IN THE CIRCUIT COURT OF HANCOCK COUNTY, WEST VIRGINIA
Business Court Division

WINE AND BEVERAGE MERCHANTS OF WEST VIRGINIA, INC.; ATOMIC DISTRIBUJTING COMPANY; BEVERAGE DISTRIBUTORS, INC.; PHILLIP JAY SHIFFLETT; JO'S GLOBE DISTRIBUTING COMPANY; and MARTIN DISTRIBUTING COMPANY,

Plaintiffs,

v.

CASE NO.: 17 – C - 91
Presiding Judge: Hon. James Young
Resolution Judge: Hon. Paul Ferrell

MOUNTAIN STATE BEVERAGE, INC.; MOUNTAIN EAGLE, INC.; NORTHERN EAGLE, INC.; WILLIAM J. RUCKER, JR.; SCOTT PARKES; and JOHNSON BROTHERS LIQUOR COMPANY,

Defendants.

ORDER DENYING DEFENDANTS' MOTION TO DISMISS AND LIFTING STAY ON DISCOVERY

On the 29th day of November 2017, this matter came before the Court upon Defendants' motion to dismiss Plaintiffs' complaint filed on the 5th day of September 2017. Plaintiffs appeared by counsel Steven Ruby Esq., Defendants appeared by counsel William Pietragallo, II, Esq., Phillip Earnest Esq., and Jennifer Bouriat Esq.

Thereupon, the Court proceeded to hear the arguments of the parties and at the conclusion of the same the Court held the motion in abeyance. Therefore, the Court upon reviewing the parties' pleadings, briefs, and legal authority finds as follows:

STANDARD OF REVIEW

The Supreme Court of Appeals of West Virginia has instructed the courts on numerous occasions regarding the proper standard to evaluate a motion to dismiss filed under the West Virginia Rules of Civil Procedure 12(b)(6). In *Sedlock v. Moyle*, 222 W.Va. 547 (2008), the Court stated, "[a]s set forth in syllabus point three *of Chapman v. Kane Transfer Company, Inc.,* 160 W.Va. 530, 236 S.E.2d 207 (1977), '[t]he trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief (citation omitted).' *See also Highmark West Virginia, Inc. v. Jamie,* 221 W.Va. 487, 491 n. 4, 655 S.E.2d 509, 513 n. 4 (2007) . . . Since the preference is to decide cases on their merits, courts presented with a motion to dismiss for failure to state a claim construe the complaint in the light most favorable to the plaintiff, taking all allegations as true. *John W. Lodge Distrib. Co. v. Texaco, Inc.,* 161 W.Va. 603, 604–05, 245 S.E.2d 157, 158–59 (1978)." *Sedlock* at 550.

Defendants argue that this State's legislature has instructed the courts to construe the West Virginia Antitrust Act, West Virginia Code § 47-18-1 et. seq., "liberally and in harmony with ruling judicial interpretations of comparable federal antitrust statutes," and that "courts of this state are . . . to apply the federal decisional law interpreting the Sherman Act, 15 U.S.C. § 1 to [its] own parallel antitrust statue." *Kessel v. Monongalia County General Hosp. Co.*, 220 W.Va. 602, 610 (2007). Thus, the Defendants argue the Court should use the heightened, "pleading plus" standard set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). While the Defendants are correct that the Court is instructed to apply federal case law to West Virginia antitrust cases, the Supreme Court

of Appeals of West Virginia has flatly rejected adopting the *Twombly* pleading standard stating, "[u]nder the federal rules, more than a notice pleading is required insofar as a plaintiff is required to plead facts to show that the plaintiff has stated a claim entitling him to relief. Under West Virginia law, however, this Court has not adopted the more stringent pleading requirements as has been the case in federal court and all that is required by a plaintiff is 'fair notice.'" *Roth v. DefliceCare, Inc.*, 226 W.Va. 214, 220 n.4 (2010). Therefore, the Court rejects Defendants argument that the Court must use the heightened *Twombly* pleading standard in analyzing a motion to dismiss in an antitrust claim in West Virginia. However, even if the Court used the heightened pleading standard, its conclusion would be the same as explained below.

