

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

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

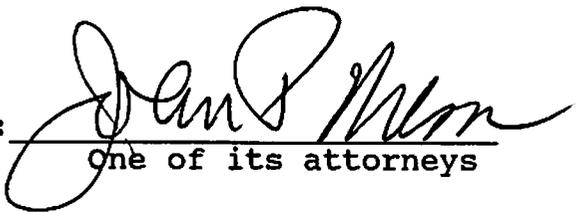
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STUART CUNNINGHAM
CLERK, U.S. DISTRICT COURT
Judge Bua

PLAINTIFF'S MOTION TO STRIKE THE DEFENSE
THAT THE TIME PERIOD COVERED
BY THE COMPLAINT IS POST-AUGUST 10, 1988

Plaintiff Grove Fresh Distributors, Inc., by its attorney, John P. Messina, moves the court for entry of an order: (a) striking the defense's contention that the time period covered by the complaint begins after August 10, 1988, and (b) declaring that the scope of the complaint cannot be limited by the alleged oral statements of plaintiff's former counsel, Jeffrey C. Hines, Esq., who was discharged in November 1989, for having a conflict of interest.

In support of this motion plaintiff submits the attached memorandum of fact and law.

DATED: March 6, 1990 GROVE FRESH DISTRIBUTORS, INC.

BY: 
One of its attorneys

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GROVE FRESH DISTRIBUTORS, INC.,)	
an Illinois corporation,)	
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Plaintiff,)	
)	No. 89 C 1114
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FLAVOR FRESH FOODS, INC.,)	Judge Bua
et al.,)	
)	
Defendants.)	

**PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS
MOTION TO STRIKE THE DEFENSE
THAT THE TIME PERIOD COVERED
BY THE COMPLAINT IS POST-AUGUST 10, 1988**

Plaintiff Grove Fresh Distributors, Inc. ("Grove Fresh"), by its attorney, John P. Messina, Esq., submits this memorandum in support of its Motion to Strike the Defense that the Time Period Covered by the Complaint is Post-August 1988.

FACTS

The controversy over the time period grows out of two covenants that plaintiff's original counsel, Jeffrey C. Hines, Esq., agreed to on July 15 and August 10, 1988. Hines executed the covenants when he settled two orange juice adulteration cases that he had filed for a Baltimore distributor of orange juice. Grove Fresh was not a party to those suits or to the agreements settling them.

Both covenants provided that in the future, Hines would not "represent or provide any information or assistance to any party" who asserted orange juice adulteration claims against those defendants. The covenant that the defense has invoked in this case runs in favor of Everfresh, Inc. ("Everfresh"), which is not a party to this case.¹ The Everfresh covenant prohibits Hines

1. Everfresh is the parent of the corporate defendant in the orange juice adulteration case pending before Judge Zagel.

from prosecuting claims arising out of acts or omissions by Everfresh or its affiliates which occurred prior to August 10, 1988.

Grove Fresh first contacted Hines about its claims in September 1988. Five months later, in February 1989, Hines filed this suit and four related suits in the Northern District of Illinois. Two of the defendants in the Illinois actions -- Everfresh Juice Co. and American Citrus Products Corp. -- are beneficiaries of the covenants that Hines executed when he settled the Maryland litigation. Nevertheless, Hines did not disclose to Grove Fresh the covenants concerning those two entities.

Hines's duties under the 1988 covenants were in conflict with his duties as Grove Fresh's advocate. The damages arising out of Grove Fresh's claims against Everfresh and American Citrus date back to 1980. Even under the strictest application of the relevant statutes of limitations, the time period for which Grove Fresh can obtain a judgment against those two entities is from February 1984 to February 1989. Hines's covenants, if enforceable, would bar him from pursuing damages for 53 of the 60 months in such time period.

Hines's Discharge

Grove Fresh had no knowledge of Hines's covenants until November 1989. On November 29, 1989, shortly after learning of the covenants, Grove Fresh discharged Hines.

For more than a month after Hines was discharged, however, he refused to withdraw his appearance. As a result, in early January 1990, Grove Fresh drafted and served on defense counsel a

nine-page Motion to Strike the Appearance of Jeffrey C. Hines, Esq. The motion became mooted before it was filed with the court because Hines, upon learning about the motion, finally consented to withdraw his appearance.

The facts set out in pages 1-2, above, are a condensed version of the facts, exhibits and supporting affidavit set forth in the motion to strike Hines's appearance. If the defendants contest any of the factual statements set out in pages 1-2, above, Grove Fresh will file the nine-page motion with this court so that there will be a formal record from which the court can make findings of fact.

