IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
January 4, 2019
Lyle W. Cayce
Clerk

No. 18-30245

CLEAN WATER OPPORTUNITIES, INCORPORATED, doing business as Engineered Polyurethane Patching Systems,

Plaintiff - Appellant

v.

THE WILLAMETTE VALLEY COMPANY,

Defendant - Appellee

Appeal from the United States District Court
for the Middle District of Louisiana
USDC No. 3:16-CV-227

Before STEWART, Chief Judge, KING and OWEN, Circuit Judges.

PER CURIAM:*

Clean Water Opportunities, Incorporated, appeals the district court's order dismissing its various federal and state antitrust claims against The Willamette Valley Company. We AFFIRM.

I.

We set forth the facts as alleged in the complaint and accept them as true, as we are required to do at the motion-to-dismiss stage. Clean Water

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Opportunities, Incorporated, doing business as Engineered Polyurethane Patching Systems ("EPPS"), manufactured patch, a polyurethane material used to fill knot holes in plywood. EPPS offered patch to plywood manufacturers in the so-called Southern Market, which includes portions of Louisiana, Texas, Mississippi, Alabama, Florida, and Arkansas.

Manufacturers of patch sell the product to plywood manufacturers on a per-gallon basis. In their dealings with plywood manufacturers, patch manufacturers sell not only patch itself, but also the equipment used to apply patch and servicing for that equipment.

Although David Edwards, the owner and founder of EPPS, had previously competed with The Willamette Valley Company ("Willamette") in the patch market, EPPS itself entered into the market in or around 2013. At that time, Willamette was the sole seller of patch. Shortly after entering the market, EPPS entered into a production contract with MARTCO, a Louisiana-based plywood manufacturing company, to supply patch for one of MARTCO's two manufacturing lines. Subsequently, EPPS proposed an additional contract under which it would supply patch to both of MARTCO's manufacturing lines for five years at $12.90 per gallon. This price was significantly lower than Willamette's price of $17 per gallon.

Willamette managed to scuttle this transaction, however. Upon learning of EPPS's proposal, Willamette offered MARTCO "a substantial discount" on all the non-patch products it sold to MARTCO, contingent upon MARTCO purchasing all its patch from Willamette. EPPS attempted to offer similar discounts to MARTCO, but MARTCO advised EPPS that EPPS was unable to offer anything that could match Willamette's discounts. MARTCO thereafter "terminate[d] its relationship with EPPS." During this time period, EPPS also sought business from two other plywood manufacturers, but discussions stalled prior to the creation of any formal agreement, also allegedly due to

Willamette's offer of a substantial discount on non-patch products to those manufacturers.

As a result of this lost business, it was no longer financially viable for EPPS to compete in the patch market. Approximately two months after losing MARTCO's business, EPPS entered into a contract with Willamette to sell all of its assets. The agreement included a noncompete clause. Willamette thereafter became the sole seller of patch in the Southern Market.

In April 2016, EPPS sued Willamette in federal court, alleging violations of the Sherman Act, the Clayton Act, and Louisiana's antitrust analogue. EPPS alleged that Willamette had engaged in predatory pricing in violation of the Sherman Act when it offered discounts on non-patch products to the would-be EPPS customers, because these discounts resulted in a price for patch that was effectively below Willamette's average variable costs for producing patch. It also alleged that Willamette illegally established a monopoly, in violation of state and federal law, and had purchased EPPS's assets to maintain its monopoly. Upon Willamette's motion to dismiss, the district court determined that EPPS had failed sufficiently to allege pricing below average variable cost and that its predatory-pricing claim therefore failed. The district court alternatively held that the predatory-pricing claim failed because EPPS had failed to allege that Willamette would have been able to recoup losses incurred as a result of its alleged pricing scheme after EPPS exited the market. The district court also concluded that EPPS's other claims depended on its predatory pricing claim, and therefore dismissed those claims as well. EPPS now appeals.

II.

A.

