10-4591cv

United States Court of Appeals
For the Second Circuit

---------♦--------

ANDERSON NEWS, L.L.C., LLOYD T. WHITAKER, as the assignee under an assignment for the Benefit of Creditors for ANDERSON SERVICES, L.L.C.,
Plaintiffs-Appellants,

v.

AMERICAN MEDIA, INC., BAUER PUBLISHING CO., L.P., CURTIS CIRCULATION COMPANY, DISTRIBUTION SERVICES, INC., HACHETTE FILIPACCHI MEDIA, U.S., HUDSON NEWS DISTRIBUTION LLC, KABLE DISTRIBUTION SERVICES, INC., THE NEWS GROUP, LP, RODALE, INC., TIME INC. and TIME/WARNER RETAIL SALES & MARKETING, INC.,
Defendants-Appellees.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (Case No.: 09-cv-2227 (PAC))

BRIEF OF DEFENDANT-APPELLEE KABLE DISTRIBUTION SERVICES, INC.

I. MICHAEL BAYDA
JAY A. KATZ
MCELROY, DEUTSCH, MULVANEY & CARPENTER, LLP
Attorneys for Defendant-Appellee Kable Distribution Services, Inc.
Wall Street Plaza
88 Pine Street, 24th Floor
New York, New York 10005
(212) 483-9490
ibayda@mdmc-law.com

DICK BAILEY SERVICE (212) 608-7666 (718) 522-4363 (516) 222-2470 (914) 682-0848 Fax: (718) 522-4024
1-800-531-2028

CORPORATE DISCLOSURE STATEMENT

Kable Distribution Services, Inc. is a wholly-owned subsidiary corporation of Kable Media Services, Inc., which in turn is a wholly-owned subsidiary corporation of American Republic Investment Co., which in turn is a wholly-owned subsidiary corporation of AMREP Corporation, a publicly-owned company.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases ***Page***

Defendant-Appellee Kable Distribution Services, Inc. ("Kable") adopts the Brief of Defendant-Appellee Bauer Publishing Co., LP ("Bauer") in its entirety, supplemented as follows:

SUMMARY OF ARGUMENT

Dismissal of the Complaint as against Kable was proper because the conclusory allegations that Kable participated in a conspiracy to boycott Plaintiffs (collectively, "Anderson") were highly implausible and contrary to the facts alleged.

Denial of Anderson's motion for reconsideration and to file a Proposed Amended Complaint ("PAC") was proper with respect to Kable because the PAC did not cure the essential implausibility of Anderson's allegations against Kable and because Anderson failed to show a clear error of law or manifest injustice.

ARGUMENT

POINT I

THE CONCLUSORY ALLEGATIONS IN THE COMPLAINT THAT KABLE CONSPIRED TO BOYCOTT ANDERSON WERE HIGHLY IMPLAUSIBLE AND CONTRARY TO THE FACTS ALLEGED

Kable is alleged to be a broker which manages the relationships between magazine publishers and their wholesalers. (Complaint, ¶13, AA21). Kable is also alleged to distribute magazines, annuals and digests for more than 250 publishers,

only one of which, Bauer, is named as a defendant in this action. (Complaint, ¶15, AA21).

As appears from the August 2, 2010 Decision of the Court below (AA49), on January 14, 2009, Anderson publicly announced that it would not distribute magazines for any publisher that did not sign a written consent by February 1, 2009 to a $.07 per copy surcharge and a shift in inventory costs to the publisher. The decision whether or not to sign the consent was that of each publisher, not Kable, their broker. Anderson has not alleged that it received a signed consent from any of the more than 250 publishers. Kable was therefore powerless to do anything but to attempt to dissuade Anderson from imposing the surcharge and the shift in inventory costs, or, failing that, to attempt to find alternative arrangements for its publishers.

Anderson has alleged that Kable discussed the idea of offering Anderson exclusivity in certain territories in exchange for Anderson dropping the surcharge, so that Anderson could obtain the profits it desired by increasing its prices to retailers, which idea was rejected by Anderson. (Complaint, ¶50, AA30). That allegation is not only inconsistent with Anderson's theory that Kable participated in a conspiracy to force Anderson out of business, it squarely contradicts that theory.

