UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

MARCO ISLAND CABLE, a Florida corporation,

Plaintiff,

vs. Case No. 2:04-cv-26-FtM-29DNF

COMCAST CABLEVISION OF THE SOUTH, INC., a Colorado corporation, COMCAST CORPORATION, a Pennsylvania corporation,

Defendants.
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ORDER

This matter comes before the Court on Defendants' Corrected Motion To Dismiss Amended Complaint for Lack of Personal Jurisdiction (Doc. #20) and Corrected Memorandum of Law in Support (Doc. #21) filed on March 9, 2004. Plaintiff filed a Motion For Dismissal of its Claims Without Prejudice Against Comcast Corporation (Doc. #24) on April 16, 2004 in response to this motion.[1] Also before the Court is Defendants' Corrected Motion To Dismiss Amended Complaint[2] (Doc. #18) and Corrected Memorandum of

[1] Defendants previously filed Motions To Dismiss (Docs. #13 & 14) on March 8, 2004. These motions will be denied as moot.

[2] Defendants refer in both of their motions to the "Amended Complaint." This case originally was filed in the Circuit Court of the Twentieth Judicial Circuit in and For Collier County, Florida and was removed to this Court by defendants on January 16, 2004 on the basis of diversity jurisdiction, 28 U.S.C. § 1332. (Doc. #1). The Complaint (Doc. #2) is the operative pleading in this case. There is no "Amended Complaint" in the Court's file.

Law in Support (Doc. #19) on March 9, 2004. Plaintiff filed a Memorandum of Law in Opposition (Doc. #25) on April 16, 2004. Defendants filed a Reply (Doc. #36) with leave of Court on May 17, 2004. Plaintiff also has filed a transcript from a motion to dismiss hearing held in another case. (Doc. #30).[3]

I.

In deciding a motion to dismiss, the Court must accept all factual allegations in a complaint as true and take them in the light most favorable to plaintiff. Christopher v. Harbury, 536 U.S. 403, 406 (2002); Hill v. White, 321 F.3d 1334, 1335 (11th Cir. 2003). A complaint should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts that would entitle it to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (footnote omitted); Marsh v. Butler County, Ala., 268 F.3d 1014, 1022 (11th Cir. 2001)(en banc). To satisfy the pleading requirements of Fed. R. Civ. P. 8, a complaint must simply give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002). However, dismissal is warranted under Fed. R. Civ. P. 12(b)(6) if, assuming the truth of the factual allegations of plaintiff's complaint, there is a dispositive legal issue which

[3] On July 8, 2004, the Court stayed this action for 45 days to allow plaintiff to retain new counsel. (Doc. #47). On August 23, 2004, the Court granted plaintiff's motion to extend this stay until September 24, 2004. (Doc. #49). Plaintiff has retained new counsel and the stay now has expired.

precludes relief. Neitzke v. Williams, 490 U.S. 319, 326 (1989); Brown v. Crawford County, Ga., 960 F.2d 1002, 1009-10 (11th Cir. 1992). The Court need not accept unsupported conclusions of law or of mixed law and fact in a complaint. Marsh, 268 F.3d at 1036 n.16.

II.

The Complaint (Doc. #2) sets forth the following facts, which at this stage of the proceedings are assumed to be true. Plaintiff Marco Island Cable, Inc. (plaintiff or Marco Island Cable) provides cable services in the Marco Island area of Collier County, Florida to approximately 8,500 residential units. Defendant Comcast Corporation is the largest cable provider in the country. Comcast Corporation operates through various regional entities such as defendant Comcast Cablevision of the South, Inc. which provides cable services throughout Collier County, Florida to over 120,000 residential units. There are approximately 260,000 residents in Collier County.

Defendants have a virtual monopoly for traditional cable service for the vast majority of Collier County. Other than Marco Island Cable, defendants' only other competitor is Time Warner Cablevision which competes with defendants in limited portions of Collier County. Plaintiff contends that defendants protect their monopoly power through (1) predatory pricing; (2) long-term exclusive contracts with residents, associations or developers

designed to prevent homeowners and condominium owners from choosing their own cable provider; (3) intimidation; (4) threats to remove cable wiring; and (5) threats to sue customers if they choose to get cable from Marco Island Cable. Plaintiff contends that defendants' actions are unlawful and have prevented it from offering cable in certain parts of Collier County.

