

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION

ALAN ENTERPRIZES LLC,

PLAINTIFF,

V.

CIVIL ACTION NO. 14-C-503-2
Honorable Joanna I. Tabit

MAC'S CONVENIENCE STORES LLC,
D/B/A CIRCLE K, JOYCE SALMON,
AND LOUIS DIAB,

DEFENDANTS.

ORDER DISMISSING PLAINTIFF'S CLAIMS WITH PREJUDICE
PURSUANT TO W. VA. RULE CIV. P. 56

Before the Court are the *Defendants' Motion for Summary Judgment*, the Plaintiff's *Motion for Partial Summary Judgment*, and the *Plaintiff's Motion for Documents Produced by Defendant to be Deemed Authentic and Representative or, in the alternative, to Take an Evidentiary Deposition of Defendant MAC'S Convenience Stores LLC'S Oil Suppliers*.

Upon reviewing the briefs and the evidence submitted, the Court rules for the reasons given below that *Defendants' Motion for Summary Judgment* is hereby GRANTED, the Plaintiff's *Motion for Partial Summary Judgment* is hereby DENIED, and the *Plaintiff's Motion for Documents Produced by Defendant to be Deemed Authentic and Representative or, in the alternative, to Take an Evidentiary Deposition of Defendant MAC'S Convenience Stores LLC'S Oil Suppliers* is hereby DENIED as moot.

BACKGROUND

Plaintiff brings a single claim against all Defendants under the West Virginia Unfair Practices Act, W. Va. Code § 47-11A-1 *et seq.* (1983) (“the Act”). Plaintiff claims Defendants sold fuel from the “Circle K” branded convenience store located at 328 E Main St, Bridgeport, West Virginia (“the Bridgeport Mac’s”) at prices that violated the Act. Amended Complaint at ¶¶ 12-15. Plaintiff claims Defendants’ conduct damaged three stores owned and operated by Plaintiff during the period of October 2011 through December 2014. Responses to Combined Discovery at 1 (Interrogatory 1) and 14-15 (Admissions 3 through 6).

The Act prohibits retailers from making sales below cost “for the purposes of unfairly diverting trade from or otherwise injuring one or more competitors, and destroying competition.” W. Va. Code § 47-11A-2. A retailer’s “costs” are arrived at through a specific formula. First, the Court must take either the retailer’s “invoice cost” or the “replacement cost thereof to the retailer within thirty days prior to the date of sale,” whichever is lower. W. Va. Code § 47-11A-6(a). Then, the Court deducts from this amount “all trade discounts, except customary discounts for cash.” *Id.* Then, the Court must add to the resulting amount “freight charges” and a statutory “markup.” W. Va. Code § 47-11A-6(a)(ii). “[I]n the absence of proof of a lesser cost,” the statutory markup “shall be seven percent of the aggregate of invoice cost or replacement cost (whichever is used), less trade discounts as aforesaid, and plus said freight charges.” W. Va. Code § 47-11A-6(a)(ii)(2).

Not all sales below “cost” are prohibited. Among other circumstances, a retailer may sell below cost when doing so is in “an endeavor in good faith to meet the legal prices of a competitor as herein defined selling the same article, product or item of merchandise, in the same locality or trade area.” W. Va. Code § 47-11A-8(d).

In their motion, Defendants argue Plaintiff cannot prevail for four reasons. The first two reasons relate to the definition of “cost” in W. Va. Code § 47-11A-6. First, Defendants claim “applicable taxes” are, as a matter of law, not included in the calculation of “cost” and that Plaintiff therefore cannot prove a sale by Defendants that was below “cost.” Second, Defendants claim Plaintiff has no evidence to show that, when using the lower of Defendants’ “invoice cost” or “replacement cost,” as permitted by W. Va. Code § 47-11A-6(a), any sale by Defendants was below “cost.” Defendants also claim Plaintiff lacks evidence to show either that Defendants acted with the “purpose” required by W. Va. Code § 47-11A-2, or to show that Defendants did not act pursuant to the “good faith” meeting competition provision in W. Va. Code § 47-11A-8.

In the alternative, Defendants argue Plaintiff cannot recover treble damages due to the amendment of W. Va. Code § 47-11A-9 in 2016.

Because the Court finds the first issue dispositive, it need not address each of Defendants’ arguments or resolve each of the factual statements as to which the parties disagree.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” W. Va, R. Civ. P. 56(c); accord. Fleet v. Webber Springs Owners Ass’n, 235 W. Va. 184, 188, 772 S.E.2d 369, 373 (2015). “A material fact is one ‘that has the capacity to sway the outcome of the litigation under the applicable law.’” Jividen v. Low, 794 W. Va. 705, 714, 461 S.E.2d 451, 460 (1995) (citation omitted).

