

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

| | | |
|----------------------------|---|--------------|
| ASSOCIATION OF MINORITY | : | CIVIL ACTION |
| CONTRACTORS AND SUPPLIERS, | : | |
| "AMCAS, INC." | : | |
| | : | |
| v. | : | |
| | : | |
| HALLIDAY PROPERTIES, | : | |
| INC., <u>et al.</u> | : | NO. 97-274 |

MEMORANDUM AND ORDER

BECHTLE, J.

AUGUST 13, 1998

Presently before the court are defendants Halliday Properties, Inc. ("Halliday Properties"), Mark H. Dambly ("Dambly"), Jefferis Square Housing Partnership ("Jefferis Square") and J.J. DeLuca Company, Inc.'s ("J.J. DeLuca Co.")(collectively "Defendants") motion for summary judgment, J.J. DeLuca Co.'s motion for sanctions pursuant to Federal Rule of Civil Procedure 11 and plaintiff Association of Minority Contractors and Suppliers, "AMCAS, Inc." 's ("AMCAS") responses thereto. For the reasons set forth below, Defendants' motion for summary judgment will be granted and the motion for Rule 11 sanctions will be denied.

I. BACKGROUND

AMCAS brings this civil action under section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, et seq.¹ AMCAS is an

1. This court has original jurisdiction over AMCAS' claims because they arise under the federal antitrust laws. 28 U.S.C. § 1331; 28 U.S.C. § 1337(a).

organization of minority owned businesses. Defendants are an individual, a partnership and two corporations involved in a construction project which is the subject of the antitrust claims. Dambly is a "developer of various construction projects throughout Delaware County, Pennsylvania." (Compl. ¶ 5.) Dambly is the owner of Halliday Properties. Dambly is also a partner in Jefferis Square (the court will refer to Dambly, Halliday Properties and Jefferis Square collectively as the "Dambly Entities"). J.J. DeLuca Co. acts as a general contractor on construction projects. J.J. DeLuca Co. is owned by James J. DeLuca ("DeLuca").

In 1994, Dambly, through Jefferis Square, purchased a 2.2 acre tract of land in the City of Chester, Pennsylvania ("Chester") and began planning for the construction of a housing development on the property (the "Project"). (Plf.'s Mem. Opp. Sum. J. at 2.) Dambly and J.J. DeLuca Co. had worked together on similar projects in the past. Id. at 6. J.J. DeLuca Co. submitted to Dambly a projection of the construction costs of completing the Project, which totaled \$2,813,366.00. Id. at 3. According to AMCAS, Dambly told DeLuca that his estimate should be "\$2,850,000.00 plus contingency." Id. at 4. AMCAS alleges that the higher estimate by DeLuca would result in the Dambly Entities being able to secure an increased amount of federal funds for the Project and a higher developer's fee for Dambly. Id. at 4 n.1. Subsequently, Dambly met with representatives of AMCAS, who informed Dambly of AMCAS' desire to become the general

contractor for the Project. AMCAS representatives were concerned that Dambly had already reached an agreement with DeLuca. Id. at 5-6. Dambly informed AMCAS that it had not reached such an agreement and that AMCAS and its members should submit bids to act as the general and subcontractors.

On May 5, 1995, AMCAS submitted its bid for \$3,062,287.17. Dambly told AMCAS that its bid was higher than that of J.J. DeLuca Co. and that it should "sharpen its pencils." Id. at 6-7. On May 22, 1995, AMCAS submitted a second bid for \$2,974,466.00 and Dambly told AMCAS its bid was lower than that of J.J. DeLuca Co.² Id. at 7. Dambly informed AMCAS that to act as the general contractor, it would be required to secure a bond for \$1.5 million. Id.

AMCAS members sought to secure the bond with the assistance of the Chester Redevelopment Authority ("CRA"). According to AMCAS, the CRA had the authority of administering federal funds in order to foster economic development in Chester. Id. at 5. Among other efforts, the CRA established a trust whose purpose was to provide bonding insurance for minority and other "disadvantaged" contractors such as AMCAS and its members. Id. at 7. However, before AMCAS secured a bond, relying on the CRA trust as collateral, the CRA became the subject of a legal

2. AMCAS also alleges that a copy of its second bid somehow wound up in the files of J.J. DeLuca Co. and that J.J. DeLuca Co. subsequently submitted a bid which was for \$3,223,890.00. Id. at 7 n.3. For the purposes of reviewing the summary judgment, the court will assume that AMCAS submitted the lowest of all bids to be general contractor on the Project.

dispute which rendered the trust funds unavailable for AMCAS to use for bonding insurance.

