

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RECEIVED
APR 9 - 1991

GROVE FRESH DISTRIBUTORS, INC.,)
an Illinois corporation,)
)
Plaintiff,)
)
vs.)
)
FLAVOR FRESH FOODS, INC.,)
et al.,)
Defendants.)

B. STUART CUNNINGHAM
UNITED STATES DISTRICT COURT
No. 89 C 111

Judge Bua

**PLAINTIFF'S MOTION TO VACATE THE ORDER
OF DISMISSAL OF APRIL 13, 1990 OR IN THE
ALTERNATIVE, FOR ENFORCEMENT OF THE
SETTLEMENT AGREEMENT AND ATTORNEY'S FEES**

Plaintiff Grove Fresh Distributors, Inc. ("Grove Fresh"), by its attorneys, John P. Messina, Esq., and Dorothy B. Zimbrakos, Esq. and Rivkin, Radler, Bayh, Hart, & Kremer, move the court pursuant to Fed.R.Civ.P. 60(b)(3) for an order setting aside the order of dismissal entered on the docket on April 13, 1990, on the ground that the plaintiff was fraudulently induced to agree to the entry of that order. In the alternative, Grove Fresh prays for an order enforcing the terms of the settlement agreement and for an award of attorney's fees and costs in the amount of \$250,000 or such other amount as would justly compensate Grove Fresh for the repeated and deliberate breaches of the agreement underlying the order of dismissal.

In support of this motion, Grove Fresh will file a statement of uncontested facts with supporting exhibits and deposition transcripts, and a memorandum of law. Grove Fresh will file these papers on or before April 11, 1991. A brief summary of some of the grounds for this motion are set out below.

1. Grove Fresh and defendant Flavor Fresh Foods, Inc. are distributors of orange juice under the "Grove Fresh" and "Flavor

Fresh" labels, respectively. Neither of them makes its own juice. Rather, each of them has its brand of orange juice packed by juice processors.

2. Flavor Fresh's primary packer is Everfresh Juice Co., of Franklin Park, Illinois ("Everfresh"). Everfresh is a division of John Labatt, Ltd., a Canadian conglomerate with extensive holdings in the food and beverage processing industry.

3. On February 10, 1989, Grove Fresh brought separate suits against Flavor Fresh and Everfresh under the Lanham, Act, RICO, and the common law of unfair competition. Grove Fresh alleged that each of the companies sold orange juice that was labeled as pure, but in fact was adulterated with beet sugar, pulp wash and undeclared preservatives. (The Everfresh case is on Judge Zagel's docket.)

4. As Flavor Fresh's principal supplier and as the maker of the adulterated samples underlying Grove Fresh's complaint, Everfresh agreed to indemnify Flavor Fresh for any damages that might be awarded for "Flavor Fresh" orange juice that was made by Everfresh. In accordance with this indemnification agreement attorneys from McDermott, Will & Emery, Everfresh's principal outside counsel, filed appearances in this case on behalf of Flavor Fresh and defendant James Benton, its president.

5. Both this court and Judge Zagel dismissed the RICO counts.¹ But both this court and Judge Zagel sustained the

1. In August 1990, Grove Fresh filed a new RICO complaint against Everfresh, Labatt and several other corporate and individual defendants. On March 20, 1991, Judge Zagel denied motions to dismiss the RICO claims.

claims under the Lanham Act and the common law.

6. This case was set for a two-week trial beginning March 19, 1990. In late November 1989, Grove Fresh served McDermott, Will & Emery with a comprehensive set of interrogatories, document requests, and Rule 30(b)(6) deposition notices directed at both Flavor Fresh and Everfresh.

7. Everfresh filed across-the-board objections to all of Grove Fresh's discovery requests and refused to produce witnesses. After futile attempts to settle the case and equally futile attempts at a 12k conference to resolve the discovery problems, Grove Fresh moved for an order regarding discovery.

8. One of the defense's most stubborn positions in discovery was that they were not required to produce any information about Flavor Fresh's or Everfresh's operations for the period prior to August 1988. On March 8, 1990, this court rejected this position and ordered the defense to provide discovery for a period of years prior to August 1988.

9. Immediately after this ruling, one of the lawyers from McDermott, Will & Emery proposed a settlement. The gist of the proposal was that Flavor Fresh would pay a sum of money to settle claims respecting orange juice made by suppliers other than Everfresh. The balance of the claims -- those involving orange juice processed by Everfresh -- would be litigated in the case before Judge Zagel.

10. Grove Fresh was agreeable to the settlement format proposed by McDermott, Will & Emery, but with one material addition concerning discovery. Because of the defense's stonewalling

discovery in this case, and because the lawyers who did the stonewalling also represented Everfresh, Grove Fresh insisted that Everfresh be a party to the Flavor Fresh settlement agreement, and that the settlement agreement spell out the discovery that would be provided to Grove Fresh in the Everfresh case.

