

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

U.S. HORTICULTURAL SUPPLY, :
INC., :
Plaintiff, : CIVIL ACTION
v. :
THE SCOTTS COMPANY, :
Defendant : NO. 03-773

MEMORANDUM AND ORDER

McLaughlin, J.

June 1, 2006

The Scotts Company ("Scotts") has moved for sanctions against the plaintiff's counsel, Spector Gadon & Rosen, P.C. ("SG&R") pursuant to 28 U.S.C. § 1927.¹ Scotts claims that SG&R has unreasonably and vexatiously multiplied proceedings. The Court will deny Scotts' motion.

I. Factual Background

The dispute between the plaintiff and Scotts originated when Scotts decided not to renew the plaintiff's distribution contract which allowed the plaintiff to distribute Scotts branded products in 2002. The plaintiff filed its complaint on February

¹It is not clear if Scotts is also requesting the Court to sanction SG&R pursuant to its inherent power. Scotts argues that the standard under which sanctions may be imposed pursuant to the Court's inherent power is substantially the same as the standard under § 1927. (Scotts' Mot. 15). Because the Court concludes that sanctions are not appropriate under § 1927, to the extent that Scotts is requesting sanctions pursuant to the Court's inherent power, the Court will deny that request.

7, 2003 and after amending that complaint, the plaintiff asserted a Sherman Act Section 2 claim, two promissory estoppel claims and a breach of contract claim.

Scotts moved to dismiss the plaintiff's Section 2 claim and argued that the promissory estoppel claims were subject to arbitration. On November 13, 2003, the Court dismissed the promissory estoppel claims without prejudice after SG&R reported that it had agreed to arbitrate them. The Court denied Scotts' motion to dismiss the Section 2 claim on February 18, 2004. Following discovery, that claim was later dismissed with prejudice by the Court on February 28, 2005 after the plaintiff agreed to withdraw the claim. All that remained was a breach of contract claim, and the Court granted Scotts' motion for summary judgment with respect to that claim on July 20, 2005.

Scotts' motion for sanctions is based on SG&R's litigation tactics concerning the Section 2 claim and the promissory estoppel claims. In support of its motion, Scotts also references conduct by SG&R in litigation against Scotts in other fora.

A. The Sherman Act Section 2 Claim

The crux of Scotts' position concerns the factual allegations in the complaint that the plaintiff was a principal distributor of J.R. Peter's products and that Scotts intended to

harm J.R. Peters when Scotts failed to renew the distribution agreement.

One of the elements that the plaintiff was required to prove to establish a violation of Section 2 was that there was a dangerous probability of Scotts achieving monopoly power. In the amended complaint, the plaintiff claimed that it was a principal distributor of products made by J.R. Peters, a competitor of Scotts. It was also alleged that Scotts viewed J.R. Peters as a threat to its dominant market position and that Scotts terminated the plaintiff's distribution contract because the plaintiff distributed products from J.R. Peters. These allegations, combined with the plaintiff's allegations about the nature of the relevant market and Scotts' market share led the Court to conclude that the plaintiff adequately alleged that there was a dangerous probability that Scotts would achieve monopoly power. See U.S. Horticultural Supply, Inc. v. Scotts Co., No. 03-773, 2004 U.S. Dist. LEXIS at *21-22 (E.D. Pa. Feb. 18, 2004).

On April 7, 2004, counsel for Scotts produced to SG&R an affidavit from John R. Peters, the president of J.R. Peters which had been executed on December 9, 2003. That affidavit stated that the plaintiff only accounted for about five-percent of the distribution of Peters' water soluble fertilizer for consumer use and that Peters' sales for its consumer water soluble fertilizer actually increased after the plaintiff ceased

its distribution of Peters' products. The Peters affidavit also stated that the plaintiff was not a distributor of Peters brand water soluble fertilizer for professional use, but that there had been discussions between the plaintiff and Peters regarding the distribution of Peters' professional products. (Scotts' Mot. Ex. 15; SG&R's Opp'n Ex. B).

This affidavit undercut the plaintiff's claims that it was a principal distributor of Peters' products and that Peters was harmed by Scotts' actions. Additionally, two employees of the plaintiff confirmed the accuracy of much of the Peters affidavit in depositions taken in December of 2004 and January of 2005.

