDICAL SUfPL Y CHAIN, INC.,

Plaintiff - Appellant,

,'

Nos. 04-3075 & 04-3102
(D.C. No. 03-CV-2J24-CM)
(D. Kan.),

GENERAL ELECTRJC COMPANY:
GENERAL ELECTR1C CAPITAL
BUSINESS ASSET FUNDING
CORPORATION; GE
TRANSPORTATION SYSTEM
GLOBAL SIGNALING. LLC~
JEFFREY IMMEL T,

Defendants - Appellees.

ORnER AND JUDGMENT·

Before LUCERO PORFIl~I(). and RA1.DOCK, CircuitJudges

A Iter examining the briefs and appellate record, this panel has determined unanimously 1.0 grant the parties' requests for decisions on the briefs without oral argument. See Fed. R. App. P. 34(0: 10th Cir. R. 34.1(G). These cases are therefore ordered submitted without oral argument. This os der and judgment is not binding precedent, except under the doctrines of law of the case. res judicata. and collateralestoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of lOth eir. R. 36.3.

Medical Supply Chain, Inc. ('(MSC'~) appeals the district court's dismissal of its federal complaint alleging violations of the antitrust provisions at J5 U.S.C. ~5 L 2. and l3(e). MSC's complaint also al'leges various violntinn.: nf d~tt" biw which the district court dismissed without prejudice after dismissing MSC's federal claims. Appeltees/cross-appcllants General Electric Company ("GE"}, General Electric Capital Business Asset Funding Ccrporation ("OE Capital"), GE Transportation Systems Global Signaling, LLC (""GETS"), and Jeffrey Imrnelt appeal tile denial ottheir motion for sanctions under Fed, R. Civ. P. 11. After reviewing both appeals, we AFFIRM the district court's; dismissal of MSC' complaint. but REVERSE its determination that no sanctions were requised against MSC.

MSC sought to establish 11 business providing an. e-commerce marketplace to support suppliers and-purehasers"'of-hospitai-stlpp~ie'S. Although other cornpan ies existed with similar business models, MSC was convinced its superior technology would give it ʁ competitive advantage over its riva~s. MSC suffered various setbacks in attempting to begin np~T!.tirme , nnp nf whirh - the- !:earch for office space - serves as the basis for this suit.

In June 2002. flu! chief executive officer of MSC contacted a leasing agent regarding a commercial office property in Blue Springs, Missouri, and was told

that the building in question was already leased and the lessee, GETS, would only consider a sub-lease of the entire building. Instead of pursuing a sub-lease. MSC contacted the building's owner and obtained a letter of intent Lo sell the building to MSC, with the sales price being the balance owed on GETS's seven-year lease. In 2003, armed with the letter of intent. MSC approached George Fricke, a property manager &l. GE Commercial Properties and offered ɜ deal. U nder th terms of the May 15.2003, offer. MSC would purchase the building and agree 10 release GETS from its lease obligation provided (l) that GETS would pay M $350.000 (representing the remainder of the 2003 lease payment), (2) that GET" would provide MSC a bill of sale for the bui ldings furniture and equipment. (3) that the City of Blue Springs would approve MSC's purchase ~JI1dccupation of the building. and (4) that fil—Capital would loan M the entire $6.400.00() purchase price for the building and land secured by a twenty-year mortgage on the property, having a. 5.4% interest rate with a moratorium on the rlJst full year o mortgage pal ments. I'he otfcr was contingent upon GE's acceptance by May 21, 2003.

The-day the uIfer was made. Fricke responded with. (]) a vuice mail message slating. "we will accept that transaction." and (2) an e-mail message stati ng, "G E will accept your proposal to term inate the existing Lease." (I Appcllaat's App. at 64.) MSC thereafter provided GE Capital with a loan

package mcluding MSl"s financial information. GE Capital later decided not to provide financing and MSC filed its complaint on June 18, 2003.