11. McDermott, Will & Emery, in its capacity as attorney-in-fact for both Flavor Fresh and Everfresh, agreed to the additional terms proposed by Grove Fresh. A copy of the settlement agreement executed by Grove Fresh, Flavor Fresh and Everfresh is being filed in chambers. (Paragraph 19 of the Settlement Agreement requires that its terms be kept confidential. Accordingly, Grove Fresh is filing the Settlement Agreement with Chambers, so as to provide Flavor Fresh with the opportunity to request that it be filed under seal, if they wish. Grove Fresh hereby waives the confidentiality provision.)

12. The Settlement Agreement has been an utter failure from the point of view of the discovery for which Grove Fresh specifically bargained. Over the last 12 months, Grove Fresh has had to file more than 30 discovery motions in the Everfresh case. Even though most of these motions have been granted, they have not cured the substantial problems by the defense's discovery abuses. The abuses include false interrogatory answers, false deposition testimony, unjustified instructions to witnesses not to answer deposition questions, and in one instance, blockading Grove Fresh's access to a key witness.

13. Based on the experience of the last year, Grove Fresh alleges that the defense fraudulently induced the settlement

agreement by representing that Everfresh would respond to discovery truthfully and completely, when, in fact, Everfresh had decided, and intended, to withhold material information and documents that were responsive to Grove Fresh's discovery requests but which were damaging to Everfresh's defense.

14. Grove Fresh is preparing a statement of uncontested facts with supporting exhibits and transcripts that will prove the allegations in paragraphs 12-13. By way of illustration, Grove Fresh will describe below one of the more significant instances of abuse.

15. There is evidence in the record that for a number of years, Everfresh added diethyl pyrococarbonate ("DEPC") to the orange juice packed at one of its plants. DEPC is a cold-fill sterilizer, which is a form of preservative that extends the shelf life of chilled orange juice. DEPC was banned 19 years ago because it is a carcinogenic agent within the meaning of the so-called Delaney Clause, Section 409(c)(3)(A) of the Food, Drug and Cosmetic Act, 21 U.S.C. Sec. 348(c)(3)(A). DEPC is one of only 13 substances that have been banned from use in human food because of a determination that they present a potential risk to the public health. See 21 C.F.R. Sec. 189.110-.191 (1990).

16. At a deposition in December 1990, a Labatt witness made a passing reference to certain documents relating to Everfresh's purchase of what "might" have been DEPC. (Everfresh has admitted that a contraband preservative was added to its juice, but it has so far refused to identify the preservative.) The witness stated that he had found such documents in the course of an audit of

Everfresh's manufacturing practices in February 1989. Subsequently, Grove Fresh made several written and oral requests for these documents, but to no avail.

17. In February 1991, Grove Fresh obtained documents from the FDA pursuant to the Freedom of Information Act. These documents suggested that Everfresh had been supplied with DEPC by Fred Kohlbach, a German national. After receiving these documents, Grove Fresh engaged several investigators in England and Switzerland to develop further information. Over the last few weeks, Grove Fresh learned that Kohlbach owns Bio Trade Ltd., a company engaged in the business of making and selling preservatives and enzymes to the beverage industry in Europe. (DEPC is permitted to be used in several European companies.) Kohlbach's company is domiciled in the Principality of Liechtenstein.

18. Grove Fresh had also learned that James Marshall, one of the two shareholders in Flavor Fresh, is a good friend of Kohlbach's. On March 29, 1991, Grove Fresh served a deposition subpoena duces tecum on Marshall. The document rider requested Marshall to produce all documents in his possession relating to Bio Trade, Kohlbach's company.

19. McDermott, Will & Emery was served with a copy of the subpoena and document rider, which effectively gave them and their client notice that Grove Fresh had developed information about Bio Trade and Kohlbach.

20. One week after McDermott, Will & Emery was served with a copy of the Marshall subpoena, one of the defense lawyers sent Grove Fresh the documents that had been described by the Labatt

witness in December 1990. The documents relate to Everfresh's purchase of an "aspetisizing compound." The name of the vendor was Bio Trade.

21. The testimony at the December 1990 deposition establishes that the defense has had the Bio Trade documents since mid-February 1989, shortly after Grove Fresh filed its lawsuits. These documents, and the information in the documents, were responsive to the discovery requests that, pursuant to paragraph 10 of the agreement effecting the settlement in this case, should have been answered completely and truthfully by April 9, 1990, just one year ago. The defense has deliberately withheld the documents for the last year.

22. There is a further twist to this history. While Grove Fresh only learned about Bio Trade within the last few weeks, Kohlbach's name first surfaced during the summer of 1990. In October 1990, Grove Fresh took Marshall's deposition pursuant to the terms of the settlement agreement in this case. At the deposition Grove Fresh attempted to find out who Kohlbach was and whether he had had any dealings with the defendants. Marshall freely admitted that Kohlbach was "an associate or friend from Germany." Marshall also confirmed that he and Kohlbach had had business dealings. But when Grove Fresh tried to find out about Kohlbach's business, it ran up against a stonewall of instructions not to answer:

MR. KOWAL: Mr. Messina, unless you can identify how this relates to the product packed by Everfresh, I will instruct him not to answer.