Plaintiff's Complaint (Doc. #2) consists of three counts. Count I alleges that defendants have violated Florida's Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.211. Count II seeks declaratory relief pursuant to Fla. Stat. § 86.011 *et seq.* to have the Court declare that all exclusive contracts for providing cable services to residents of Collier County entered into by Comcast are null and void. Count III alleges that defendants have violated Florida's Antitrust Statute, Fla. Stat. § 542.19.

III.

Defendant Comcast Corporation contends that the Complaint should be dismissed for lack of personal jurisdiction.[4] (Doc. #20, p. 2). In response to this motion, plaintiff has filed a Motion For Dismissal of its Claims Without Prejudice Against Comcast Corporation. (Doc. #24). Plaintiff states that it does not have sufficient knowledge of the corporate structure of Comcast Corporation to assert that the Court has personal jurisdiction over

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[4] This motion pertains to only defendant Comcast Corporation and not to Comcast Cablevision of the South.

this defendant. Thus, plaintiff requests that the Court dismiss all claims against Comcast Corporation without prejudice with leave to amend its Complaint to rename Comcast Corporation if discovery reveals that it is a proper defendant and that the Court has personal jurisdiction over it.

Pursuant to Fed. R. Civ. P. 41(a)(1), the Court will grant plaintiff's motion to the extent that it seeks to voluntarily dismiss all claims against Comcast Corporation. No answer or motion for summary judgment has been filed. If plaintiff later decides that it wishes to add Comcast Corporation it may file a motion seeking such relief. Defendants' Motion To Dismiss for Lack of Personal Jurisdiction will be denied as moot.

IV.

Defendant Comcast Cablevision of the South, Inc. (defendant or Comcast) contends that the Court should dismiss or stay this case and refer the issues of inside wiring, predatory pricing, and exclusive contracts to the Federal Communications Commission (FCC) under the doctrine of primary jurisdiction because of the FCC's "expert knowledge in resolving these types of disputes." (Doc. #19, pp. 17-18).

The Eleventh Circuit has explained the doctrine of primary jurisdiction as follows:

> Primary jurisdiction is a judicially created doctrine whereby a court of competent jurisdiction may dismiss or stay an action pending a resolution of some portion of the actions by an administrative agency. Even though the

> court is authorized to adjudicate the claim before it, the primary jurisdiction doctrine comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

Smith v. GTE Corp., 236 F.3d 1292, 1298 n.3 (11th Cir. 2001) (internal quotation and citation omitted). The United States Supreme Court has made clear that there is no "fixed formula . . . for applying the doctrine of primary jurisdiction." United States v. Western Pac. R.R. Co., 352 U.S. 59, 64 (1956). The Eleventh Circuit has recognized, however, that there are two main justifications for the rule: (1) the expertise of the agency deferred to; and (2) the need for uniform interpretation of a statute or regulation. Boyes v. Shell Oil Prods. Co., 199 F.3d 1260, 1265 (11th Cir. 2000).

In support of its argument that the Court should stay or dismiss this action under the primary jurisdiction doctrine and refer the issues of inside wiring, predatory pricing, and exclusive contracts to the FCC, defendant cites to various provisions in 47 C.F.R. §76.7, which make clear that based upon the facts in the Complaint, plaintiff could have brought certain claims against defendant pursuant to the Communications Act of 1934 (commonly referred to as the Cable Act) by filing a petition with the FCC. (Docs. #19, p. 18; 36, pp. 9-10). Defendant does not explain, however, why the fact that the FCC may have concurrent jurisdiction

over the substance of plaintiff's claims requires this Court to refer them to the FCC.

By its very nature, the doctrine of primary jurisdiction applies only where the court and the agency have concurrent jurisdiction over a matter. Fulton Congeneration Assoc. v. Niagra Mohawk Power Corp., 84 F.3d 91, 97 (2d Cir. 1996); Entergy Serv., Inc. v. Union Pac. R. Co., 99 F. Supp. 2d 1080, 1089 (D. Neb. 2000); DeBruce Grain, Inc. v. Union Pac. R. Co., 983 F. Supp. 1280, 1284-85 (W.D. Mo. 1997). Simply because the doctrine of primary jurisdiction applies, i.e., a court and an agency have concurrent jurisdiction, does not mean that the court must defer to the agency. Clark Oil Co., Inc. v. Texaco, Inc., 609 F. Supp. 1373, 1381-2 (D. Del. 1985) ("primary jurisdiction is not always applied whenever an agency and a court have concurrent jurisdiction").