A properly supported summary judgment motion shifts the burden of production to the nonmoving party. Williams v. Precision Coil, Inc., 194 W. Va. 52, 60 (1995). “[T]he party opposing summary judgment must satisfy the burden of proof by offering more than a mere

‘scintilla of evidence,’ and must produce evidence sufficient for a reasonable jury to find in a nonmoving party’s favor.” Painter v. Peavy, 192 W. Va. 189, 192-93 (1994). Summary judgment is, therefore, appropriate “where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.” Id. at 193. The nonmoving party may not rely on speculation and unsupported allegations to oppose summary judgment, but must offer “significant probative evidence tending to support the complaint.” Id. (citations omitted).

CONCLUSIONS OF LAW

The Court interprets the Act to provide that a retailer’s taxes are not included in the calculation of its cost for purposes of the Act. W. Va. Code § 47-11A-6 (1983) directs that calculating cost for a wholesaler includes “the invoice cost of the merchandise to the wholesaler plus applicable taxes....”, whereas cost for a retailer omits any mention of “applicable taxes.” This difference falls within the maxim *expressio unius est exclusio alterius*. Applying principles of statutory construction, the statute’s silence as to “applicable taxes” in the retailer context evidences that the Legislature did not intend for those “taxes” to be included as a retailer’s costs. The Court appreciates the Plaintiff’s argument that this interpretation thwarts legislative intent by rendering the Act moot in the context of retail gasoline sales due to “cost” being so low; however, this, perhaps unintended, collateral effect should be resolved, if at all, legislatively. Furthermore, the Court determines that the Legislature did not build a structure within the Unfair Practice Act to determine the inclusion or exclusion of taxes within the cost calculation, depending on when and how taxes are assessed in a particular industry or when assessed by an individual business.

FINDINGS OF UNCONTROVERTED FACT

Because the Court finds that, as a matter of law, applicable taxes are not included in a retailer's costs under W. Va. Code § 47-11A-6(a), the Court need not examine whether every factual contention submitted by Defendants is uncontroverted. The Court does find it to be uncontroverted, however, that there is no evidence Defendants sold fuel below cost if taxes are excluded from the calculation. Plaintiff therefore cannot prove an essential element of its cause of action.

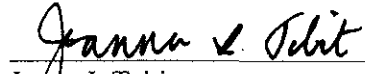
As a result, the Court need not rule on 1) whether, as Defendants also argue, Plaintiff cannot show a sale by Defendants that was below "cost" using the lower of Defendants' "invoice cost" or "replacement cost"; 2) whether Plaintiff cannot show that Defendants acted with the "purpose" required by W. Va. Code § 47-11A-2; 3) whether Plaintiff cannot show that Defendants did not act pursuant to the "good faith" meeting competition provision in W. Va. Code § 47-11A-8; or 4) whether Plaintiff cannot recover treble damages as a matter of law, due to the 2016 amendment to W. Va. Code § 47-11A-9.

CONCLUSION


Accordingly, the Court finds that it is appropriate to dismiss the Plaintiff's claims with prejudice and grant the Defendants summary judgment. The Plaintiff's Motion for Partial Summary Judgment is denied for the reasoning set forth above and the Plaintiff's Motion for Documents to be Produced is denied as moot. The Defendants, as the prevailing parties, are entitled to their costs as set forth in West Virginia Code § 59-2-8 and Rule 54(d) of the West Virginia Rules of Civil Procedure.

IT IS SO ORDERED.

ENTER this 3rd day of January, 2017.


Joanna I. Tabit
Presiding Judge, Business Court Division

PRESENTED BY:

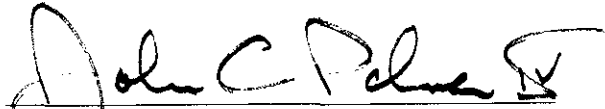

Michael Bonasso (WVSB #394)
FLAHERTY SENSABAUGH BONASSO, PLLC
Post Office Box 3843
Charleston, West Virginia 25338-3843
(304) 345-0200
(304) 345-0260 (facsimile)

Kyle T. Turnbull (WVSB #12036)
FLAHERTY SENSABAUGH BONASSO, PLLC
48 Donley Street, Suite 501
Morgantown, WV 26501
(304) 598-0788
(304) 598-0790 (facsimile)

and

Zach Chaffee-McClure (*Pro Hac Vice*)
Shook, Hardy & Bacon LLP
2555 Grand Blvd.
Kansas City, MO 64108
(816) 474-6550
(816) 421-5547 (facsimile)
Counsel for Defendants

INSPECTED BY:


John C. Palmer IV (WVSB #2801)
Stephen D. Annand (WVSB #150)
Keith J. George (WVSB #5102)
Robinson & McElwee PLLC
400 Fifth Third Center
700 Virginia Street East
Charleston, West Virginia 25301

and

Devan K. Flahive (WVSB #12539)
Robinson & McElwee PLLC
140 West Main Street, Suite 300
Clarksburg, West Virginia 26301
Counsel for Plaintiff