

10-4591-cv

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
FILIPACCI MEDIA, U.S., HUDSON NEWS DISTRIBUTORS LLC, KABLE
DISTRIBUTION SERVICES, INC., THE NEWS GROUP, LP, RODALE, INC.,
TIME INC., & TIME/WARNER RETAIL SALES & MARKETING, INC.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE RODALE, INC.

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for Defendant-Appellee Rodale, Inc. certifies that no publicly traded company has a 10% or greater stock ownership in Rodale.

April 18, 2011

s/John M. Hadlock
John M. Hadlock

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Rodale, Inc. adopts and joins in the Counterstatement or questions presented set forth in the Brief of Defendant-Appellee Bauer Publishers Co., L.P.

2. Did the District Court properly conclude that the allegations contained in the Complaint against the publishers, and specifically Rodale, lacked adequate factual specificity concerning their participation in the alleged unlawful conspiracy to survive a motion to dismiss?

STATEMENT OF FACTS

Rodale, Inc. (“Rodale”) is a publishing company located in Pennsylvania. Rodale publishes such magazines as Men’s Health, Prevention, Women’s Health and other titles largely in the health and fitness field.

Rodale, Inc. (“Rodale”) adopts the Statement of Facts in the Briefs of Defendant-Appellee Bauer Publishing Co., LP. (“Bauer”) and Defendants-Appellees Time, Inc. and Time Warner Retail Service and & Marketing, Inc. (together “Time”). Curtis Circulation Company (“Curtis”) is the national distributor for Rodale and it is alleged in the Complaint that Curtis’ actions as therein alleged were taken on behalf of its publisher-clients, including Rodale. Rodale therefore, also adopts the Statement of Facts and Arguments in the Brief of Curtis. Additionally, Rodale joins in the Brief of Defendants-Appellees American Media, Inc. and Distribution Services, Inc. (together “AMI”), and in particular Point II therein that the District Court Properly Dismissed the Common Law Claims Against all Defendants and Denied Leave to Amend. Rodale submits this separate Brief to bring to the Court’s attention that there are essentially no allegations in the Complaint, or the Proposed Amended Complaint, that purport to identify any activity specific to Rodale upon which the alleged unlawful conspiracy or concerted action can be based.

As observed by the District Court, the Complaint lacks specific factual allegations concerning any of the publishers, and any factual allegation against Rodale specifically, concerning any action taken by them apart from the conclusory assertion that all the defendant national distributors and all of the defendant publishers, including Rodale, acted in concert to cut off the Plaintiffs' supply of magazines. The Complaint asserts that Charles Anderson personally met with the President or CEO of several of the publishers named in the Complaint to describe the reasons for Plaintiffs' decision to impose a \$.07 per copy surcharge (Complaint ¶ 41) (AA 14), but Rodale is not mentioned as one of the publishers that Mr. Anderson visited. The Complaint further asserts that Mr. Anderson later met or had telephone conversations with the executives of "many of the Defendants" but does not mention Rodale as a publisher with whom he had any conversation with whatsoever. Indeed it is not asserted anywhere in the Complaint that the Plaintiffs had any other contact with Rodale whatsoever during the alleged conspiracy period between mid-January and February 7, 2009, when the Plaintiffs ceased doing business. The sole mention of Rodale is that it is a publisher (Complaint ¶ 11) (AA 7-8), that it uses Curtis as its national distributor (Complaint ¶¶ 14 and 49) (AA 14, 16) and, in conclusory fashion, that Rodale along with the other publisher and distributor Defendants, acting in concert, cut off the Plaintiffs.. (Complaint ¶ 47) (AA 16).

The Proposed Amended Complaint, which the District Court did not permit the Plaintiffs to serve, adds virtually nothing relating to Rodale. Plaintiffs, in their Proposed Amended Complaint, assert that there were meetings or telephone calls between Charles Anderson of the Plaintiffs and various Defendants, but again never mentions that Plaintiffs had any contact during this critical time period with any representative of Rodale. Similarly, Plaintiffs do not allege that Rodale participated in any meetings or telephone conversations with other Defendants during this critical time period. The only factual allegations relating to Rodale are that on January 29, 2009, a Rodale official stated in an e-mail to the president of DSI, a marketing firm with which Rodale had a relationship, that it had received an e-mail originating from Comag, a different national distributor, to its clients indicating that Comag had reached an agreement with Anderson and a separate wholesaler, Source Interlink (“Source”), and characterized the CEO of Comag as “dangerous”. He also sent a second e-mail two days later to another publisher complaining about Comag. (Proposed Amended Complaint at ¶¶ 60 and 61) (AA53-54). There is no factual assertion as to the context of those communications, or how that characterization of the Comag CEO demonstrates that Rodale was a party to any alleged concerted action.

Indeed there is no allegation in the embellished Proposed Amended Complaint that Rodale even discontinued supplying its magazines to the Plaintiff.

At paragraph 66 of the Proposed Amended Complaint it is asserted that Curtis on behalf of its publishers, which included Rodale, and in concert with other Defendants, refused to enter into any substantive negotiations with Plaintiffs and then cut Plaintiffs off from their supply of the publishers magazines. The paragraph then proceeds to assert that some of Curtis' publishers, but not Rodale, following Curtis' declaration, cut off their supply of magazines to the Plaintiffs. (Proposed Amended Complaint at ¶ 66) (AA 55-56). Nowhere is there asserted in the Proposed Amended Complaint that Rodale cut off its supply of magazines to Plaintiffs, or that it did anything relating to Plaintiffs that could connect it to any alleged concerted action, except its executive's characterization of Comag's CEO as "dangerous" and his complaint that Comag was continuing to supply a different wholesaler, Source Interlink – which continues to date as a wholesaler of magazines, including Rodale's magazines.

LEGAL ARGUMENT

Rodale adopts the legal argument set forth in the Brief of the Defendant-Appellee, Bauer, the Brief of Defendants-Appellees Time, the Brief of Defendants-Appellees AMI, particularly Point II of their Brief, and also particularly because of its relationship with Curtis as its national distributor, the Brief of Defendant-Appellee Curtis.

The District Court, addressing the allegations against the publisher Defendants, including specifically Rodale, concluded that the Complaint lacks sufficient specific allegations as to any of the publishers. It noted that the Complaint instead attempted to implicate the publishers, including Rodale, in the conspiracy because of their relationships with the respective national distributor Defendants. The court concluded that as the Complaint was deficient as to the national distributors, it was therefore deficient as to the publishers. The Complaint lacks the requisite specificity as to factual assertions giving rise to the alleged conspiracy among the publishers, including specifically Rodale, as determined by the District Court, and it also fails to assert a factual basis upon which the alleged conspiracy can be considered “plausible,” as required by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). That argument has been thoroughly set forth in the Brief of Defendant-Appellee Bauer and Defendants-Appellees Time in which Rodale joins. In addition, the Complaint fails to assert any activity specific to Defendant-Appellee Rodale that would suggest that Rodale was a participant in that alleged conspiracy. It is not sufficient simply to allege that all of the Defendants joined in a concerted plan to discontinue dealing with Plaintiffs, although the proposed Amended Complaint does not even assert that as against Rodale. The *Twombly* decision requires Plaintiffs to plead sufficient factual allegations to establish a concerted action claim that is plausible,

but also obligates the Plaintiffs to include sufficient allegations as to each named defendant to advise each of when it allegedly joined the conspiracy and what it purportedly did that exposes it to liability. “Notice pleading requires at a minimum that the pleading give the opposing party notice of . . . which of *its* actions gave rise to the claims upon which the complaint is based.” E & L Consulting, Ltd. V. Doman Indus. Ltd., 472 F.3d 23, 32 (2d Cir. 2006) (emphasis added). Rule 8(a) requires that actions brought against multiple parties “must clearly specify the claims with which each individual is charged.” 5 Wright & Miller, Federal Practice and Procedure §1248 (2004); United States v. Bonanno Organized Crime Family of LaCosta Nostra, 683 F. Supp. 1411, 1429 (E.D.N.Y. 1988); *and* Matthews v. Kilroe, 170 F. Supp. 416 (S.D.N.Y. 1959).

The Complaint contains no allegation against Rodale whatsoever other than that it along with the other Defendant publishers and national distributors “acting in concert” cut off Anderson from its supply of magazines. The lower court quite properly ruled that such a cursory and conclusory allegation, with no factual assertions relating to Rodale or the other publishers, was inadequate. It is not asserted in the Complaint when Rodale purportedly joined the conspiracy or what steps it took to affirm its commitment to the alleged unlawful plan or, as referred to in the *E & L Consulting* case: “...which of its [Rodale’s] actions gave rise to the claims upon which the Complaint is based.” 472 F.3d at

32, The Proposed Amended Complaint that the District Court refused to permit is arguably less sufficient as to Rodale because it does not even assert that Rodale cut off Plaintiffs. The assertion that a Rodale executive sent an e-mail to its marketing company in which it noted that the CEO of Comag was “dangerous” for reasons, or in a context, that is not explained, and that the executive complained that Comag was servicing a different wholesaler, Source, adds nothing to the original Complaint that is suggestive that Rodale committed itself to the alleged concerted action that is the subject of the Complaint.

Accordingly, in addition to all of the deficiencies in the Complaint that have been very effectively identified and described in the Briefs of Bauer and Time, which Rodale adopts and joins, the Complaint is totally deficient in asserting any factual allegations against Rodale that can support the claim that it willfully participated in a conspiracy in violation of the antitrust laws.

CONCLUSION

For the forgoing reasons, Rodale respectfully requests that this Court offer in the decision as the District Court.

April 18, 2011

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CERTIFICATE OF SERVICE

I hereby state that, on this 18th day of April 2011, I electronically filed the foregoing Brief for Defendant-Appellee Rodale, Inc. with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I further state that counsel as shown in the attached Service List are registered CM/ECF users and will be served by the appellate CM/ECF system.

I certify under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York
April 18, 2011

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