

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TIM CALLAHAN d/b/a	:	CIVIL ACTION
TIM'S SUNOCO, et al.	:	
	:	
	:	
	:	
	:	NOS. 03-4461
	:	04-2915
v.	:	04-2916
	:	04-2918
	:	04-2919
	:	04-2920
	:	04-2921
	:	04-2922
SUNOCO, INC., et al.	:	04-2923

MEMORANDUM

Dalzell, J.

April 28, 2005

Several individuals and business entities that have leased service stations from Sunoco, Inc. (R&M) bring these nine actions against Sunoco¹ for breach of contract. As will become apparent, because of diverse citizenship and the requisite amounts in controversy, we have jurisdiction over all nine cases under 28 U.S.C. § 1332.

¹ We use "Sunoco" to refer to Sunoco, Inc. (R&M) and Sunoco, Inc. Although Sunoco, Inc. was not a party to the allegedly breached contract, plaintiffs named it as a defendant in these actions without articulating any theory upon which its liability could be predicated.

In any event, both corporations are incorporated in Pennsylvania and share Pennsylvania as their principal places of business.

Sunoco's omnibus motion for summary judgment² is now before us.

Factual Background

Sunoco distributes and markets gasoline in twenty-two states through three kinds of service stations. Defs.' Mot. Summ. J. Ex. M ("Schwab Aff.") ¶¶ 3-4. First, it transports gasoline to its company-operated stations ("co-ops"). Second, Sunoco sells gasoline to distributors ("jobbers") at the "rack" price then in effect at the terminal³ where the jobber takes delivery of the gasoline. From the terminal, jobbers transport the gasoline, at their

² Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In ruling on a motion for summary judgment, the Court must view the evidence, and make all reasonable inferences from the evidence, in the light most favorable to the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). The moving party bears the initial burden of proving that there is no genuine issue of material fact in dispute. Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585 n.10 (1986). Once the moving party carries this burden, the nonmoving party must "come forward with 'specific facts showing there is a genuine issue for trial.'" Id. at 587 (quoting Fed. R. Civ. P. 56(e)). The task for the Court is to inquire "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." Liberty Lobby, 477 U.S. at 251-52; Tabas v. Tabas, 47 F.3d 1280, 1287 (3d Cir. 1995) (en banc).

³ Sunoco maintains 105 terminals from which jobbers may take delivery of gasoline, and it sets the rack price at 97 of these terminals on a "daily basis." Schwab Aff. ¶ 9. There is no posted rack price at the other 8 terminals. Id.

own cost, to their stations, where they resell it to the public. See Defs.' Mot. Summ. J. Ex. Q ("Byard Aff.") ¶ 3.

Finally, Sunoco enters into Dealer Franchise Agreements (DFAs) with individuals and entities like the plaintiffs ("dealers"). See generally Defs.' Mot. Summ. J. Ex. L. Among other things, a typical DFA will include a lease of a Sunoco-owned service station to a dealer and a provision obligating Sunoco to provide gasoline to the station at the "Dealer price[] in effect at the time and place of delivery."⁴ Id. § 2.02. Sunoco delivers gasoline to its dealers at its own cost. Schwab Aff. ¶ 11.

Every business day,⁵ Sunoco's Pricing Department sets the DTW price for each of the 414 price zones in which its 1,180 dealers operate. Id. ¶¶ 5, 7. In setting the DTW price for each zone, the Pricing Department analyzes competitors' prices, historical sales volume within the price zone, trends in the gasoline spot market, Sunoco's costs, Sunoco's "netback requirements,"⁶ and terminal inventories. Defs.' Mot. Summ. J. Ex. B ("Schwab Dep.") at 43-47.

⁴ The parties commonly refer to this price as the "dealer tank wagon" price or "DTW" price.

⁵ During a lengthy discussion of how Sunoco sets its DTW prices, the Pricing Department manager testified that he is "involved every day in pricing decisions" and that he reviews his employees' recommendations "at the end of the day before we finalize the decision." See Schwab Dep. at 55.

⁶ We understand the "netback requirements" to be the profit that Sunoco intends to earn from selling the gasoline to its dealers. See Schwab Dep. at 45.

Although Sunoco uses a mathematical forumula to generate a "recommended" price, setting final DTW prices requires Pricing Department employees to weigh all of the relevant factors. Id. at 51-52. Dealers in different price zones pay different prices, but every dealer within a particular price zone is charged the same DTW price.⁷ Id. at 39.

Although all dealers within a price zone pay the same DTW price, market conditions sometimes make it impossible for a dealer to earn a profit when reselling the gasoline to consumers at a competitive price. If faced with such a situation, a dealer can request a temporary voluntary allowance ("TVA") from Sunoco. TVAs are discounts on DTW prices that "enable Sunoco dealers to meet (not beat) . . . unusual or special competition." See Pls.' Mem. Ex. I, at 412. Generally, Sunoco does not grant TVAs greater than four cents per gallon, and it does not approve TVA requests that would allow dealers to earn more than about five cents per gallon sold. As the name implies, TVAs are voluntarily; no dealer is required to accept them.

Plaintiffs are seven current and former New York dealers⁸ and two current and former New Jersey dealers.⁹

⁷ The DTW price is generally higher than the rack price to compensate Sunoco for the functions that it performs for the dealers (e.g., delivering the gasoline). Byard Aff. ¶ 7.

⁸ The seven New York plaintiffs are Tim Callahan (C.A. No. 03-4461), S.N. Enterprises of WNY, Inc. (C.A. No. (continued...))

Three of the New York dealers -- S.N. Enterprises of WNY, Inc.,¹⁰ Michael Kopty, and West Seneca One Stop, Inc.¹¹ -- executed Mutual Cancellation Agreements in which they released Sunoco from "all liabilities, claims, and responsibilities (whether or not known . . .) arising directly or indirectly under, out of, or in connection with" their DFAs. See Defs.' Mot. Summ. J. Ex. FF.

In these nine related cases,¹² plaintiffs contend that Sunoco has breached their DFAs because it has not set DTW prices in good faith. Specifically, they allege that Sunoco has set the DTW price "to control Dealers' business activities, and in some cases, to take over and operate, or eliminate the Dealers' service stations." See, e.g., Compl. ¶ 9 in C.A. No. 04-2915. After exchanging extensive

⁸(...continued)
04-2915), Michael Kopty (C.A. No. 04-2916), Chima & Bains, Ltd. (C.A. No. 04-2919), West Seneca One Stop, Inc. (C.A. No. 04-2921), Automotive Modern Technologies Co. (C.A. No. 04-2922), and J&B Sunoco, Inc. (C.A. No. 04-2923).

⁹ The two New Jersey plaintiffs are David and Marilyn Holt (C.A. No. 04-2918) and Shoreline Enterprises, LLC (C.A. No. 04-2920).

¹⁰ It appears that Simon Nasr was an officer or director of S.N. Enterprises of WNY, Inc.

¹¹ It appears that Daniel J. Mrozek was an officer or director of West Seneca One Stop, Inc.

¹² Plaintiffs initially filed C.A. No. 03-4461 as a putative class action. After denying their motion for class action certification, see Callahan v. Sunoco, Inc., No. 03-4461, 2004 WL 1119936 (E.D. Pa. May 19, 2004), we directed the named plaintiffs to file separate civil actions.

discovery, Sunoco filed the instant omnibus motion for summary judgment.

Analysis

A. Pricing

Because the DFAs include an open price term for the gasoline that Sunoco supplies its dealers, Sunoco must set DTW prices in "good faith," with "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." See generally U.C.C. §§ 2-103(1)(b), 2-305(2) (1998); see also N.J. Stat. Ann. §§ 12A:2-103(1)(b), 12A:2-305(2) (2005); N.Y. U.C.C. Law §§ 2-103(1)(b), 2-305(2) (Consol. 2005).

In diversity actions such as these, we employ the choice-of-law rules of the forum state. See Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 496, 61 S. Ct. 1020 (1941). Pennsylvania choice-of-law principles direct us to apply the substantive law of the jurisdiction with the "most significant contacts" with the issues involved in the case. In re Estate of Agostini, 457 A.2d 861, 871 (Pa. Super. Ct. 1983). Because each relationship between Sunoco and a dealer centers around the state where that dealer's service station is located, we hold that the dealer's state is the jurisdiction with the most significant contacts to the case that dealer brought. In short, we shall apply New Jersey law

when considering the New Jersey dealers' claims and New York law when evaluating the New York dealers' claims.