Following the receipt of this affidavit, on September 21, 2004, SG&R represented to the Court that it wanted to conduct discovery to test the affidavit and represented that numerous depositions would be taken. Scotts did not object to SG&R conducting some discovery to test the Peters affidavit and Scotts spent a considerable amount of resources pursuing discovery. Although SG&R never took any depositions, Scotts does not dispute assertions by SG&R that hundreds of attorney hours were spent on discovery following the receipt of the Peters affidavit.

Shortly after the close of discovery, Scotts served the plaintiff with a motion for sanctions pursuant to Federal Rule of Civil Procedure 11. On February 17, 2005, SG&R filed a motion to

voluntarily withdraw the Section 2 claim within the twenty-one day safe harbor provided for in Rule 11. The Court dismissed the Section 2 claim with prejudice on February 28, 2005.

B. The Promissory Estoppel Claims

Scotts also takes issue with SG&R's handling of the promissory estoppel claims. After filing the amended complaint, which included the two promissory estoppel claims, SG&R argued that these claims were not subject to arbitration because they did not implicate rights which arise under the distribution agreement.

Contemporaneous with the proceedings before this Court, Scotts filed a motion in the Southern District of Ohio to compel arbitration of a claim for the payment of a debt that was filed by Scotts against the plaintiff. Scotts successfully obtained an order from that court compelling arbitration on October 20, 2003.

SG&R then reversed course with respect to the promissory estoppel claims and agreed to arbitrate them. SG&R sent a letter to the Court on November 3, 2003 regarding its intention to arbitrate the promissory estoppel claims. Scotts did not object and the Court dismissed the promissory estoppel claims without prejudice on November 13, 2003.

C. SG&R's Conduct in Other Fora

Scotts also takes issue with some of SG&R's litigation tactics in other fora. Scotts' chief complaint in this respect concerns SG&R's litigation tactics in a bankruptcy proceeding.

On February 2, 2004, the day before the arbitration proceeding was set to begin, the plaintiff filed for bankruptcy. The arbitration went forward nonetheless and instead of pursuing the promissory estoppel claims, SG&R dropped them and stipulated to an award in Scotts' favor with respect to the debt that Scotts claimed it was owed.

While the bankruptcy proceeding was ongoing, SG&R filed four separate plans of reorganization. Eventually, the United States Trustee's Office moved to dismiss the bankruptcy case and SG&R did not contest this motion.

II. Legal Analysis

28 U.S.C. § 1927 provides:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927.

To violate § 1927, an attorney must be found to have:

"(1) multiplied proceedings; (2) in an unreasonable and vexatious manner; (3) thereby increasing the cost of the proceedings; and (4) doing so in bad faith or by intentional misconduct." In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 278 F.3d 175, 188 (3d Cir. 2002). An attorney must act with willful bad faith before an award of sanctions is proper under § 1927. Baker Indus., Inc. v. Cerberus Ltd., 764 F.2d 204, 209 (3d Cir. 1985). Bad faith is evident where, for example, the claims advanced were meritless, where counsel knew or should have known this, and where the motive for filing the suit was for an improper purpose such as harassment. Prudential, 278 F.3d at 188. Simply pursuing a weak claim does not warrant sanctions under § 1927. Hackman v. Valley Fair, 932 F.2d 239, 243 (3d Cir. 1991).

Here, SG&R's conduct does not support a finding of willful bad faith. Scotts' primary argument is that the Section 2 claim should never have been brought in the first place, and that in any event it should have been withdrawn after April 7, 2004, because SG&R did not adequately investigate some of the factual allegations in the complaint. Scotts states that employees of SG&R's client agreed with the factual assertions in the Peters affidavit which undercut the Section 2 claim.

Ronald Soldo and Dennis Salettel, two of the plaintiff's executives, did admit that many of the factual

allegations in the Peters affidavit were accurate. However, when SG&R filed the complaint, Mr. Soldo reviewed it and confirmed its accuracy. Furthermore, despite the fact that Mr. Soldo and Mr. Salettel did not question the factual assertions in the Peters affidavit, Mr. Soldo stated in an affidavit that he still believes that Scotts' decision not to renew the plaintiff's distribution agreement harmed J.R. Peters with respect to its line of professional water soluble fertilizer. (Soldo Decl. ¶¶ 1, 6, Apr. 13, 2005).