MSC 's complaint is grounded in the belief that certain partieswish to prevent competition in the hospital supplye-commerce market in North America. According to MSC. two e-commerce marketplaces. neither of which are parties to the present suit; Global Health Exchange L.L.C. ("GHX"j, and Ncoforma, lnc., effectively control the hospital supplye-commerce market in North America in that ~U% ot UIC nospnar supply e-commerce business passes through these marketplaces. MSC alleged thatthese marketplaces each require that suppliers or purchasers Who usc either of these marketplaces agree to (1) become a member of the other marketplace as well and (2) dealexclusively with GHX and Neoforma. GE is an initial shareholder of GHX.[1]

In its complaint, MS(, raises four federal claims under 15 U.S.C. § 1. which provides that "[elver)' contract, combination in the form of trust or otherwise, or conspiracy. in restraint of trade or commerce among the several States. 01' wi III foreign nations, is declared IO be illegal."]]1 these four claims. MSC alleged thai

[1] A March 29, 2000, press release attached to MSC's amended complaint refers to "GE Medical Systems" as "equal shareholders" of GHX with four other initial shareholders: Johnson & Johnson, Baxter International, lnc., Abbott Laboratories, and Medtronic, Inc, (I Appellant's App. at *109.)* For the purposes of this opinion, we will assume that GE Medical Systems isa wholly owned subsidiary of GE.

the refusal of GE, through its subsidiaries GE Capital and GETS. to provide it with a loan under the tcrmo of the proposed agTcemlilPl w:ls: an improper reslraint. on trade in that it mas. a. "Concerted Refusa I to Deal" (count 1)\ a "Refusal to Dea I in Furtherance o fa Monopoly" (count 2), a "Refusal to Deal/Denial of Unique Einancial Instrument" (count J), and a "Conspiracy in Restraint of Tradet Icuuntd).

MSC also raised five claims under 15 U.S,c. § 2, which slates: "Every person who shal I monopolize, or artempt to moncpolize, or combine or conspire with any other person or persons. to monopolize any part of the trade or commerce among the several Slates, or with foreign nations, !':hJl1 1he deemed guilty of a felony ... ." In these five claims, MS(, alleged "Restraint of 1 rade Throuzh Monopoly" (COUll I 5). "Restraint nfTracic Through Attempted MonopolillallOn" (count 6), "Single l-irrn Refusal to neal' (count 7). "Refusal to Deal 'Change of Patl.ern'" (count R). and "Refusal to Deal Denial of Essential Facility" (courn 9). MSC 5 final rc(h..ral r laun ~dl!.:gt.:Ll "Drsorimuration ill Services ur Fncilitics" (count 1>0). under the Rouiuson-Paunan AcL, 15tJ S (' § lJ{el, which reach:.

> H shaU be unlawful for an)' person to discriminate in favor Or one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish ur furnishing. ur b)' cuntributing tu tll~ fun.mshiug of, any services or facilities eonnected with the processing. handling. sale, or

> offering for sale ofsuch commodity so purchased upon terms not accorded to all purchasers on prcporrionally equal terms.

Finally, MSC raises four state law claims, including breach 0r contract.

Although the only defendants named ᗰ the complaint were Mr. lmrnelt and the three GE companies. MSC allegedan agreement existed among some combsnution of (I) the major suppficrs/disrributor s of hospital supplies, (2) the major organizations making group purchases of hospital supplies. (3) GI-JX. and (4) Necforma, to prevent other marketplaces from threatening the allegedly inflated costs associated with conducting business through GHX and Neoforma. ln its amended complaint MSC alleges that GE, under the direction of Mr. lmmelt, was the driving force behind. and controls. the agreement.

Fellowing aile tiling ofMSC's complaint and amended complaint, the dcfcndnnt1! filed lh~jr motion for dj:SJ11h~Hll and ‹ı motton 5cck.iuI; lhl;;'llllpU~iliulI uf sanctions under fed. R. Civ. P. 1l. The district court granted the defendants' motion to dismiss. dismissing the federal claims on the merits for failure to state a claim and declining to exercise supplememat jurisdiction over the state claims once the federal claims had been dismissed. See 28 U.S.c. 1367(e}{3). Because none of the defendants were competitors in the "market of "hospital supplies delivered through e-commerce in North Amertca. '" (II Appellant" s App. at 492), the district court held that any agreement between a defendant and a competitor in that market to refuse to lend motley to MSC would be a vertical agreement to be

analyzed under the "rule of reasoa." Under thai ru le, M SC woul d have to demonstrate ihar GE possessed market power in the relevant market in order [,o be ahl,~ In restrain trade unreasnaahly. and that the relevant rrsarkets in this case w~re the commercial real estate market and the related market ofpotential financiers. Because the defendants did not have market power in these two areas, the district court dismissed the complaint Although the dlstrict court ordered MSC LO pay defendants' costs, it denied defendants motion for sanctions. Both parties appeal.