Turning first to New Jersey law, we note that the New Jersey Supreme Court recently considered a case remarkably similar to those now before us. There, three Hess dealers contended that Hess "violated the implied covenant of good faith and fair dealing in setting gasoline prices notwithstanding a provision in the contract giving defendant unilateral authority to set and change dealer tank wagon (DTW) prices." Wilson v. Amerada Hess Corp., 773 A.2d 1121, 1123 (N.J. 2001). The trial court granted summary judgment to Hess because the dealers did not produce any evidence that Hess intended to deprive the dealers of their profits when it set the DTW price, and the intermediate appellate court affirmed that decision.

Agreeing with the lower courts' application of the relevant standards, the New Jersey Supreme Court explained that "a party exercising its right to use discretion in setting price under a contract breaches the duty of good faith and fair dealing if that party exercises its discretionary authority arbitrarily, unreasonably, or capriciously, with the objective of preventing the other party from receiving its reasonably expected fruits under the contract." Id. at 1130. "Without bad motive or intention, discretionary decisions that happen to result in economic disadvantage to the other party are of no legal

significance." Id. Although the New Jersey Supreme Court found that the lower courts had applied these standards correctly to the record as it existed, it nevertheless reversed their decisions and remanded the case because the trial court denied the dealers sufficient opportunity to explore Hess's motivation during discovery.

The parties have not cited any New York authority interpreting the relevant Uniform Commercial Code provisions, and we have found no New York case analyzing claims similar to those of the plaintiffs, much less doing so with Wilson's clarity. Moreover, at least one federal court has held that a choice between New Jersey U.C.C. principles and New York U.C.C. principles would "not materially effect [sic] the outcome" of the case before it. See G-I Holdings, Inc. v. Baron & Budd, 179 F. Supp. 2d 233, 268 n.6 (S.D.N.Y. 2001) (Sweet, J.) (citing Wilson in text). Because we predict that the New York courts would adopt Wilson's persuasive reasoning, we shall treat it as though it were the law of both New Jersey and New York.

Wilson makes clear that, for their claims to survive summary judgment, plaintiffs must produce some evidence suggesting that, in establishing DTW prices, Sunoco exercised its discretionary authority under the DFAs "arbitrarily, unreasonably, or capriciously, with the objective of preventing the [dealers] from receiving [their] reasonably expected fruits under the contract." Wilson, 773

A.2d at 1130. To this end, plaintiffs claim that Sunoco set DTW prices so as "to move as much gasoline volume as possible at the expense of its lessee dealers." Pls.' Mem. at 18. Sunoco does not contest that it set the DTW prices with an eye toward increasing the volume of gasoline sold, and it would be surprising indeed if Sunoco used a pricing system designed to reduce the volume of gasoline sold.

Still, the plaintiffs have failed to explain how this additional gasoline sold caused them any injury. While it is theoretically possible that Sunoco requires dealers to sell gasoline at prices below the DTW price, so that they lose money with every gallon that they sell, there is no record evidence that Sunoco's actually does so. On the contrary, since it is undisputed that the DFAs contain no limits on the prices that dealers may charge to consumers, the record suggests that dealers generally are free to set prices at whatever levels they wish.¹³

Competitive pressures, of course, set a ceiling on the prices that dealers may charge, and Sunoco's DTW price establishes a floor on the consumer price because dealers presumably would not sell gasoline at a loss. Between this floor and ceiling, dealers must set gasoline prices at levels sufficient to cover their operating expenses (e.g., employee salaries) and to earn a profit. The plaintiff dealers argue

¹³ We shall discuss the significance of the TVAs to the dealers' pricing freedom later in this Memorandum.

that Sunoco's pricing system arbitrarily, unreasonably, and capriciously prevents them from earning profits in two ways.

1. Price Zones

First, the plaintiffs contend that Sunoco divides its marketing areas into price zones without regard for the competitive pressures that dealers face. It bears mentioning that the plaintiffs do not assert that the very idea of price zones is fundamentally flawed, nor do they challenge the way in which any particular price zone is drawn. Rather, plaintiffs submit that Sunoco generally draws price zones arbitrarily, unreasonably, and capriciously.

Though plaintiffs point to Sunoco's allegedly inconsistent descriptions of a maximum-sized price zone, see Pls.' Mot. Ex. F at 71 (stating that stations 40 miles apart can be competitors), Pls.' Mot. Ex. G at 61 (explaining that stations 15, 20, or 30 miles apart would not be competitors), Pls.' Mot. Ex. A at 26 (reporting that stations 20 miles apart are not competitors), such evidence fails to raise an issue of material fact. A hypothetical may illuminate the evidentiary problem.