ANALYSIS

Defendants aver that the Court should grant its motion and dismiss Plaintiffs' claims alleging Defendants restrained trade in violation of West Virginia Code § 47-18-3, attempted to create a monopoly in violation of West Virginia Code § 47-18-4, tortiously interfered with an existing contractual or business relationship, and was unjustly enriched. For the reasons discussed below the Court **DENIES** Defendants' motion to dismiss.

I. Plaintiffs have plead sufficient facts for the restraint of trade claim to survive Defendants' motion to dismiss.

Defendants argue that Plaintiffs' restraint of trade claim fails for two reasons: the complaint fails to allege (1) concerted action and (2) antitrust injury.

A. *Plaintiffs alleged Defendants were separate entities.*

Any restraint of trade claim requires concerted action. Concerted action requires more than one entity. In its motion to dismiss, Defendants pounced on Plaintiffs' use of the phrase, "under the same control" when describing the relationship between entities named in the Complaint. Compl. ¶¶ 31-32. This wording opened the door for Defendants to avail themselves to the single entity defense as analyzed by the Supreme Court of the United States in *American Needle Inc. v. National Football League,* 560 U.S. 183, 186 (2010). In *American Needle*, the Court explains that "substance, not form" controls when analyzing whether an entity is capable of concerted action. 560 U.S. at 195. While *American Needle* does not go as far to say that a single entity defense can never be settled at the motion to dismiss stage, the nature of the "substance versus form" analysis in *America Needle* requires the Court to conduct a factual inquiry that is inappropriate at this stage of the proceedings. Further, Defendants have not brought to the Court's attention any case in which a Court dismissed a defendant on the basis of the single entity defense at this stage of the proceedings.

Although Plaintiffs' choice of wording opened themselves up for attack, the Complaint alleges elsewhere that Defendants are six legally distinct entities. Compl. ¶ ¶ 13-18, 54. Therefore, when analyzing the Complaint in the light most favorable to the Plaintiffs and taking all allegations as true as the Court must, the Court finds that the Complaint sufficiently pleads concerted action between distinct entities.

B. *Plaintiffs allege sufficient antitrust injury.*

Defendants proffer that Plaintiffs have failed to allege an antitrust injury, which is the second element necessary to state a claim under West Virginia's antitrust statute.

Oksanen v. Page Memorial Hosp., 945 F.2d 696, 709 (4th Cir. 1991). The overarching purpose of antitrust is to protect competition, not competitors *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338 (1990). For this reason, injury to the competitors themselves is irrelevant to the Court; what the Court must look towards is injury to the market. *Princeton Ins. Agency, Inc. v. Erie Ins. Co.*, 225 W. Va. 178, 189 (W.Va 2009).

Defendants are correct in pointing out that much of the injury alleged by the Plaintiffs is to the competitors - themselves and other distributors. This type of "injury" does not equate antitrust injury. Nonetheless, Plaintiffs do allege instances of antitrust injury in the Complaint. Plaintiffs discuss the stringent barriers to enter the wine distribution industry in West Virginia, which leaves the West Virginia wine market vulnerable to antitrust injury. Compl. ¶ 25. Further, the Complaint states that "MSB-NE" can force its customers to "accept unfavorable terms that MSB-NE would not be able to impose in a competitive market place and which would increase customers' costs of doing business." Compl. ¶ 58. This alleged injury is the very injury to the market that an antitrust claim requires.

Therefore, when taking as true all of the Plaintiffs' allegations, as the Court is called to do when analyzing a motion to dismiss, the Court finds that (1) Plaintiffs have sufficiently alleged that the Defendants are separate entities that acted in concerted action and (2) Plaintiffs have sufficiently alleged an appropriate antitrust injury. For these reasons, Plaintiffs' restraint of trade claim survives Defendants' motion to dismiss.