After Anderson announced its intention to "impose" the surcharge, Source Interlink Distribution LLC, another wholesaler ("Source"), announced a similar surcharge. (Anderson's Brief, p. 10). Kable subsequently entered into an agreement with Source to continue supplying Source with the magazines of Kable's publisher clients. (Anderson's Brief, p. 21). But that was after Source rescinded the surcharge. (PAC, ¶71, AA91). Source was allegedly an advocate of scan-based trading. (Complaint, ¶35, AA25). Unlike Source, Anderson elected not to rescind the surcharge, but rather to discontinue business operations because its losses had become unsustainable. The conclusion is ineluctable that had Anderson rescinded the surcharge, Kable would have continued supplying magazines to Anderson. In fact, the suggestion that Kable would have done otherwise, thereby forcing its many small publisher clients out of business (Complaint, ¶¶15, 74, AA21, 38), is not only implausible, it is preposterous.

Fundamental flaws in Anderson's theory of plausibility are readily apparent. According to Anderson (Brief, pp. 17-18):

> "As the complaint alleged – and the proposed amended complaint elaborated – defendants' goal was to 'gain[] control over the single-copy magazine distribution channel.' Compl. ¶58 (AA33). 'To achieve that goal, defendants needed to eliminate Source and Anderson,' the 'two wholesalers supporting … efficiency measures' that the publishers opposed. *Id.* ¶¶36, 58 (AA26, 33). By eliminating competition at the wholesale level, the publishers and their distributors were able to ensure that retailers could not force wholesalers to compete on price.

> Publishers could therefore effectively dictate wholesale prices for single-copy distribution, thereby preserving their own margins and those of their national distributors. *See* PAC ¶80 (AA95)."

The allegations concerning control by the publishers over the single-copy magazine distribution channel are entirely conclusory and contrary to common sense. Anderson did not allege any facts supporting the allegation that the publishers and distributors would be able to control the two remaining wholesalers. It did not allege that Kable or any other publisher or distributor owned all or any part of either of the two remaining wholesalers, or that there was any corporate affiliation with either of them. The elimination of Anderson and Source would have left only two wholesalers in the wholesaler distribution channel. The two wholesalers, and not any of the publishers or distributors, would be in complete control of that channel. The two wholesalers would have the power to dictate terms to the publishers, and the publishers would have no recourse.

Moreover, as noted above, Anderson alleged in its Complaint (¶¶13-15, AA21) that national distributors are retained by publishers to "broker" and manage their relationships with their wholesalers, that Curtis Circulation Company ("Curtis") distributes magazines for at least 400 publishers, and that Kable distributes magazines for more than 250 publishers. Anderson did not allege that it received a signed consent form from any of these publishers, and in fact has

alleged in substance that following its imposition of the surcharge it lost 80% of its business. (Complaint, ¶64, AA35). Anderson apparently realized that if it alleged that several hundred publishers conspired within a matter of days to force Anderson out of business and that Anderson was forced out of business within days thereafter, the Complaint would not have passed the laugh test. So it selected only five of the publishers to name as defendants to make the alleged conspiracy seem possible, without alleging facts showing conspiratorial conduct by any of them or explaining how their reactions to the surcharge differed from any of the other hundreds of publishers.

The allegations against Kable were patently implausible. Dismissal of the Complaint as against Kable was the proper result. The standard of review of this matter is set forth in Bauer's Brief.

POINT II

ANDERSON'S MOTION FOR RECONSIDERATION AND FOR LEAVE TO FILE THE PROPOSED AMENDED COMPLAINT WERE PROPERLY DENIED

A Judgment was entered on August 2, 2010. (AA13). On August 16, 2010 Anderson moved for reconsideration and for leave to file the PAC. (AA13). As the Court below noted (AA108-09), a motion for reconsideration should not be granted where the moving party seeks solely to relitigate an issue that has already been decided, which is exactly what Anderson sought to do. (AA109).

The motion for leave to file the PAC was also properly denied. Once a judgment is entered, the filing of an amended complaint is not permissible until the judgment is set aside or vacated pursuant to Fed. R. Civ. P. 59(e) or 60(b). Nat'l Petrochemical Co. of Iran v. M/T Stolt Sheaf, 930 F.2d 240, 244-45 (2d Cir. 1991) ("the liberal amendment policy of Rule 15(a) [cannot] be employed in a way that is contrary to the philosophy favoring finality of judgments and the expeditious termination of litigation").