IJ

A moti on to dismiss under Fed. R. C iv. P. 12(b)(6) "admits all wei 1-pleaded facts in the complaint as distinguished from conclusory allegations." Mitchell_Y.. K.i..!lg_. 537 F.2d 385, 386 (10111Cir. 1976). Exhibits attached to a complaint are properly 'treated as part of the pleadings for purposes of ruling on a motion to dismiss. Indus. Constructors Corp. v. United States Bureau of Reclamation, 15 F.3d 963. 964~65 (1 Uth Cir. J 91)1). Because the legal sufficiency of a complaint is a question 0r Jaw. we review de IWVO ~t Rule: 12(h)(()) dismissal. 1:: JIioU rndll~ Ltd. P'~hiD v. BP Am. Prod. Co .. 407 J;'.3u J 09 L 1123 rl Oth Cir. 2(05). In reviewing the district courts grant ofa Rule 12(b)(6) motion 10 disrnis ...

> all well-pleaded factual allegations in the amended complaint are accepted as true and viewed in the light most favorable to the nonmoving party. A 12(b){6) motion should not be granted unless it

> appears beyond a doubt that the plaintiff can prove no set of Iacts in support of his claim which would entitle him Lo relief.

ultan v. Utah Stale Sch. for Deaf & Blind. 173 f·.3d 1226. 1236 (lOth Cr-. 1999) (quotations and citations omitted).

A

(o its appeal, MSC brought claims under the fi'rst two sccti ona of the Shennan Act.

> The Sherman Act contains a basic distinction between concerted and tncepenoent action. The conduct ot a smgle firm is governed by § 2 alone and is unlawful only when h threatens actual monopolization. It is not enough that a single firm appears (o "restrain trade" unreasonably. [Of even a vigorous competitor may leave that impression.
>
> Section I of the Sherman Act, in contrast, reaches unreasonable restraints of trade effected by a "contract. combination ... or COl1gpir~cy" between ,scpal'a'co:ntities. II doca not reach conduct that is wholly unilateral. Concerted activity subject 10 § I is judged more sternly than unilateral activity under § 2.

Coppen .eld Corp. v. Indepel1dcnce Tube Corp". 467 U.S. 752. 767~68 (984) (quotations, chations, and footnotes omitted).

MSC alleges that GE, as a sole entity, monopolized or attempted to monopolize [he market of hospital supplies delivered though e-commerce in North America. This claim appears to be the bedrock upon which MSC's .15 U.S.C. ~ 2 claims rest. MSC argu.es that a cartel was formed through an llfgreement or conspiracy among OE and other separate entities such as GHX. Neoforma, and

FILED
United States Court of Appeals
Tenth Circuit

July 26, 2005

PATRICK FISHER
Clerk

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MEDICAL SUPPLY CHAIN, INC.,

Plaintiff - Appellant,

v.

GENERAL ELECTRIC COMPANY; GENERAL ELECTRIC CAPITAL BUSINESS ASSET FUNDING CORPORATION; GE TRANSPORTATION SYSTEMS GLOBAL SIGNALING, LLC; JEFFREY IMMELT,

Defendants - Appellees.

Nos. 04-3075 & 04-3102
(D.C. No. 03-CV-2324-CM)
(D. Kan.)

ORDER AND JUDGMENT*

Before **LUCERO**, **PORFILIO**, and **BALDOCK**, Circuit Judges.