II. Plaintiffs have plead sufficient facts for its attempted monopoly claim to survive Defendants' motion to dismiss.

Attempted monopolization requires the plaintiffs to prove three elements: (1) specific intent to destroy competition in the relevant market; (2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose; and (3) a dangerous probability of success. *Spectrum Sports v. McQuillan*, 506 U.S. 447, 456 (1993).

Throughout the Complaint Plaintiffs allege a scheme undertaken by the Defendants in an attempt to monopolize the wine distribution industry in West Virginia. Plaintiffs allege actions undertaken by the Defendants that show a specific intent to destroy competition in the West Virginia wine distribution market. Compl. ¶ ¶ 41-58. The Plaintiffs further allege that Defendants used predatory and anticompetitive conduct by preventing, suppressing, and eliminating competition in the distribution of wine in the State of West Virginia. Compl. ¶ 61. The Plaintiffs further allege the above-referenced scheme would give Defendants "at least approximately 75%" of the wine distribution market in West Virginia, which would in turn allow the Defendants to create a monopoly that would allow Defendants to control and affect the price of wine, and would prevent, suppress, and eliminate competition in the distribution of wine to retailers in the State of West Virginia. Compl. ¶ ¶ 46, 61. This market power combined with the various barriers for entry into West Virginia wine distribution market creates enough of a dangerous probability of success for this claim to survive at this stage of the litigation.

Therefore, the Court has determined that when taking all of Plaintiffs' allegations in the Complaint as true, Plaintiffs have adequately plead an attempt to create a

monopoly in violation of West Virginia Code § 47-18-4. Thus, Defendants' motion to dismiss as to this claim is denied.

III. Plaintiffs have plead sufficient facts for the tortious interference claim to survive Defendants' motion to dismiss.

To assert a clam of tortious interference Plaintiffs must assert: (1) the existence of a contractual or business relationship or expectancy; (2) an intentional act of interference by a party outside that relationship or expectancy; (3) proof that the interference caused the harm sustained; and (4) damages. *Torbett v. Wheeling dollar Savings & Trust Company*, 314 S.E.2d 166, 173 (1983).

Here, the mere fact that the Complaint alleges restraint of trade and attempted monopolization in violation of West Virginia Code § 47-18-3 and West Virginia Code § 47-18-4 satisfies element (2) requiring an intentional act of interference. Further, Defendants' motion to dismiss does not contest elements 1, 3, and 4 of Plaintiffs' tortious interference claim.

Therefore, when taking Plaintiffs allegations as true, Plaintiffs' tortious interference claim survives and Defendant's motion to dismiss must be denied.

IV. Plaintiffs have plead sufficient facts for the unjust enrichment claim to survive Defendants' motion to dismiss.

Plaintiffs allege that Defendants have obtained substantial sums of money in which the acceptance of which would be inequitable and unconscionable. Compl. ¶ 69. Although a bare-boned allegation, this claim survives as it is possible for Defendants to have not violated West Virginia Code § 47-18-3 and West Virginia Code § 47-18-4 but to have violated other West Virginia statutes or committed other illegal acts leaving the

Plaintiffs without a legal remedy. Therefore, when viewing Plaintiffs' allegations as true, Plaintiffs' unjust enrichment claim survives.

CONCLUSION

Therefore, Defendants' motion to dismiss Plaintiffs' Complaint is **DENIED.** Further, the stay that was placed on discovery by Order dated November 15, 2017 is **LIFTED**. The timeframe on discovery is to run as if served on the date of entry of this Order.

Enter this 7th day of December, 2017.

ORDER ENTER: _____
HONORABLE JAMES H. YOUNG, JR.

A TRUE COPY
Attests
_____
Clerk, Circuit Court, Hancock County

_____
Deputy