Imagine a perfectly straight road with three service stations located precisely at mile markers 100, 115, and 130 ("Stations 100, 115, and 130," respectively). Plaintiffs imply that Station 100 could be in the same price zone as Station 115, but it could not be in the same price zone as Station 130 because stations that are thirty miles

apart are not in competition with each other. Thus, Sunoco would assign Stations 100 and 115 to one price zone (say, Zone Alpha) and assign Station 130 to a different price zone (Zone Beta). Assuming that the DTW price is consistently lower in Zone Beta than in Zone Alpha, the plaintiffs would permit Station 115 to sue Sunoco for arbitrarily assigning it to Zone Alpha when it should have been assigned to Zone Beta.

Under plaintiffs' theory, Sunoco could escape liability only by assigning all stations to a single price zone or by not assigning more than one station to any price zone. Either alternative would effectively eviscerate price zones. The former would render price zoning meaningless because every station in the entire nation would be charged the same DTW price, and the latter would require Sunoco to set prices for each station individually, even if several nearby stations faced similar competitive conditions.

Thus, plaintiffs essentially ask us to hold that price zones are inherently arbitrary, unreasonable, and capricious, though they wisely choose not to make their argument explicit in view of the apparently common use of the practice among Sunoco's competitors. See Cain v. Chevron U.S.A., Inc., 757 F. Supp. 1120, 1124 (D. Or. 1991) (finding that Chevron's "system of zone pricing is a commercially reasonable trade practice, used by gasoline marketers for many years"); see also Defs.' Mot. Summ. J. Ex. P at 22; Defs.' Mot. Summ. J. Ex. R at 33-34. Plaintiffs have adduced

no evidence that Sunoco is the only gasoline marketer to use price zones to establish DTW prices, and we cannot find that zone pricing is unreasonable per se in the absence of any evidence that its competitors set prices in other ways.¹⁴

At bottom, then, plaintiffs complain that they occasionally paid higher DTW prices than nearby dealers in adjacent price zones. See Pls.' Mem. at 8-10. These vague statements do not demonstrate, however, that the price differential is attributable to any generally arbitrary, unreasonable, or capricious conduct on Sunoco's part. To the extent that they suggest that Sunoco drew a few price zones unreasonably, plaintiffs have failed to identify the precise nature of the alleged improprieties. Plaintiffs do not create issues of material fact merely by claiming that they "sometimes" paid different¹⁵ prices than other unidentified dealers in their general vicinity.

Finally, plaintiffs suspect that Sunoco uses price zones "to keep the prices high where the proximate competition to any dealer is not providing retail pricing

¹⁴ While plaintiffs might have created a genuine issue as to whether Sunoco used price zones in good faith if they had shown that Sunoco "change[s] the description and/or parameters of a given price zone" in an attempt to disadvantage them, see Pls.' Mem. at 13, they have not come forward with any evidence showing that Sunoco actually made unreasonable adjustments to its price zones.

¹⁵ In most instances, plaintiffs allege only that they paid "different" prices -- not that they paid higher prices -- than other dealers. See, e.g., Pls.' Mem. Ex. D at 88-90.

pressure." Pls.' Mem. at 12. Sunoco concedes that point when it explains that "local competitive conditions" are the "most crucial" factors in setting DTW prices. See Defs.' Mem. at 10. This concession is not surprising because Sunoco does not act unreasonably when it charges higher prices in markets where there is less competition. Any capitalist would do the same.

It is possible that Sunoco's price discrimination guarantees maximum profits for it and deprives dealers of the opportunity to exploit market power over consumers in areas where there is little competition. But "[w]ithout bad motive or intention, discretionary decisions that happen to result in economic disadvantage to the other party are of no legal significance." Wilson, 773 A.2d at 1130. Here, there is no evidence of "bad motive or intention." Sunoco takes advantage of market conditions for its own benefit, and the plaintiff dealers could not have "reasonably expected" Sunoco to do anything less. Id. We hold, therefore, that there is insufficient evidence from which a reasonable jury could find that Sunoco used price zones to set DTW prices in bad faith.