* After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' requests for decisions on the briefs without oral argument. See Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). These cases are therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Medical Supply Chain, Inc. ("MSC") appeals the district court's dismissal of its federal complaint alleging violations of the antitrust provisions at 15 U.S.C. §§ 1, 2, and 13(e). MSC's complaint also alleges various violations of state law which the district court dismissed without prejudice after dismissing MSC's federal claims. Appellees/cross-appellants General Electric Company ("GE"), General Electric Capital Business Asset Funding Corporation ("GE Capital"), GE Transportation Systems Global Signaling, LLC ("GETS"), and Jeffrey Immelt appeal the denial of their motion for sanctions under Fed. R. Civ. P. 11. After reviewing both appeals, we **AFFIRM** the district court's dismissal of MSC's complaint, but **REVERSE** its determination that no sanctions were required against MSC.

I

MSC sought to establish a business providing an e-commerce marketplace to support suppliers and purchasers of hospital supplies. Although other companies existed with similar business models, MSC was convinced its superior technology would give it a competitive advantage over its rivals. MSC suffered various setbacks in attempting to begin operations, one of which – the search for office space – serves as the basis for this suit.

In June 2002, the chief executive officer of MSC contacted a leasing agent regarding a commercial office property in Blue Springs, Missouri, and was told

that the building in question was already leased and the lessee, GETS, would only consider a sub-lease of the entire building. Instead of pursuing a sub-lease, MSC contacted the building's owner and obtained a letter of intent to sell the building to MSC, with the sales price being the balance owed on GETS's seven-year lease. In 2003, armed with the letter of intent, MSC approached George Fricke, a property manager at GE Commercial Properties and offered a deal. Under the terms of the May 15, 2003, offer, MSC would purchase the building and agree to release GETS from its lease obligation provided (1) that GETS would pay MSC $350,000 (representing the remainder of the 2003 lease payment), (2) that GETS would provide MSC a bill of sale for the building's furniture and equipment, (3) that the City of Blue Springs would approve MSC's purchase and occupation of the building, and (4) that GE Capital would loan MSC the entire $6,400,000 purchase price for the building and land secured by a twenty-year mortgage on the property, having a 5.4% interest rate with a moratorium on the first full year of mortgage payments. The offer was contingent upon GE's acceptance by May 23, 2003.

The day the offer was made, Fricke responded with (1) a voice mail message stating, "we will accept that transaction," and (2) an e-mail message stating, "GE will accept your proposal to terminate the existing Lease." (I Appellant's App. at 64.) MSC thereafter provided GE Capital with a loan

package including MSC's financial information. GE Capital later decided not to provide financing and MSC filed its complaint on June 18, 2003.

MSC's complaint is grounded in the belief that certain parties wish to prevent competition in the hospital supply e-commerce market in North America. According to MSC, two e-commerce marketplaces, neither of which are parties to the present suit, Global Health Exchange L.L.C. ("GHX") and Neoforma, Inc., effectively control the hospital supply e-commerce market in North America in that 80% of the hospital supply e-commerce business passes through these marketplaces. MSC alleged that these marketplaces each require that suppliers or purchasers who use either of these marketplaces agree to (1) become a member of the other marketplace as well and (2) deal exclusively with GHX and Neoforma. GE is an initial shareholder of GHX.[1]

In its complaint, MSC raises four federal claims under 15 U.S.C. § 1, which provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." In these four claims, MSC alleged that

---

[1] A March 29, 2000, press release attached to MSC's amended complaint refers to "GE Medical Systems" as "equal shareholders" of GHX with four other initial shareholders: Johnson & Johnson, Baxter International, Inc., Abbott Laboratories, and Medtronic, Inc. (I Appellant's App. at 109.) For the purposes of this opinion, we will assume that GE Medical Systems is a wholly owned subsidiary of GE.

the refusal of GE, through its subsidiaries GE Capital and GETS, to provide it with a loan under the terms of the proposed agreement was an improper restraint on trade in that it was a "Concerted Refusal to Deal" (count 1), a "Refusal to Deal in Furtherance of a Monopoly" (count 2), a "Refusal to Deal/Denial of Unique Financial Instrument" (count 3), and a "Conspiracy in Restraint of Trade" (count 4).