Defendant has provided no reason, other than the fact that the FCC has concurrent jurisdiction over the substance of plaintiff's claim, for the Court to refer the issues described above to the FCC. Defendant does not explain why the expertise the FCC possesses is necessary to deciding the issues before the Court or why the need for uniform interpretation of a statute or regulation is implicated in this matter. Plaintiff has alleged state law claims against defendant under Florida's Deceptive and Unfair Trade Practices Act and Florida's Antitrust Act and seeks declaratory relief regarding defendant's practices. Although certain

provisions of the Cable Act and its governing regulations may be relevant to the Court's decision, that alone is not sufficient for the Court to stay or dismiss this case under the primary jurisdiction doctrine.

V.

Defendant contends plaintiff's claim under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA) must be dismissed because plaintiff fails to plead adequately any improper conduct sufficient to establish a violation of FDUTPA. Specifically, defendant contends that plaintiff's allegations of exclusive contracts and predatory pricing are insufficiently pled and "fail to implicate FDUTPA" and that plaintiff's allegations regarding threats by defendant to remove customer's cable wiring cannot form the basis for a claim under FDUTPA because defendant's alleged actions are specifically permitted under the Cable Act.[5] (Doc. #19, p. 15).

The Florida Deceptive and Unfair Trade Practices Act (FDUTPA) declares unlawful "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce." Fla. Stat. § 501.204(1). FDUTPA provides that "anyone aggrieved by a violation of this part

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[5] Under 47 C.F.R. § 76.802, the removal of certain cable wiring is allowed only if a cable operator gives the subscriber the opportunity to purchase the wiring at the replacement cost and the subscriber declines.

may bring an action to obtain a declaratory judgment that an act or practice violates this part and to enjoin a person who has violated, is violating, or is otherwise likely to violate this part." Fla. Stat. § 501.211. Thus, to state a claim for injunctive relief under FDUTPA, plaintiff must allege that defendant engaged in an unfair method of competition, unconscionable act or practice, or unfair or deceptive act or practice in trade or commerce[6] and that plaintiff is "aggrieved" by such actions. Klinger v. Weekly World News, Inc., 747 F. Supp. 1477, 1480 (S.D. Fla. 1990).

After reviewing the relevant portions of the Complaint, the Court concludes that plaintiff's allegations regarding exclusive contracts, predatory pricing, and wiring, taken in the light most favorable to plaintiff, are sufficient to withstand a motion to dismiss because it does not appear beyond doubt that plaintiff can prove no set of facts that would entitle him to relief

VI.

Defendant contends plaintiff's monopolization claim under Florida's Antitrust Act must be dismissed because plaintiff fails to plead adequately any of the requisite elements for such a claim. (Doc. #19, pp. 6-15).

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[6] The Court notes that it continues to be true that "there is a surprising dearth of case law illuminating the scope of the Florida trade law." N.G. Travel Assoc. v. Celebrity Cruises, Inc., 764 So.2d 672, 674 n.3 (Fla. 3d DCA 2000), quoting Packaging Corp. Int'l v. Travenol Lab., Inc., 556 F. Supp. 1480 (S.D. Fla. 1983).

Florida Statute § 542.19 provides, in relevant part, as follows: "It is unlawful for any person to monopolize . . . any part of trade or commerce in this state." The elements of a monopolization claim under Florida law are: "(1) possession of monopoly power [by defendant] in a relevant market; (2) willful acquisition or maintenance of that power in an exclusionary manner; and (3) causal antitrust injury."[7] Okeelanta Power Ltd. P'ship v. Florida Power & Light Co., 766 So.2d 264, 267 (Fla. 4th DCA 2000).

A.

Defendant contends that plaintiff's monopolization claim must be dismissed for failure to plead adequately a relevant market. (Doc. #19, pp. 7-9).

A relevant market for a monopolization claim consists of both product and geographic components. JES Props., Inc. v. USA Equestrian, Inc., 253 F. Supp. 2d 1273, 1283 (M.D. Fla. 2003). The relevant product market is "the 'area of effective competition' in which competitors generally are willing to compete for the consumer potential[.]" Id. at 1284, citing American Key Corp. v. Cole Nat'l Corp., 762 F.2d 1569, 1581 (11th Cir. 1985). That market is "composed of products that have reasonable interchangeability for the purposes for which they are produced - price, use, and

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[7] Florida courts have adopted the body of federal law interpreting the Sherman Antitrust Act to interpret Florida state antitrust claims. Hager v. Venice Hosp., Inc., 944 F. Supp. 1530, 1537 (M.D. Fla. 1996), citing Fla. Stat. § 542.32.