ARGUMENT

A. The 1988 Covenants Cannot Be Enforced Against Grove Fresh.

Flavor Fresh was not a beneficiary of either of the 1988 covenants executed by Hines. Nevertheless, the 1988 covenants have become an issue in this case because some of Flavor Fresh's adulterated juice was packed by Everfresh, which is a beneficiary of the covenant dated August 10, 1988. Flavor Fresh's answer does not specifically mention the covenant running in favor of Everfresh. However, in paragraph 5 of its answer to the complaint Flavor Fresh asserts that "the period of time covered by the complaint [is] after August 10, 1988." This defense can only be based on the covenant in favor of Everfresh.

There are two elementary reasons why Flavor Fresh cannot invoke the 1988 covenant as a defense to Grove Fresh's claims. First, Grove Fresh was not a party to the agreement containing Hines's covenant. Since Grove Fresh did not sign the agreements

and received no consideration under the agreements, it cannot be bound by the agreements.

Second, Flavor Fresh, like Grove Fresh, was not a party to the agreements containing Hines's covenants. Since Flavor Fresh did not sign the agreements and gave no consideration for Hines's covenants, it has no right to enforce the covenants.

Even if Flavor Fresh could overcome these two basic principles of contract law, there is a third reason why it cannot enforce the 1988 covenants: The covenants are blatant violations of the Maryland Code of Professional Conduct², and thus are void as against public policy.

Rule 5.6(b) of Maryland's Code of Professional Conduct provides:

A lawyer shall not participate in offering or making:

....

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.

This rule was violated when Everfresh's attorneys proposed that Hines agree to restrict his practice as part of the settlement of claims against Everfresh's affiliate. The Rule was violated again when Hines accepted Everfresh's proposal.

If it was unethical for Everfresh's prior counsel to have proposed the restrictive covenant; and if it was unethical for Hines to have consented to the restrictive covenant, then it

2. The covenants were executed in connection with cases filed in federal court in Maryland. Pursuant to Rule IV.B of General Rule 2A of the U.S. District Court for the District of Maryland, the Rules of Professional Conduct promulgated by the Maryland Supreme Court govern attorney conduct in that federal court.

would be unethical for Everfresh's present counsel to attempt to enforce the covenant by asserting that the covenant limits the damages that Grove Fresh can recover in the pending litigation. See Illinois Code of Professional Responsibility, Rule 1-102(a)(1), (2), (5).

B. The Scope Of Grove Fresh's Complaint Cannot Be Limited By Alleged Oral Statements Of Counsel Who Was Discharged For A Conflict Of Interest.

In court appearances on February 21 and March 1, 1990, defense counsel has alleged that the claims against Flavor Fresh are limited to the adulterated juice packed by Everfresh. This contention has no basis in the record.

The scope of any plaintiff's claim is governed by the complaint, as well as by answers to interrogatories or requests to admit that specifically address the scope of plaintiff's complaint. In this case, the defense has not served Grove Fresh with any interrogatories or requests to admit. Thus, the only limitation on the scope of Grove Fresh's claims are those that can be found in the complaint itself. Here, there is nothing on the face of the complaint that limits Grove Fresh's claims to adulterated juice packed by Everfresh.

In a motion presented on February 21, 1990, Flavor Fresh's attorneys alleged that "[i]t was the defendants' understanding" that the complaint filed in this case was limited to orange juice packed by Everfresh. However, the motion carefully avoids identifying the source of this alleged "understanding." It certainly is not based on any writing; if it were, the writing would have been attached to the motion.

There is only one possible source for the defense's alleged "understanding": Jeffrey C. Hines, who was discharged as plaintiff's counsel on November 29, 1989, because of a conflict of interest. If Hines made oral statements which the defense construed as limiting the scope of Grove Fresh's claims -- and Grove Fresh does not concede that Hines ever made such statements -- the defense's reliance on his statements was unreasonable. At all relevant times the defense has known that Hines was operating under a gross, irreconcilable conflict of interest.

In fact, the defense knew about Hines's conflict of interest long before Grove Fresh and its local counsel ever did. If the controversy over the scope of the complaint proceeds to an evidentiary hearing, the evidence would show that the defense chose not to move for Hines's disqualification because they believed they could exploit his conflict in settlement negotiations.

Since the defense has always known about Hines's conflict of interest but chose not to move for his disqualification, they should be estopped from relying on alleged statements that Hines made before Grove Fresh learned about his conflict of interest.

GROVE FRESH DISTRIBUTORS, INC.

BY: 
One of its attorneys

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