We review a district court's grant of a motion to dismiss de novo, applying the same standard on review as that applied by the district court. *See Gonzalez*

v. Kay, 577 F.3d 600, 603 (5th Cir. 2009). In order to survive a motion to dismiss, a plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Although we are bound to accept plaintiff's factual allegations as true, this principle "is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A plaintiff is not entitled to relief when "the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." *Id.* at 679.

B.

EPPS first alleges that Willamette engaged in predatory pricing in order to maintain its monopoly over the patch industry when it offered substantial discounts on its non-patch products to several would-be EPPS customers. "Predatory pricing occurs when a defendant 'sacrifice[s] present revenues for the purpose of driving [a competitor] out of the market with the hope of recouping the losses through subsequent higher prices.'" *Felder's Collision Parts, Inc. v. All Star Advert. Agency, Inc.*, 777 F.3d 756, 759 (5th Cir. 2015) (alterations in original) (quoting *Int'l Air Indus., Inc. v. Am. Excelsior Co.*, 517 F.2d 714, 723 (5th Cir. 1975)). In order to successfully state a claim of predatory pricing under the Sherman Act, a plaintiff must plausibly allege that "1) the prices complained of are below an appropriate measure of the alleged monopolist's costs and 2) that the alleged monopolist has a reasonable chance of recouping the losses through below-cost pricing." *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 527 (5th Cir. 1999). As to the first element, an ideal measure of the alleged monopolist's cost would be true marginal cost. *Id.* at 532. However, because of difficulties in ascertaining true marginal cost, this court looks to average variable cost in conducting the predatory-pricing inquiry. *Id.* Average variable costs are costs that "vary with the amount

produced," including "hourly labor, the cost of materials, transport, and electrical consumption at a plant." *Id.* Accordingly, in order to state a claim for predatory pricing, a plaintiff must sufficiently plead that the alleged monopolist priced its goods below its average variable costs for producing those goods.

EPPS alleges that, although Willamette did not price patch itself below average variable cost, it effectively did so when it substantially discounted non-patch products to induce customers to purchase its patch. When these discounts are considered, EPPS argues, the price of patch sank below Willamette's average variable cost to produce it. Willamette does not appear to dispute that the effective price of patch, with discounts on other products considered, constituted an appropriate measure of price for purposes of the predatory-pricing analysis, and we see no authority barring such an approach. We therefore consider Willamette's pricing holistically, rather than focusing exclusively on the price at which it sold patch.

EPPS's factual allegations fail to plausibly support its claim that Willamette effectively priced its patch below average variable cost. EPPS alleges that Willamette offered discounts to several plywood manufacturers that "were substantial and represented a benefit below Willamette's cost to produce patch." Absent further factual enhancement, these claims amount to no more than conclusory allegations, which we are not bound to accept as true Federal Rule of Civil Procedure 12(b)(6). *See Iqbal*, 556 U.S. at 678.

The specific factual allegations EPPS does plead only serve to render its case implausible. First, EPPS alleges that it offered to sell patch at $12.90 per gallon and that Willamette sold patch at $17 per gallon. Second, it alleges that the competitive price for patch was $10. Thus, the average variable cost for producing patch likely falls somewhere below the competitive price of $10. Even setting average variable cost directly at the competitive price of $10,

Willamette needed only to discount its other products to undercut EPPS's price of $12.90. In doing so, Willamette only had to remain within the $2.90 interval between EPPS's price and the competitive price in order to maintain above-cost pricing. And likely, it could have gone further, since its average variable costs were almost certainly lower than the competitive price. Accordingly, we have no reasonable basis to infer that Willamette effectively priced its patch below average variable cost. Because EPPS failed to plausibly allege one of the two essential elements of its predatory pricing claim against Willamette, dismissal of that claim was appropriate. We therefore need not consider the question of whether EPPS successfully alleged recoupment.

C.

EPPS also alleges that Willamette violated § 2 of the Sherman Act and §§ 4 and 7 of the Clayton Act when it purchased EPPS's assets and entered into a noncompete agreement with EPPS's founder. The Supreme Court has recognized that the acquisition of a competitor alone may constitute a violation of federal antitrust laws, under certain circumstances. *See United States v. Grinnell Corp.*, 384 U.S. 563, 576 (1966) (listing acquisition by defendant of its competitors as one of several "unlawful and exclusionary practices" used by defendant to achieve monopoly).