MSC also raised five claims under 15 U.S.C. § 2, which states: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ." In these five claims, MSC alleged "Restraint of Trade Through Monopoly" (count 5), "Restraint of Trade Through Attempted Monopolization" (count 6), "Single Firm Refusal to Deal" (count 7), "Refusal to Deal 'Change of Pattern'" (count 8), and "Refusal to Deal Denial of Essential Facility" (count 9). MSC's final federal claim alleged "Discrimination in Services or Facilities" (count 10), under the Robinson-Patman Act, 15 U.S.C. § 13(e), which reads:

> It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or

> offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

Finally, MSC raises four state law claims, including breach of contract.

Although the only defendants named in the complaint were Mr. Immelt and the three GE companies, MSC alleged an agreement existed among some combination of (1) the major suppliers/distributors of hospital supplies, (2) the major organizations making group purchases of hospital supplies, (3) GHX, and (4) Neoforma, to prevent other marketplaces from threatening the allegedly inflated costs associated with conducting business through GHX and Neoforma. In its amended complaint MSC alleges that GE, under the direction of Mr. Immelt, was the driving force behind, and controls, the agreement.

Following the filing of MSC's complaint and amended complaint, the defendants filed their motion for dismissal and a motion seeking the imposition of sanctions under Fed. R. Civ. P. 11. The district court granted the defendants' motion to dismiss, dismissing the federal claims on the merits for failure to state a claim and declining to exercise supplemental jurisdiction over the state claims once the federal claims had been dismissed. See 28 U.S.C. 1367(c)(3). Because none of the defendants were competitors in the "market of 'hospital supplies delivered through e-commerce in North America,'" (II Appellant's App. at 492), the district court held that any agreement between a defendant and a competitor in that market to refuse to lend money to MSC would be a vertical agreement to be

analyzed under the "rule of reason." Under that rule, MSC would have to demonstrate that GE possessed market power in the relevant market in order to be able to restrain trade unreasonably, and that the relevant markets in this case were the commercial real estate market and the related market of potential financiers. Because the defendants did not have market power in these two areas, the district court dismissed the complaint. Although the district court ordered MSC to pay defendants' costs, it denied defendants' motion for sanctions. Both parties appeal.

II

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) "admits all well-pleaded facts in the complaint as distinguished from conclusory allegations." Mitchell v. King, 537 F.2d 385, 386 (10th Cir. 1976). Exhibits attached to a complaint are properly treated as part of the pleadings for purposes of ruling on a motion to dismiss. Indus. Constructors Corp. v. United States Bureau of Reclamation, 15 F.3d 963, 964-65 (10th Cir. 1994). Because the legal sufficiency of a complaint is a question of law, we review de novo a Rule 12(b)(6) dismissal. Elliott Indus. Ltd. P'ship v. BP Am. Prod. Co., 407 F.3d 1091, 1123 (10th Cir. 2005). In reviewing the district court's grant of a Rule 12(b)(6) motion to dismiss,

> all well-pleaded factual allegations in the amended complaint are accepted as true and viewed in the light most favorable to the nonmoving party. A 12(b)(6) motion should not be granted unless it

> appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Sutton v. Utah State Sch. for Deaf & Blind, 173 F.3d 1226, 1236 (10th Cir. 1999) (quotations and citations omitted).

A

In its appeal, MSC brought claims under the first two sections of the Sherman Act.

> The Sherman Act contains a basic distinction between concerted and independent action. The conduct of a single firm is governed by § 2 alone and is unlawful only when it threatens actual monopolization. It is not enough that a single firm appears to "restrain trade" unreasonably, for even a vigorous competitor may leave that impression.
> . . . .
> Section 1 of the Sherman Act, in contrast, reaches unreasonable restraints of trade effected by a "contract, combination . . . or conspiracy" between *separate* entities. It does not reach conduct that is wholly unilateral. Concerted activity subject to § 1 is judged more sternly than unilateral activity under § 2.

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767-68 (1984) (quotations, citations, and footnotes omitted).

MSC alleges that GE, as a sole entity, monopolized or attempted to monopolize the market of hospital supplies delivered though e-commerce in North America. This claim appears to be the bedrock upon which MSC's 15 U.S.C. § 2 claims rest. MSC argues that a cartel was formed through an agreement or conspiracy among GE and other separate entities such as GHX, Neoforma, and