2. Temporary Voluntary Allowances

Apart from the price zones, plaintiffs also believe that Sunoco's temporary voluntary allowances also prevent them from earning profits. More specifically, plaintiffs claim that "in order to receive a TVA, lessee dealers are required not only to lower their retail price, but also give

up a percentage of their margin." Pls.' Mem. at 18-19. Although several of the plaintiffs testified at their depositions that Sunoco calculated TVAs so as to limit their profits, see id. at 19-20, this testimony does not create an issue of material fact about whether Sunoco's use of TVAs was an unreasonable pricing practice.

Because TVAs effectively reduce DTW prices, they cut into Sunoco's profits. Nevertheless, Sunoco offers TVAs "to assist those dealers that are adversely affected by competitive retail prices that are below [its] established area dealer tankwagon price." Pls.' Mem. Ex. I, at 412. When the plaintiff dealers complain that TVAs limit their profits, they are really grumbling that the TVAs that Sunoco provides are too small to allow them to earn their customary profits.¹⁶ In other words, the dealers would prefer that Sunoco offer larger TVAs (which would reduce Sunoco's profits even further) so that they can maintain their own margins. They want Sunoco to bear the full cost of increased market competition, but there is nothing unreasonable in Sunoco's current policy, which forces the dealers to share some of the burden that competition imposes on profits.

¹⁶ It is more than a little ironic that, only a few pages after they lambaste Sunoco's price zone system for its failure to take account of local market conditions, plaintiffs criticize TVAs, which clearly attempt to correct for the inevitable imperfections in setting DTW prices through price zones.

The plaintiffs' complaints about TVAs appear even more specious when one recognizes that dealers are not required to accept TVAs. In fact, Sunoco provides a TVA only after a dealer requests it. See Pls.' Mem. Ex. I; Duffy Dep. at 26-27. Thus, if dealers truly felt that TVAs were cutting into the profits that they could otherwise earn, they would never request them. The record demonstrates that, far from believing that TVAs hurt them, the plaintiff dealers understood that TVAs actually benefitted them. It is certainly possible that Sunoco might have withheld and/or limited TVAs in bad faith, but plaintiffs cannot point to record evidence confirming such a possibility ever became a reality. We hold, therefore, that no reasonable jury could conclude that Sunoco used TVAs to set DTW prices in bad faith.

B. Release

Even if Sunoco's use of price zones and/or TVAs had revealed that it set DTW prices in bad faith, Sunoco maintains that it still would be entitled to summary judgment on the claims of S.N. Enterprises of WNY, Inc., Michael Kopty, and West Seneca One Stop, Inc. because they released Sunoco from "all liabilities, claims, and responsibilities (whether or not known . . .) arising directly or indirectly

under, out of, or in connection with" their DFAs. See Defs.' Mot. Summ. J. Ex. FF.¹⁷

In this breach-of-contract action, plaintiffs argue, without irony, that it would "certainly be inequitable" to give effect to the plain and unambiguous language of the release. See Pls.' Mem. at 23. However "inequitable" plaintiffs may believe it would be to enforce the release, it would surely be more inequitable to enforce the DFAs' implicit covenant of good faith while simultaneously ignoring the explicit releases that these three plaintiffs signed.

Plaintiffs also note that, even if the Mutual Cancellation Agreements effectively bar their claims against Sunoco, Inc. (R&M), they would have no effect on their claims against Sunoco, Inc. because they do not purport to release the claims against Sunoco, Inc. This point is well taken; the releases have no effect on plaintiffs' claims against Sunoco, Inc. Of course, plaintiffs' claims against Sunoco, Inc. are totally frivolous because Sunoco, Inc. was not a signatory to the DFA and, thus, could not be liable for any alleged breach of the DFA.

In sum, we hold that the Mutual Cancellation Agreements would entitle Sunoco to summary judgment on the

¹⁷ These three dealers operated service stations in New York. For the reasons already explained, we shall apply New York law when we construe the releases.

claims of S.N. Enterprises of WNY, Inc., Michael Kopty, and West Seneca One Stop, Inc. even if it had set their DTW prices in bad faith.

Conclusion

Plaintiff dealers contend that Sunoco's use of price zones and TVAs to establish DTW prices breached its duty, under the Uniform Commercial Code, to set DTW prices in good faith, but they have failed to submit any evidence from which a reasonable jury could find in their favor. Even if they had submitted sufficient evidence to raise an issue of material fact, Sunoco would still be entitled to summary judgment on the claims of the three dealers who released Sunoco from any liability. For all of these reasons, we shall grant Sunoco's motion for summary judgment.