Under AMCAS' statement of the facts, Defendants held private meetings and telephone conversations with certain individuals who were identified in the Amended Complaint only as "co-conspirators" and not named as parties to the action.³ According to the Plaintiff's summary judgment opposition brief, the primary co-conspirators included Chester City Council members Dominic Pileggi, Dianne Merlino, Chuck McLaughlin and Annette Burton. Id. at 8. Also alleged to have conspired with Defendants are Delaware County Republican Party Chairman Thomas Judge, Thomas Judge's son Bobby, Delaware County Councilman Wally Nunn and Delaware County Executive Ted Ericson. Id. at 8-9. According to AMCAS, the purpose of this conspiracy was twofold. First, the conspiracy would secure additional public funding for the Project, despite its alleged unpopularity with other public officials. In particular, AMCAS states that the CRA was unwilling to provide the Dambly Entities with federal funding for the project directly. Id. at 5 n.2. Thus, Defendants hoped to have the CRA dissolved and the desired funds transferred to another entity that would treat their requests more favorably.

3. At a hearing before the court held March 5, 1998, the court inquired into the identity of those "co-conspirators" who were unnamed in the Amended Complaint. For the purposes of this motion, the court will presume that the individuals identified by name in the summary judgment opposition brief are those individuals whom AMCAS believes that it can demonstrate engaged in a conspiracy with Defendants.

Second, the conspiracy intended to prevent AMCAS from relying on the CRA trust to obtain a bond. AMCAS would thereby be removed from consideration as a general contractor on the Project and DeLuca would be guaranteed that position. AMCAS alleges that the means by which Defendants and the co-conspirators achieved these purposes was to dissolve the CRA and transfer the funds from the CRA to Chester and then to a newly created entity called the Chester Economic Development Authority ("CEDA"), which was headed by Dianne Merlino and included additional co-conspirators as board members. Id. at 5 n.2.

The Chester City Council voted on and passed several resolutions attempting to dissolve the CRA. (Dec. Harold Langer in Supp. of Defs.' Mot. Ex. D.) Pursuant to the resolutions, the Chester City Council filed suit in the Court of Common Pleas for Delaware County, Pennsylvania in order to force the transfer of the CRA's assets to Chester. See City of Chester v. Chester Redevelopment Authority, No. 95-7184 (Ct. Common Pleas Nov. 29, 1995); (Dec. Harold Langer in Supp. of Defs.' Mot. Ex. A.) The parties to that action were Chester as the plaintiff and the CRA and its bank, First Fidelity Bank, N.A., as defendants. None of the Defendants in the present civil action were named as parties of record in that state civil action. In a series of orders, the Court of Common Pleas ordered First Fidelity Bank, N.A., to transfer the assets of the CRA to Chester. Id. at 4-6. On appeal, the Commonwealth Court reversed and remanded the case, finding that the City Council vote/resolution failed to comply

with 35 Pa. Const. Stat. Ann. § 1704.1, which requires that public authorities such as the CRA may only be dissolved after the authority has discharged its debts and obligations. City of Chester v. Chester Redevelopment Authority, 686 A.2d 30 (Pa. Commw. 1996). Subsequently, the parties entered into a settlement agreement which confirmed the dissolution of the CRA and transferred its assets to Chester. (Dec. Harold Langer in Supp. of Defs. Mot. Ex. B.)

On January 13, 1997, AMCAS filed its Amended Complaint alleging that Defendants violated section 1 of the Sherman Act. The Amended Complaint contains two counts alleging antitrust activity, one alleging an agreement among the Defendants to unreasonably restrain trade and one alleging an agreement among the Defendants and co-conspirators. On January 16, 1997, J.J. DeLuca Co. filed its notice of motion for sanctions pursuant to Federal Rule of Civil Procedure 11. On February 5, 1997, AMCAS filed its response to the motion for sanctions. On March 27, 1998, Defendants filed the instant motion for summary judgment pursuant to Federal Rule of Civil Procedure 56. On April 18, 1998, AMCAS filed its response.

II. Motion for Summary Judgment

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party

is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Whether a genuine issue of material fact is presented will be determined by asking if "a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

To defeat a motion for summary judgment, the non-moving party must produce evidence to establish prima facie each element of its claim. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Such evidence and all justifiable inferences that can be drawn from it are to be taken as true. Anderson, 477 U.S. at 255. However, if the non-moving party fails to establish an essential element of his claim, the moving party is entitled to a judgment as a matter of law. Celotex, 477 U.S. at 322-23.

III. DISCUSSION

A. Motion for Summary Judgment

Defendants set forth several reasons why the court should grant the motion for summary judgment. The court will first evaluate Defendants' primary contention that the Noerr-Pennington Doctrine applies to AMCAS' allegations that Defendants conspired with various political and public officials to initiate a lawsuit dissolving the CRA. The court will then evaluate AMCAS' argument that the "sham" exception to the Noerr-Pennington Doctrine applies. Next, the court will evaluate whether the Noerr-Pennington Doctrine also applies to the Defendants

activities among themselves, as opposed to their activity in regard to the co-conspirators.

In the Amended Complaint, AMCAS sets forth two distinct counts under the Sherman Act, one that Defendants conspired with the co-conspirators and one that Defendants conspired among themselves. The main allegation addressed in AMCAS' Amended Complaint and more clearly in their response to the instant motion, is that Defendants conspired with various public officials and influential political leaders to dissolve the CRA and thereby prevent AMCAS from obtaining bonding insurance for the Project. The facts as set forth by AMCAS in its Amended Complaint and responsive briefs are that Defendants made phone calls, held private meetings and otherwise exercised influence over city and county political figures in order to obtain a dissolution of the CRA. AMCAS further alleges that Defendants wished to dissolve the CRA and have its responsibilities transferred to an entity which would treat its request for funding more favorably. As noted above, the action was partly intended to prevent AMCAS from obtaining bonding insurance. AMCAS' theory is that by stifling competition, J.J. DeLuca Co. was able to successfully submit an inflated bid, thereby securing "supracompetitive" profits for the Defendants. The alleged activity of attempting to exercise influence over public officials and political leaders to pass a resolution regarding a public authority constitutes petitioning activity within the Noerr-Pennington Doctrine. In City of Columbia v. Omni Outdoor

Advertising, Inc., 499 U.S. 365 (1991), the Supreme Court reiterated the Noerr-Pennington Doctrine under which "[t]he federal antitrust laws . . . do not regulate the conduct of private individuals in seeking anticompetitive action from the government." Id. at 379; see also Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 139 (1961)("A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them."); Mine Workers v. Pennington, 381 U.S. 657, 670 (1965)("Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose."). As noted above, the Noerr-Pennington Doctrine rests on the bedrock of the First Amendment to the United States Constitution which guarantees the right of the people to "petition the Government for a redress of grievances." U.S. Const. Amend. 1. Regardless of the anticompetitive effects, as a matter of law, Defendants' alleged petitioning constitutes a petitioning of the government under the First Amendment and falls within the protections provided by the Noerr-Pennington Doctrine.

AMCAS argues that the "sham" exception applies to Defendants' activities. It is well settled that the Noerr-Pennington doctrine does not protect sham petitioning of the

government. In setting forth that exception to the doctrine, the Court stated:

The "sham" exception to Noerr encompasses situations in which persons use the governmental process--as opposed to the outcome of that process--as an anticompetitive weapon. A classic example is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay.

Omni Outdoor Advertising, 499 U.S. at 380. However, the Court refused to recognize a "conspiracy" exception to the Noerr-Pennington doctrine that would create liability for private citizens who somehow conspire with public officials in bringing about an anticompetitive result:

[t]he same factors which . . . make it impracticable or beyond the purpose of the antitrust laws to identify and invalidate lawmaking that has been infected by selfishly motivated agreement with private interests likewise make it impracticable or beyond that scope to identify and invalidate lobbying that has produced selfishly motivated agreement with public officials.