MR. MESSINA: . . . This is a discovery deposition in the Everfresh case. I am entitled to find out what this witness knows about people in the industry ...

MR. KOWAL: Mr. Messina, unless you can identify how this relates to the product packed by Everfresh, I will instruct him not to answer.

MR. MESSINA: This is a discovery deposition in the Everfresh case. I am entitled to find out what this witness knows about people in the industry . . .

MR. KOWAL: If you can relate this information to the case as it pends against Everfresh and the subjects that were specified in the settlement agreement, I would consider allowing him to answer. If you can't, then my objection will stand.

Of course, Grove Fresh could not explain how Kohlbach related to the claims against Everfresh because Everfresh had deliberately withheld the information about Kohlbach's business dealings with Everfresh. Marshall's counsel persisted in the instructions not to answer. (The pertinent excerpt from Marshall's deposition is attached.)

WHEREFORE, Grove Fresh prays for the following relief:

A. That the court set aside the order of dismissal entered on the docket on April 13, 1990, on the ground that the plaintiff was fraudulently induced to agree to the entry of that order.

B. In the alternative, that the court enforce the terms of the settlement agreement respecting discovery, and award Grove Fresh attorney's fees and costs in the amount of \$250,000 or such other amount as would justly compensate Grove Fresh for the repeated and deliberate breaches of the agreement underlying the order of dismissal.

GROVE FRESH DISTRIBUTORS, INC.

BY: 
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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GROVE FRESH DISTRIBUTORS, INC.,)
Plaintiff,)
vs.) No. 89 C 1113
EVERFRESH JUICE COMPANY and)
HUGO POWELL,)
Defendants.)

The deposition of JAMES MARSHALL called as a witness for examination, taken pursuant to the Federal Rules of Civil Procedure of the United States District Courts pertaining to the taking of depositions, taken before NANCY A. GUIDOLIN, a Notary Public within and for the County of DuPage, State of Illinois, and a Certified Shorthand Reporter of said state, at Suite 1960, 135 South LaSalle Street, Chicago, Illinois, on the 20th day of September, A.D. 1990, at 10:00 a.m.

1 Q. Are you going to listen to your lawyer,
2 Mr. Marshall?

3 A. Yes, I am.

4 Q. Has Flavor Fresh ever bought beet sugar?

5 A. Yes.

6 Q. What drinks do you use beet sugar in?

7 MR. KOWAL: Excuse me. I will instruct the
8 witness not to answer that question on the same
9 grounds as I stated before.

10 BY MR. MESSINA:

11 Q. Have you ever used pulp wash? Has Flavor
12 Fresh ever purchased pulp wash?

13 MR. KOWAL: Mr. Messina, unless you can tie
14 this to the product packed by EverFresh, I will
15 instruct him similarly to do what we have done
16 before.

17 BY MR. MESSINA:

18 Q. Would you answer the question, please?

19 A. I refer to my attorney.

20 Q. Who is Dr. Fred Cohlbach?

21 A. He is an associate or a friend from
22 Germany.

23 Q. Have you ever had any business dealings
24 with Dr. Cohlbach?

1 A. Yes, I have.

2 Q. What are those business dealings?

3 MR. KOWAL: Mr. Messina, unless you can
4 identify how this relates to the product packed by
5 EverFresh, I will instruct him not to answer.

6 MR. MESSINA: This is a discovery deposition,
7 Mr. Kowal, and if you want to keep instructing the
8 witness not to answer, that is fine, but Mr.
9 Marshall is here both as a designated witness and
10 individually, and, you know, you may have some
11 plausible, although I disagree with it, basis for
12 thinking that somehow you can restrict my inquiry
13 from Flavor Fresh under the 30(b)(6) Notice because
14 of the settlement agreement, but there is absolutely
15 no basis for you limiting my examination of
16 Mr. Marshall. This is a discovery deposition in the
17 EverFresh case. I am entitled to find out what this
18 witness knows about people in the industry, and if
19 you want to take the risk of instructing him not to
20 answer, so be it, but I will get background
21 information.

22 This is the first witness that we have had
23 in this case who has been in the industry for along
24 time, and I am entitled to discovery. That is my



1 answer. So you do what you want to do.

2 BY MR. MESSINA:

3 Q. Mr. Marshall, would you tell me what
4 business dealings with Mr. Cohlbach are or have
5 been --

6 MR. KOWAL: You have made your little statement
7 for the record. I want to make mine. It is my
8 position that there was a settlement between the
9 parties for Grow Fresh and Flavor Fresh that related
10 to Flavor Fresh, its officers, directors and others
11 of which Mr. Marshall is one and, therefore, he is
12 the beneficiary of the agreements made at that -- in
13 that agreement.

14 If you can relate this information to the
15 case as it pends against EverFresh and the subjects
16 that were specified in the settlement agreement, I
17 would consider allowing him to answer. If you can't
18 then my objection will stand.

19 BY MR. MESSINA:

20 Q. Would you answer the question, please,
21 Mr. Marshall?

22 MR. KOWAL: I will instruct you not to answer
23 the question.

24 BY MR. MESSINA: