

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

Eastern District of Kentucky
FILED

DEC 9 - 2005

AT COVINGTON
LESLIE G WHITMER
CLERK U S DISTRICT COURT

CIVIL ACTION NO. 04-37 (WOB)

BUYER'S CORNER REALTY, INC.

PLAINTIFF

VS.

MEMORANDUM OPINION AND ORDER

NORTHERN KENTUCKY ASS'N
OF REALTORS, ET AL

DEFENDANTS

This is an antitrust action brought pursuant to section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, and sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26. The case is currently before the court on cross motions for summary judgment.

The court heard oral argument on these motions on Thursday, December 1, 2005. David Barry represented the plaintiffs, and Jack Bierig, Julie Potter, and Joseph Baker represented the defendants. Also present was Cindy Dobias, Chief Executive Officer of the defendant companies. Official court reporter Joan Averdick recorded the proceedings.

Having heard the parties, the court now issues the following opinion and order.

FACTS

Defendant Northern Kentucky Association of Realtors ("NKAR") is a real estate professionals' trade association. It offers services to its members including training, technology services, computer classes, comparative data, legislative monitoring, and

publications. As a condition of membership, NKAR requires members to join the Kentucky Association of Realtors ("KAR") and the National Association of Realtors ("NAR"). Those entities offer services in addition to the services provided by the NKAR.

In 2004, the annual membership fees for the NKAR, the KAR, and the NAR were \$162, \$98, and \$84, respectively, for a total of \$344. Upon payment of this amount to the NKAR, a realty agent becomes a member of all three associations. As of December 31, 2003, the NKAR had 1,055 members.

Defendant Northern Ky. Multiple Listing Service ("NKMLS") is a wholly-owned subsidiary of the NKAR. It is a non-profit organization. The NKMLS operates a computerized database of homes for sale in Northern Kentucky that are listed with real estate agents who are members of the NKAR. The NKMLS is the only multiple listing service in Northern Kentucky. The monthly fee for MLS services in 2004 was \$35.00.

A real estate professional cannot purchase MLS services from NKMLS unless he or she has joined a NAR Federation trade association and is thereby authorized to use the Realtor® trademark.¹ However, real estate professionals do not have to join the NKAR in order to purchase MLS services from the NKMLS; they can join any NAR Realtor® association. In 2003, the NKMLS

¹The parties refer to this requirement as "the membership rule."

gave access to its MLS to approximately 285 real estate brokers and agents who were members of associations of Realtors® other than the NKAR.

Membership in an association of Realtors® requires that a real estate licensee agree to subscribe to, and abide by, the Code of Ethics of the NAR. The Code contains a "non-solicitation" rule that, with respect to the MLS, allows listing brokers to place their listings on the MLS without the fear of losing those listings to other brokers who might otherwise solicit the seller. The Code also contains an arbitration clause that requires that members resolve their disputes through arbitration.

Also, NKAR members are free not to participate in the MLS. Of the 1,055 members that the NKAR had at the end of 2003, 22 did not purchase MLS services.

The NKMLS also operates a publicly-available website which offers much of the listing information contained in the database at no cost.

Fees for the NKAR are set by its Board of Directors, which consists of NKAR members who are elected by the association's general membership. Similarly, fees for the NKMLS are set by its Board of Directors, which consists of NKMLS participants and subscribers who are elected by NKMLS participants.

Plaintiff Buyer's Corner is a Kentucky corporation doing

business in Northern Kentucky whose principal, plaintiff Sherry Edwards, is a licensed real estate broker. Edwards has been a member of a local association of Realtors® for 24 years. She has been a member of the NKMLS for over 20 years. For the years 2001-2004, plaintiff paid \$1,357 in trade association charges to the NKAR.

Edwards operates exclusively as a buyer's agent, that is, she never represents sellers or takes listings. She is also a member of the National Association of Exclusive Buyer Agents ("NAEBA"), an organization of real estate licensees who exclusively represent buyers. She believes that NAR and its affiliates are unethical because they permit real estate brokers to represent both the buyer and the seller in a single transaction. Edwards alleges that she has continued her membership in the NKAR solely to gain access to the NKMLS.

