

1979

Keene Corporation v. R. W. Taylor Steel Company et al : Appellant's Reply Brief

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

KEENE CORPORATION,
a corporation,

Plaintiff and
Respondent,

vs.

Case No. 15787

R. W. TAYLOR STEEL
COMPANY, a corporation,
RALPH W. TAYLOR and
LOU JEAN M. TAYLOR,

Defendants and
Appellants.

APPELLANT'S REPLY BRIEF

FILED

Appeal from Judgment of the Second Judicial
District Court, Weber County, State of Utah
The Honorable John H. Wahlquist

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TABLE OF CONTENTS

ARGUMENT

POINT I

THE PRICING POLICY OF KEENE SELLING STEEL GRATING TO GRATING, INC. WAS INHERENTLY ILLEGAL AND IN VIOLATION OF THE FEDERAL ANTITRUST LAWS AND FOR THE COURT TO ENFORCE THE SALE OF THE GRATING AT THESE FIXED PRICES WOULD MAKE THE COURT A PARTY TO ENFORCING THE PRECISE CONDUCT FORBIDDEN BY THE ANTITRUST LAWS.

... Page 1

CASES CITED

Continental Wall Paper Co. v. Louis Voight & Son Co.
212 U.S. 259, (1909)

... Page 2,
6, & 7

Kelly v. Kosuga
358 U.S. 516 (1959)

... Page 6 & 7

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THE PRICING POLICY OF KEENE SELLING STEEL GRATING TO GRATING, INC. WAS INHERENTLY ILLEGAL AND IN VIOLATION OF THE FEDERAL ANTITRUST LAWS AND FOR THE COURT TO ENFORCE THE SALE OF THE GRATING AT THESE FIXED PRICES WOULD MAKE THE COURT A PARTY TO ENFORCING THE PRECISE CONDUCT FORBIDDEN BY THE ANTITRUST LAWS.

Both Appellant and Respondent agree that under certain circumstances a violation of the antitrust laws can be

asserted as a defense to a contract action. More particularly in those cases where the court, in enforcing the contract would enforce the precise conduct forbidden by the Sherman Act, the defense has been allowed. Continental Wall Paper Co. v. Louis Voight & Son Co., 212 U.S. 227 (1909). In this case, the enforcement of the sales by Keene Corporation to Grating, Inc. at the price determined by Keene would, in fact, be an enforcement of the precise conduct forbidden by the antitrust laws.

Contrary to Keene's claim that defendants-appellants are playing "fast and loose" with the court, defendants-appellants are, in fact, claiming that Keene, Harsco and other manufacturers of steel grating did fix the price at which the steel grating was sold to Grating, Inc. and that the district court's enforcement of the purchase orders and invoices involved in this case enforce the "precise conduct forbidden by the Sherman Act". Keene attempts to simplify and narrow the scope of the Sherman Act by apparently assuming that a price fixing agreement must necessarily entail a situation where manufacturers distributing goods to the same level of the market agreed to sell their products at the same price. Certainly the antitrust laws in affecting their remedial purposes are much broader in scope and reach conduct much more sophisticated. In the federal antitrust

case, Grating, Inc. is claiming that Keene and Harsco were manufacturers of steel grating, essentially controlling the distribution of steel grating in the Western United States. Keene Corporation was distributing steel grating through its representative, Grating, Inc. Grating, Inc. would purchase steel grating from Keene Corporation, take title thereto and redistribute it to its customers. Manufacturer Harsco, however, would compete directly with Grating by selling steel grating to the retail customers through its commissioned agent, Tom Giblin. Because Keene and Harsco were selling steel grating into the market at different levels (i.e., Keene selling to a distributor for resale; Harsco selling directly to the customer), a somewhat more sophisticated price fixing arrangement evolved. Keene and Harsco agreed to first fix the price at which Harsco through its commissioned agent, Tom Giblin, and Keene through its independent distributor, Grating could resell steel grating. Obviously, Harsco would have no difficulty enforcing this price agreement through its commissioned agent. Keene enforced the pricing requirement on Grating by threatening to cut Grating off, enter the market itself and undersell Grating driving it out of business. This arrangement was obviously beneficial to Harsco in that it allowed Harsco to divide the

market and price its products free of competition at a higher predetermined level. Keene not selling directly to the customer, would not directly benefit from this agreement standing alone. Keene Corporation benefitted by first fixing with Harsco Grating's resale price at an artificially high level then raising the price at which Keene sold to Grating, Inc. to an artificially high level. This put Grating, Inc. into a price "squeeze". Keene Corporation in effect insured that Grating, Inc. would maintain at least 50% of the market, but that its entire profitability would be passed onto Keene by selling to Grating, Inc. at inflated prices. When Grating, Inc. complained of the inordinate price hikes, Keene Corporation kept their scheme together by entering into agreements with other manufacturers of steel grating such as Harsco and Borden Manufacturing Company whereby these other manufacturers would refuse to sell steel grating to Grating, Inc. or would submit bids to Grating, Inc. at the same level or higher levels than Keene Corporation was currently selling to Grating, Inc.