Defendants first identified the infirmities of Anderson's Complaint in a letter to the Court on March 30, 2009 seeking a pre-motion conference for permission to file a motion to dismiss the Complaint. The motion to dismiss the Complaint was not filed until December 14, 2009, six months later. (Docket No. 58). By that motion, defendants again pointed out the infirmities of the Complaint. No explanation has been offered for Anderson's failure to seek to replead during this six-month period, or thereafter while the motion was pending. Nor does Anderson identify any new purported fact not known to it prior to December 14, 2009.

Without identifying any allegations it sought to add, Anderson belatedly and in a footnote in its opposition to defendants' motion to dismiss, purported to reserve the right to amend its Complaint if the motion to dismiss were granted. (Docket No. 72). However, no formal motion to amend was made prior to the entry of Judgment. (Anderson's Brief, p. 26).

A Rule 59(e) motion including a proposed amended pleading can only be granted to correct "a clear error of law or to prevent manifest injustice." In re: Assicurazioni Generali, S.P.A., 592 F.3d 113, 120 (2d Cir. 2010). Moreover where, as here, a plaintiff "had the opportunity to amend the complaint earlier but waited until after judgment, the court may exercise its discretion more exactingly." Id. (internal quotation marks omitted). If Anderson believed that it could cure the deficiencies in the original Complaint, and specifically to show a plausible claim, it should have submitted a proposed amendment before the motion to dismiss was decided instead of waiting to see how the Court would decide the motion. As this Court has explained, where plaintiffs informally requested leave to amend in their motion papers and did not submit proposed amendments or otherwise indicate how they would correct any deficiencies in the complaint, "it was within the district court's discretion to dismiss the Complaint with prejudice." Rosner v. Star Gas Partners, L.P., 344 F. App'x 642, 645 (2d Cir. 2009). "[A] busy district court need not allow itself to be imposed upon by the presentation of theories seriatim." State Trading Corp. of India, Ltd. v. Assuranceforeningen Skuld, 921 F.2d 409, 418 (2d Cir. 1990) (quoting Freeman v. Continental Gin Co., 381 F.2d 459, 469 (5th Cir. 1967)).

Moreover, the PAC did not cure the basic insufficiencies of the Complaint which made Anderson's theory implausible. Anderson again alleged that Kable

was a mere broker, distributing magazines and other publications for over 250 publishers. (PAC, ¶¶16, 18, AA74). Anderson again alleged that Kable offered Anderson exclusivity in certain territories if Anderson would retract the surcharge. (PAC, ¶58, AA87). Anderson again repeated its obviously invalid theory that reducing the number of wholesalers from four to two would give the publishers control over the single-copy magazine distribution system. (PAC, ¶44, AA81-82). And of course the context to determine plausibility was the same in the PAC as it was in the original Complaint -- the imposition of a surcharge by Anderson requiring immediate actions by the publishers.

The additional allegations concerning Kable in the proposed Amended Complaint are conclusory. Thus, the allegations in paragraphs 56 and 62 (AA86, 88) that the presidents of Kable and Curtis met "to plan their collusive action" and the presidents of Kable and TWR [Time Warner] scheduled a meeting "to discuss the conspiracy", and in paragraph 59 (AA87), that Kable's president attempted to solicit the president of non-party Comag "to join defendants' conspiracy", are mere characterizations, not based on any supporting facts. Courts are not required to accept such terms as a sufficient basis for a complaint. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 and fn. 9 (2007). And the allegation in paragraph 57 (AA86) that Kable communicated with TWR ostensibly to "catch up on a few

IPDA [International Periodical Distributors Association] type items" is plainly insufficient. Twombly, fn. 12 (membership in trade association).

For those reasons, the motion for reconsideration and for permission to file the PAC were properly denied. The standard of review of these matters is set forth in the Brief of TWR.

CONCLUSION

The judgment and the Decisions of the Court below should be affirmed.

Dated: April 18, 2011

McElroy, Deutsch, Mulvaney & Carpenter, LLP

By /s/ I. Michael Bayda
I. Michael Bayda
Jay A. Katz
Attorneys for Defendant-Appellee
Kable Distribution Services, Inc.
Wall Street Plaza
88 Pine Street, 24th Floor
New York, NY 10005
(212) 483-9490
ibayda@mdmc-law.com

CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 32(a)(7)(C)

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I certify under penalty of perjury that the foregoing Brief for Defendant-Appellee Kable Distribution Services, Inc. contains 2066 words, as calculated by the Misrosoft Word 2002 word processing system, and therefore complies with Rule 32(a)(7)(B)(i).

April 18, 2011

/s/ I. Michael Bayda
I. Michael Bayda