



KeyCite Yellow Flag - Negative Treatment

Distinguished by [Forest2Market, Inc. v. Arcogent, Inc.](#), N.C.Super., January 5, 2016

80 N.C.App. 139

Court of Appeals of North Carolina.

F. RAY MOORE OIL COMPANY, INC.

v.

STATE of North Carolina; Thomas Todd,
State Purchasing Officer; and William
R. Rhinehart, Senior State Purchaser.

No. 852SC802.

|

April 1, 1986.

Supplier of fuel oil to State filed action for declaratory judgment, praying that the court construe contract with State, and State counterclaimed asking for treble damages for unfair and deceptive trade practices. The Superior Court, Beaufort County, Frank R. Brown, J., found that the supplier had engaged in unfair trade practices and that the State was entitled to damages. The Court of Appeals, Webb, J., held that supplier's misrepresentation of his purchase price of fuel oil constituted a deceptive trade practice.

Affirmed.

****372 *139** The plaintiff filed this action for a declaratory judgment, praying that the court construe a contract. The defendants counterclaimed asking for treble damages for unfair and deceptive ***140** trade practices. The case was tried by the court without a jury. The evidence showed that the plaintiff responded to an offer to receive bids for the supplying of fuel oil to agencies of the State of North Carolina in eleven southeastern counties for the period from 1 July 1981 through 30 June 1982. The bid specifications provided there could be price adjustments during the contract period and contained the following terms:

3. **PRICE ADJUSTMENTS:** Any price changes, downward or upward; which might be permitted during the contract period must be general, either by reason of market change or on the part of the contractor to other customers.

(a) *Notification:* Immediate notification must be given to the Division of Purchase and Contract, *in writing*, concerning *any* increase or decrease in the commercial posted price. A copy of manufacturers' official notice or other evidence that the change is general in nature must be submitted.

(b) *Decrease:* The State shall receive full proportionate benefit immediately at any time during the contract period. Fill-up or voluntary discounts allowed other customers during this contract period shall also apply to this contract.

....

4. **DEFINITIONS:** For purposes of this Contract and related documents, the following definitions will apply.

....

(b) *Commercial Posted Price:* A price readily available to customers indicating the current rack price, terminal price, posted price, etc., in effect and which is discounted for large wholesale purchasers or government entities.

In accordance with the bid specifications the plaintiff listed its supplier as Apex Petroleum.

There was evidence that the plaintiff adjusted its price on several occasions according to the price posted by Apex. The plaintiff purchased fuel oil from Apex and other suppliers at reduced prices which it did not pass on to the State. If these savings ***141** had ****373** been passed on the State would have paid \$12,316.43 less for the fuel oil than it paid.

The court made findings of fact in accordance with the evidence and concluded the plaintiff misrepresented to the State the source and price of the oil it sold to the State. The court found further that the State relied on this misrepresentation to its detriment. It found that the plaintiff "by its actions and misrepresentations has engaged in a course of conduct which offends established public policy, is oppressive or substantially injurious to the consumer, or both, thereby constituting an unfair trade practice which necessitates the trebling of damages." The court entered a judgment for the State for \$36,949.29.

The plaintiff appealed.

Attorneys and Law Firms

McMullan & Knott by James B. McMullan, Jr., Washington, for plaintiff-appellant.

Atty. Gen. Lacy H. Thornburg by Special Deputy Atty. Gen. T. Buie Costen and Associate Atty. Gen. Victor H. E. Morgan, Jr., Raleigh, for defendants-appellees.

Opinion

WEBB, Judge.

The first question posed by this appeal is whether it was a breach of contract for the plaintiff to base its price to the State on the posted price of Apex Petroleum rather than on the price it was actually paying for oil, some of which was bought from other suppliers. We hold this was a breach of contract. In the section of the contract dealing with price adjustments paragraph (b) says: “Decrease: The State shall receive full proportionate benefit immediately at any time during the contract period.” We believe this means without ambiguity that if the plaintiff were to receive a reduction in the price it paid for oil this reduction was to be passed on to the State.

The plaintiff argues that it was required to base its price to the State on the rack price of Apex and not upon its actual cost. The contract required the plaintiff to list its principal supplier, which was Apex. It also required the plaintiff to notify the State immediately of a change in the commercial posted price. A commercial posted price is defined as “[a] price readily available to customers indicating the current rack price, terminal price, *142 posted price, etc.” The plaintiff contends that these requirements in the contract show that the price upon which it should base its price to the State should be based on the price charged by Apex. We do not so read these provisions. The plaintiff was required by the terms of its contract with the State to list its principal supplier and notify the State of any change in the commercially posted price. We do not believe this means the defendant did not have to pass on any savings it had in the purchase of fuel oil in light of the specific requirement of subparagraph (b) that the State shall receive full proportionate benefit immediately upon a price decrease.

[1] [2] Our Supreme Court held in *Hardy v. Toler*, 288 N.C. 303, 218 S.E.2d 342 (1975) that false representations upon which the other party relies are unfair and deceptive trade practices. In this case the Court has found as a fact which was supported by the evidence that the plaintiff represented to the State that *his* supplier was Apex when in fact he was purchasing a large part of his fuel supply from other suppliers at a lower price than the posted price of Apex. The State relied on this representation in paying for the fuel. This would be a misrepresentation upon which the State relied and constitutes an unfair and deceptive trade practice. There is evidence that the plaintiff thought it was properly following the terms of the contract in its dealings with the State. In *Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d 397 (1981) it was held that it is not necessary to prove bad faith to show an unfair or deceptive trade practice. The good faith of the plaintiff in this case is irrelevant.

[3] The appellant, relying on *Sperry Corp. v. Patterson*, 73 N.C.App. 123, 325 S.E.2d 642 (1985) argues that the State is not a person within the meaning of G.S. 75-16. In *Sperry* we held that the State could not be sued for an unfair or deceptive trade practice. It is true that we said in *374 that case that “[t]he State of North Carolina is not a ‘person, firm, or corporation’ within the meaning of G.S. 75-16....” *Id.* at 125, 325 S.E.2d at 645. We believe the proper interpretation of that case should be that the State is not a person, firm or corporation that can be sued under G.S. 75-16. The statute is aimed at unfair and deceptive practice by those engaged in business for profit. The State was not engaged in business in *Sperry*. There is no reason why the State as a consumer *143 cannot take advantage of G.S. 75-16 if it is the victim of an unfair or deceptive trade practice.

[4] The appellant contends there was not sufficient evidence to support the court's findings of fact as to the average general market price available to plaintiff. An exhibit was offered which was prepared from the plaintiff's records which showed the amount and price of fuel purchased by Moore during the contract period. This supports the findings of fact as to the general market price available to the plaintiff.

The appellant also contends it was error for the court to find as a fact that the contract required the plaintiff to list its principal source of supply so that defendant could monitor plaintiff's cost of fuel. The appellant says this is so

because the contract does not say why the principal source of supply must be listed. It is true the contract does not say this but a witness testified to it which supports this finding of fact.

In its last assignment of error the appellant argues it was error to sustain an objection to a question to one of its witnesses as to whether he had determined a general market price for fuel for the period of time of the contract. We cannot pass on this assignment of error because the record does not show what the answer would have been. We do not believe the general market price is relevant. The

issue in this case is what was the price at which the plaintiff was able to buy fuel.

Affirmed.

ARNOLD and WELLS, JJ., concur.

All Citations

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