In its brief, EPPS does not argue that Willamette's acquisition of EPPS, standing alone, amounted to an antitrust violation. Instead, EPPS contends that because the district court erred in dismissing its predatory-pricing claim, it similarly erred in dismissing its unlawful-acquisition claim. The two claims allegedly must rise and fall together. Because we reject the latter claim, we must likewise reject the former. Accordingly, we affirm the district court's grant of Willamette's motion to dismiss as to EPPS's unlawful-acquisition claim.

D.

The balance of EPPS's complaint consists of its allegation that Willamette illegally monopolized the patch market in violation of § 2 of the Sherman Act and an analogous Louisiana law. Unlike its unlawful-acquisition claim, EPPS argues that its § 2 claim stands independent of its predatory-pricing claim. For support, EPPS cites out-of-circuit precedent holding that "[b]ehavior that otherwise might comply with antitrust law may be impermissibly exclusionary when practiced by a monopolist." *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 187 (3d Cir. 2005). The thrust of EPPS's § 2 theory is that although Willamette's pricing scheme may not have itself violated federal law as a predatory-pricing scheme, it may nonetheless violate § 2 because it has been practiced by a monopolist and had the effect of maintaining that monopoly.

In order to state a claim under § 2 for the unlawful maintenance of a monopoly, a plaintiff must allege that the defendant: "1) possesses monopoly power in the relevant market and 2) acquired or maintained that power willfully, as distinguished from the power having arisen and continued by growth produced by the development of a superior product, business acumen, or historic accident." *Stearns Airport*, 170 F.3d at 522 (citing *Grinnell*, 384 U.S. at 563). We assume arguendo that EPPS has successfully alleged facts demonstrating that the first element is present. The second element requires a showing of exclusionary conduct. "Exclusionary conduct under section 2 is the creation or maintenance of monopoly by means other than the competition on the merits embodied in the *Grinnell* standard." *Id.* The "key factor" we look to in conducting this inquiry is "the proffered business justification for the act. If the conduct has no rational business purpose other than its adverse effects on competitors, an inference that it is exclusionary is supported." *Id.*

The rationality of Willamette's acts is readily apparent. The only exclusionary conduct EPPS alleges is Willamette's offering of substantial discounts to its customers. Willamette's justification for these actions "is obvious: it was trying to sell its product." *Id.* at 524. Here, Willamette was faced with the prospect of losing business to a competitor. In order to keep that business, it offered discounts on its other products. Although, as the predatory-pricing framework contemplates, certain discounts may be so substantial as to cross the line into economic irrationality, no such discounts are present here: as stated above, the discounts resulted in an effective selling price of patch that was, in all likelihood, either competitive or supracompetitive.

While the rationality of a business decision is a significant factor in ascertaining whether conduct is exclusionary, it is not a sine qua non. *See id.* at 524-26 (considering other factors in addition to business rationality, including the approval of the consumer and the potential existence of bribery or threats, in determining the validity of plaintiff's § 2 claim). EPPS does not, however, explain why this court should deem this economically rational conduct exclusionary. As a result, the rationality of Willamette's actions is determinative. We therefore affirm as to the district court's denial of EPPS's § 2 claim.

E.

Finally, the Louisiana antitrust claim similarly rises and falls with the claims discussed above. The parties do not dispute that EPPS's Louisiana antitrust claim hinges on the success of the federal claims, because the Louisiana statute substantially mirrors the Sherman Act. This circuit's caselaw confirms that understanding. *Felder's Collision Parts*, 777 F.3d at 759. Because each of EPPS's federal-law claims fails, so too must its Louisiana claim.

III.

We therefore conclude that dismissal pursuant to Rule 12(b)(6) was appropriate as to each of EPPS's claims against Willamette. Accordingly, the judgment of the district court is AFFIRMED.