Scotts also argues that sanctions are appropriate because, despite representations to the contrary, SG&R made no effort to prosecute its Section 2 claim after Scotts provided SG&R with the Peters affidavit on April 7, 2004. In support of this argument, Scotts points to SG&R's representation to the Court at the September 21, 2004 hearing that SG&R expected to take numerous depositions.

SG&R admits that no depositions were taken, but asserts that it spent several hundred attorney hours on discovery, including multiple interviews with Mr. Peters after April 7, 2004 in an effort to test the Peters affidavit. Although Scotts maintains its argument that SG&R did not prosecute the Section 2 claim, Scotts does not dispute SG&R's claims regarding the amount of time spent on discovery.

Although it appears that SG&R made some factual

allegations in the complaint that were later undercut by employees of their client, the Court concludes that this alone does not demonstrate any improper motives on behalf of SG&R. Furthermore, Scotts' other arguments demonstrate a gradual capitulation by SG&R to Scotts' demands rather than willful bad faith. Scotts did not immediately request that SG&R withdraw the Section 2 claim when it obtained the Peters affidavit. Instead, Scotts waited some time before providing SG&R with a copy. Additionally, at least as late as September 21, 2004, Scotts did not dispute that SG&R was entitled to some additional discovery on the Section 2 claim. When Scotts did request that SG&R withdraw the Section 2 claim, SG&R withdrew it within the required twenty-one days under Rule 11.

With respect to the promissory estoppel claims, SG&R did argue that those claims were not subject to arbitration because they did not arise out of the distribution agreement before later agreeing to arbitrate those claims. However, this change in position appears to have been the result of Scotts obtaining an order from an Ohio district court compelling arbitration of Scotts' claim that it was owed a debt by the plaintiff rather than any bad faith on behalf of SG&R.

Once SG&R was forced to go to arbitration, it decided to also arbitrate the promissory estoppel claims. SG&R advised the Court of its intention to arbitrate the promissory estoppel

claims on November 6, 2003 and Scotts did not object. The Court dismissed the promissory estoppel claims without prejudice on November 13, 2003. Although SG&R did sign a stipulation, prepared by Scotts, which stated that the promissory estoppel claims did arise in connection with the distribution agreement, this representation appears to have been a concession by SG&R to facilitate arbitration.

When considering a motion for sanctions, a Court must be mindful of chilling the ability of an attorney to vigorously represent the interests of a client. Hackman, 932 F.2d at 243; Baker Indus., 764 F.2d at 208. "Imposition of attorney's fees and costs under section 1927 is reserved for behavior of an egregious nature, stamped by bad faith that is violative of recognized standards in the conduct of litigation." In re Orthopedic Bone Screw Prods. Liab. Litig., 193 F.3d 781, 795 (3d Cir. 1999) (internal quotations omitted). Although SG&R could have done a better job communicating with its client regarding some of the factual assertions in the complaint and it probably pursued a weak case in an overly aggressive manner, the Court does not find that SG&R acted with willful bad faith to multiply proceedings in a vexatious manner.

Finally, SG&R's litigation conduct in other fora cannot form the basis for an award of sanctions by this Court. Other courts have held that sanctions only reach conduct that occurred

in the district court in which the motion for sanctions was filed. See e.g., Grid Sys. Corp. v. John Fluke Mfg. Co., Inc., 41 F.3d 1318, 1319 (9th Cir. 1994); In the Matter of Case, 937 F.2d 1014, 1023 (5th Cir. 1991); Argus Group 1700, Inc. v. Steinman, Nos. 96-8011, 96-8244, 96-8618, 1997 U.S. Dist. LEXIS 1834 at *9-10 (E.D. Pa. Feb. 20, 1997). Scotts concedes in its motion that SG&R's conduct elsewhere cannot be the basis for sanctions before this Court, although Scotts argues it shows a pattern of vexatious tactics. (Scotts' Mot. 16). Because the Court finds that SG&R's conduct before this Court does not warrant sanctions, the Court will not rely on allegations of conduct by SG&R in other fora to support a finding of willful bad faith.

The Court concludes that SG&R's conduct before this Court did not demonstrate willful bad faith and that an award of sanctions is not appropriate under § 1927. Thus, the Court need not reach SG&R's argument that sanctions under § 1927 are not appropriate when an attorney complies with Rule 11's safe harbor.

An appropriate Order follows.