Edwards filed this action alleging that defendants' "membership rule" constitutes an unlawful tying arrangement and group boycott in violation of section 1 of the Sherman Act, 15 U.S.C. § 1.

ANALYSIS

A. Tying Claim

Section 1 of the Sherman Act states, in part:

Every contract, combination in the form of trust or otherwise, in restraint of trade or commerce among the several states is declared illegal.

15 U.S.C. § 1.² Although the literal language of this statute prohibits every agreement in restraint of trade, the "Supreme Court has long recognized that Congress intended to outlaw only 'unreasonable' restraints." *In re Cardizem CD Antitrust Litigation*, 332 F.3d 896, 906 (6th Cir. 2003) (citation omitted), cert. denied, 125 S. Ct. 307 (2004).

"Tying" arrangements are one type of restraint that may run afoul of the antitrust laws. As the Supreme Court has explained, a "tying" arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchase a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Eastman Kodak v. Image Technical Services, Inc.*, 504 U.S. 451, 461 (1992) (citation omitted). See also *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 12 (1984) ("Our cases have concluded

²Private persons are given a cause of action under the Sherman Act by section 4 of the Clayton Act, which provides for a suit to recover treble damages by any person injured in his business or property by the violation of the antitrust laws. Section 16 of the Clayton Act allows injured parties to sue for injunctive relief.

that the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.").

A tying arrangement is a violation of antitrust law only if a "substantial volume of commerce is foreclosed thereby." *Jefferson Parish*, 466 U.S. at 16 (emphasis added). This is because the primary concern about such arrangements is that they may allow a seller to exploit its power in the market for the tying product to invade, and then stifle competition in, the market for the tied product. *Id.* at 14-16.

Thus, the Supreme Court noted in *Jefferson Parish* that where the buyer would not have purchased the tied product from another seller, such foreclosure is not present:

Similarly, when a purchaser is "forced" to buy a product he would not have otherwise bought even from another seller in the tied product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed.

Id. at 16.

The Sixth Circuit has formulated the elements of a tying claim as follows:

A plaintiff may bring a private antitrust action based on an illegal tying arrangement under §1 of the Sherman Act if he can allege that: (1) the seller has "'appreciable economic power' in the tying product market"; and (2) "the arrangement affects a substantial volume of commerce in the

tied market." . . . We have also required that a plaintiff allege: (1) the seller of the tying product has a direct economic interest in the sale of the tied product, *Beard v. Parkview Hosp.*, 912 F.2d 138, 139, 142-44 (6th Cir. 1990); and (2) the plaintiff has suffered antitrust injury as a result of the tying arrangement, *Valley Prods. Co. v. Landmark, a Div. of Hospitality Franchise Sys., Inc.*, 128 F.3d 398, 402-03 (6th Cir. 1997).

CTUnify, Inc. v. Nortel Networks, Inc., 115 Fed. Appx. 831, 834 (6th Cir. 2004).

1. Antitrust Injury and Standing

The requirement that an antitrust plaintiff be able to prove that he or she has suffered "antitrust injury" is treated as a threshold issue of standing:

[I]t is appropriate to turn first to the issue of antitrust standing before weighing the issues of relevant market, market share, etc. In other words, before discussing the claims made in this case regarding relevant market and market power we must determine if [the plaintiff] has antitrust standing to assert claims under the Supreme Court's precedents.

HyPoint Tech., Inc. v. Hewlett-Packard Co., 949 F.2d 874, 876-77 (6th Cir. 1991) (emphasis added), cert. denied, 503 U.S. 938 (1992).

In *HyPoint*, the Sixth Circuit emphasized the importance of the standing inquiry:

Antitrust standing to sue is at the center of all antitrust law and policy. It is not a mere technicality. It is the glue that cements each suit with the purposes of the antitrust laws, and prevents abuses of those laws. The requirement of antitrust standing ensures that antitrust litigants use the laws to prevent anticompetitive action and makes certain that they will not be able to recover under the antitrust laws when the action challenged would tend to promote competition in the economic sense. Antitrust laws