Id. at 383. AMCAS argues that the lawsuit instituted by the Chester City Council at the Defendants' urging was a sham lawsuit and is excepted from the Noerr-Pennington Doctrine. However, because Defendants were not parties to that litigation, the sham exception cannot apply under the facts at hand. Defendants did not have the authority to dissolve the CRA, nor did they have the authority to bring a lawsuit on behalf of the city. At best, AMCAS has provided the court with allegations that Defendants petitioned various political leaders to obtain a resolution from

the Chester City Council in favor of dissolving the CRA and to initiate the suit to transfer the CRA's funds. To that end, such petitioning was successful in achieving its sought after outcome. Where a party seeks beneficial government treatment and is successful in obtaining such treatment, the petitioning for such treatment cannot be said to be a sham.⁴ Additionally, as noted above, even if AMCAS demonstrated that the Defendants conspired with public officials to pass the resolution for selfishly motivated reasons, such a theory would be unsuccessful under Omni Outdoor Advertising. Omni Outdoor Advertising, 499 U.S. at 383. To the extent that the dissolution of the CRA has resulted in increasing the difficulty of AMCAS and others similarly situated to obtain bonding insurance, AMCAS' remedies would be political in nature and the Supreme Court has been clear in that "the antitrust laws regulate business, not politics." Id. The court finds that Defendants' activities as alleged by AMCAS do not fall within the sham exception to the Noerr-Pennington Doctrine.

4. Because Defendants did not bring the lawsuit, the court need not determine whether the lawsuit itself was a sham. However, the court notes that the lawsuit originally succeeded in the trial court but was later reversed. However, on remand, the parties reached a settlement which included a provision which dissolved the CRA. Thus, the objective of the lawsuit-- dissolution of the CRA--was obtained. As such, the court would be unable to reach the conclusion that the lawsuit itself was a sham, even if the Defendants themselves had filed suit. See Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., 508 U.S. 49, 60 n.5 (1993)(stating "[a] winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham.").

To the extent that the Amended Complaint alleges that Defendants conspired between themselves to restrain trade, that claim is also barred by the Noerr-Pennington doctrine. AMCAS alleges that the Dambly Entities and DeLuca acted in concert in influencing political officials in dissolving the CRA. Under AMCAS' and its expert's view, the Dambly Entities and J.J. DeLuca Co. were not acting in traditional vertical relationship, but rather shared common economic interests in defeating AMCAS' attempt at becoming general contractor. (Plf.'s Expert Rep. at 1.) AMCAS asserts that both the Dambly Entities and J.J. DeLuca Co. stood to profit from higher construction costs, thus providing a motive for preventing AMCAS from competing with its lower bid. However, two entities acting together to petition the government is no more a violation of the antitrust laws than one entity petitioning the government alone. The Noerr-Pennington doctrine not only protects entities with a vertical relationship in their petitioning efforts, it protects collective petitioning by those with a horizontal relationship as well. See Noerr Motor Freight, Inc., 365 U.S. at 136 (stating "[w]e think it . . . clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly."); see also Ticor Title Ins. Co. v. F.T.C., 998 F.2d 1129, 1131 n.3 (3d Cir. 1993)(noting "[t]he Noerr-Pennington doctrine immunizes agreements among competitors to influence legislative, judicial,

or administrative action from antitrust liability."). Thus, AMCAS' claim that Defendants acted with a common interest in seeking to influence the Chester City Council to dissolve the CRA is also barred by the Noerr-Pennington Doctrine.

The only facts which AMCAS asserts which could possibly survive the Noerr-Pennington doctrine are its claim of "bid-rigging." Specifically, AMCAS alleges that Dambly and DeLuca shared information relating to AMCAS' bid and that J.J. DeLuca Co. then used that information in submitting its own bid. The alleged sharing of information had no bearing on AMCAS' ability to submit what it claims was the lowest bid and, under AMCAS' own allegations, its inability to act on that bid resulted from the governmental petitioning activity as discussed above, not the sharing of information between the Dambly Entities and J.J. DeLuca Co. AMCAS puts forth no facts demonstrating that J.J. DeLuca Co. used information from the Dambly Entities regarding AMCAS' bid in any way other than to influence the Chester City Council to dissolve the CRA. The facts as alleged in the Amended Complaint and the summary judgment, when viewed in their entirety, simply do not make out an antitrust claim.

In conclusion, AMCAS has submitted to the court allegations of cronyism, favoritism and poor business practices within the construction industry and related political activity in Chester. However, AMCAS has not presented the court with a genuine antitrust claim. The dissolution of the CRA by the Chester City Council does not give rise to an antitrust action

against the proponents and advocates of such a dissolution. To the extent that AMCAS suffers disappointment in its inability to secure construction contracts without the support of public entities such as the CRA, AMCAS' remedies are through the political process rather than the present federal antitrust litigation.

B. Motion for Rule 11 Sanctions

Defendants argue that this court should impose sanctions under Federal Rule of Civil Procedure 11. Defendants argue that there was a lack of factual support for AMCAS' claims and that the legal claims were unwarranted by existing law. The court will deny Defendants' motion to impose sanctions.

First, Defendants argue that there was a lack of factual support for AMCAS' claims. The court recognizes that the case involved issues of fact which heavily depended on Defendants' activities at meetings and discussions with the alleged co-conspirators, many of the details of which were unknown to Plaintiffs at the time of the filings. While Defendants believe that discovery did not develop those facts in AMCAS' favor, it does not necessarily result in an imposition of Rule 11 sanctions. That is particularly true in an antitrust case such as this, which would ordinarily rely heavily on depositions and testimony regarding what words were spoken by whom in specific communications and meetings, as well as the motivation for certain behavior by various actors. Therefore, the court will not impose sanctions on this basis.

Second, Defendants argue that AMCAS' claims themselves were unwarranted by existing law. The most troubling issue is Defendants' assert that AMCAS used pleading techniques, including the use of the term "co-conspirators" in the Amended Complaint instead of revealing the identity of those individuals, to avoid a motion to dismiss. In some cases, such techniques could lead to the imposition of sanctions. The court recognizes that AMCAS' counsel's drafting of the Amended Complaint comes close to crossing the line between stating the facts in the client's favor and omitting key facts. However, the court again recognizes that in this case, many of the crucial facts, including the identity of all of the individuals involved, were likely unknown to AMCAS and depended solely on information known only to the participants in the alleged conspiracy which could only be found through the discovery process. The broad discovery rules permitted in the federal court system serves, in part, to allow plaintiffs to develop such unknown factual issues and to allow defendants to uncover the details which are inevitably lacking in a complaint under the notice pleading system. Finally, the court notes that at the heart of AMCAS' claims are allegations involving the misuse of public funds and the dissolution of a public entity for private gain. The court acknowledges the importance of civil actions which challenge actions undertaken by individuals in the public sector, especially where the potential exists for one private entity to use the public sector to the disadvantage of another. In such cases, the legal remedies are often limited and

Rule 11 sanctions could chill such important litigation, even where the legal theories advanced are less than certain to succeed. In conclusion, although the court has found that AMCAS' allegations do not make out an antitrust claim, the court also finds that Rule 11 sanctions against AMCAS and its attorney would be unwarranted under the circumstances of this case.

IV. CONCLUSION

For the reasons set forth above, Defendants' motion for summary judgment will be granted and the motion for Rule 11 sanctions will be denied.

An appropriate Order follows.

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

| | | |
|----------------------------|---|--------------|
| ASSOCIATION OF MINORITY | : | CIVIL ACTION |
| CONTRACTORS AND SUPPLIERS, | : | |
| "AMCAS, INC." | : | |
| | : | |
| v. | : | |
| | : | |
| HALLIDAY PROPERTIES, | : | |
| INC., <u>et al.</u> | : | NO. 97-274 |

ORDER

AND NOW, TO WIT, this 13th day of August, 1998, upon consideration of defendants Halliday Properties, Inc., Mark H. Dambly, Jefferis Square Housing Partnership and J.J. DeLuca Company, Inc.'s ("J.J. DeLuca Co.")(collectively "Defendants") motion for summary judgment, J.J. DeLuca Co.'s motion for sanctions pursuant to Federal Rule of Civil Procedure 11 and plaintiff Association of Minority Contractors and Suppliers, "AMCAS, Inc." 's ("AMCAS") responses thereto, IT IS ORDERED THAT Defendants' motion for summary judgment will be granted. Judgment is entered in favor of Defendants and against AMCAS.

IT IS FURTHER ORDERED THAT J.J. DeLuca Co.'s motion for Rule 11 sanctions is DENIED.

IT IS FURTHER ORDERED THAT AMCAS' motions to compel documents of Dianne Merlino, to preclude testimony of Judge Clouse and to preclude testimony of John Innelli are DENIED AS MOOT and Defendants' renewed motion to compel is DENIED AS MOOT.

LOUIS C. BECHTLE, J.