Although this is a brief summary of the nature of the claims Grating, Inc. has brought against Keene and others in its federal antitrust action, each of these allegations are specifically set forth in the pleadings on file with the Federal District Court.

Based upon the foregoing allegations, it is clear that the artificially high prices at which Keene Corporation was selling steel grating to Grating, Inc. was an intrinsic part of the price fixing scheme between Harsco and Keene Corporation and to enforce sales at these artificially high prices would make the District Court a party to this scheme. Further, even if this court does not accept the fact that the price at which Keene Corporation sold the steel grating to Grating, Inc. standing alone was an integral part of the price fixing agreement, Grating, Inc. has specifically alleged in the federal case that Keene Corporation entered into agreements with other manufacturers, including Harsco and Borden Manufacturing Co., to either refuse to sell grating to Grating, Inc. or to submit quotes for the sale of grating at levels as high or higher than the price Keene Corporation was selling grating to Grating, Inc. This prevented Grating, Inc. from seeking any cheaper source of supply. Certainly under these circumstances the sale of steel grating to Grating, Inc. were at levels which were fixed and determined by Keene Corporation in combination or conspiracy with the other manufacturers of steel grating controlling this geographic market and for the District Court to enforce those sales contracts at those artificially

high and fixed prices would make the District Court party to the illegal conduct.

Contrary to Keene's argument in its brief, Grating, Inc.'s allegations against Keene in the federal antitrust case are almost identical to those presented in the Continental Wall Paper Co. case, supra and are completely distinguishable from the facts of Kelly v. Kosuga, 358 U.S. 516 (1959), the case principally relied upon by Keene.

In Kelly, the petitioner purchased carloads of onions at a fair price and then jointly agreed with the sellers (respondents) not to deliver any of the onions on the futures market in order to "fix and create a false and fictitious price". There was no question that the sale price was fair and was not fixed.

The petitioners tried to avoid payment on the ground the agreement to withhold delivery was in violation of the antitrust laws and illegal.

In Kelly, the Supreme Court first specifically recognized the rule set forth in the Continental Wall Paper case, supra:

In any event, an analysis of the narrow scope in which the defense is allowed in respect of the Sherman Act indicates that the principle of distinction is not what the petitioner claims it to be. The leading case here in which the defense was allowed is Continental Wall Paper Co. v. Louis Voight & Sons Co. 212 US 227, 53 L ed 486, 29 S Ct 280, much relied on by petitioner. There the

Voight company had made purchases from Continental, a corporation which existed only as a selling agent for numerous wallpaper companies doing business as a pool and selling at prices, alleged to be excessive and unreasonable, fixed through the pool agreement. The Court was of the opinion that to give judgment for the excessive purchase price so fixed in favor of such a vendor would be to make the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act. 212 US at 261. Kelly at p. 520.

Then the court distinguished the facts of the Kelly case from the Continental Wall Paper Co. case and ruled that the defense was unavailable.

Accordingly, while the nondelivery agreement between the parties could not be enforced by a court, if its unlawful character under the Sherman Act be assumed, it can hardly be said to enforce a violation of the Act to give legal effect to a completed sale of onions at a fair price. And while analysis in terms of "divisibility" or some other verbal formula may well be circular, see 6 Corbin, Contracts, §1520, in any event, where, as here, a lawful sale for a fair consideration constitutes an intelligible economic transaction in itself, we do not think it inappropriate or violative of the intent of the parties to give it effect even though it furnished the occasion for a restrictive agreement of the sort here in question. CF. Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 US 179, 185, 50 L ed 428, 433, 26 S Ct 208.

Affirmed. (Emphasis added). Kelly at p. 521.

The law as set forth in Continental Wall Paper Co. v. Louis Voight & Son Co., supra, is still good law and under the facts of this case and Grating's allegations against Keene in the federal case is still controlling. The District Court

erred in dismissing as a matter of law appellants' defenses
based upon violations of the Federal Antitrust Laws.

DATED this 12 day of March, 1979.

SNOW, CHRISTENSEN & MARTINEAU

By 

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