qualities considered." Moecker v. Honeywell Internat'l, Inc., 144 F. Supp. 2d 1291, 1303 (M.D. Fla. 2001), quoting United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 404 (1956). The relevant geographic market "includes the area in which a potential buyer may rationally look for the goods or services he or she seeks." JES Props., Inc., 253 F. Supp. 2d at 1284. The definition of the relevant market is essentially a factual question. Aquatherm Indus., Inc. v. Florida Power & Light Co., 971 F. Supp. 1419, 1426 (M.D. Fla. 1997), citing U.S. Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F.3d 986, 994 (11th Cir. 1993). As a result, as this Court has recognized, "[d]ismissals are exceedingly disfavored . . . because of their fact-intensive nature." Lockheed Martin Corp. v. Boeing Co., 314 F. Supp. 2d 1198, 1207 (M.D. Fla. 2004), citing Covad Communications Co. v. BellSouth Corp., 299 F.3d 1272, 1279 (11th Cir. 2002), vacated on other grounds, 124 S. Ct. 1143 (2004).

The Complaint alleges that the product market for plaintiff's claims is cable services. (Doc. #2, ¶¶ 3, 6, 39). It alleges that the geographic market is Collier County, Florida. (Doc. #2, ¶¶ 1, 11, 39). Under the standard outlined above, the Court concludes that plaintiff's allegations are sufficient to withstand a motion to dismiss. Thus, defendant's motion to dismiss Count III on this ground is due to be denied.

B.

Defendant contends that plaintiff's monopolization claim must be dismissed for failure to plead adequately the improper use of monopoly power. (Doc. #19, pp. 9-12).

As explained above, the second element of a monopolization claim under Florida law is the willful acquisition or maintenance of monopoly power in an exclusionary manner. "Unlawful monopoly power requires anticompetitive conduct, which is conduct without a legitimate business purpose that makes sense only because it eliminates competition." Morris Communications Corp. v. PGA Tour, Inc., 364 F.3d 1288, 1295 (11th Cir. 2004). Exclusionary behavior includes practices which tend to impair the opportunities of rivals and which either do not advance competition or unnecessarily restrict it. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 n.32 (1985). Thus, a defendant that attempts to exclude competitors on some basis other than efficiency has engaged in predatory conduct. Id. at 605.

The Complaint alleges that, in violation of state law, defendant uses exclusive contracts with developers of condominiums and planned unit developments to prevent potential competitors from competing with defendant. (Doc. #2, ¶¶ 14-23, 40). The Complaint further alleges that defendant offers developers cash payments as an inducement for the developers to bind future purchases to defendant and threatens to sue - and has sued - condominium

associations if they attempt to change cable providers. (Doc. #2, ¶¶ 22, 23). It also alleges that defendant engages in predatory pricing by offering deep discounts and cash payments to customers in areas where plaintiff seeks to enter the market and by maintaining prices above a competitive level in Collier County to lock out plaintiff from the market. (Doc. #2, ¶¶ 42-44).

Defendant contends that plaintiff's allegations regarding exclusive contracts are insufficient because such contracts are improper for antitrust purposes only if a competitor is prohibited from bidding on such a contract. (Doc. #19, pp. 10-11). Defendant, however, has failed to address all of plaintiff's allegations regarding exclusive contracts. For example, as explained above, plaintiff contends that defendant offered developers cash payments for these exclusive contracts. In addition, as explained in more detail below, plaintiff alleges that these exclusive contracts are violative of state law and are enforced through the threat of legal action. The Court concludes that these allegations are sufficient to defeat defendant's motion to dismiss because, under the standard outlined above, such conduct lacks a legitimate business purpose and unnecessarily restricts

competition.[8] For these reasons, defendant's motion to dismiss Count III on this ground is due to be denied.

C.

Defendant contends that plaintiff fails to plead adequately an antitrust injury that it has suffered as a result of defendant's actions. (Doc. #19, pp. 12-13).

To recover under the antitrust laws, a plaintiff "must demonstrate not only an antitrust violation, but also 'antitrust injury,' that is, 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful.'" MCA Television Ltd. v. Public Interest Corp., 171 F.3d 1265, 1279 (11th Cir. 1999), quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977). "Thus, antitrust injuries include only those injuries that result from interference with the freedom to compete." Johnson v. University Health Servs., Inc., 161 F.3d 1334, 1338 (11th Cir. 1998).

The Complaint alleges that plaintiff has suffered, inter alia, lost profits and the inability to compete for certain customers as a result of defendant's predatory and monopolistic conduct. (Doc. #2, ¶ 46). The Court concludes that this is sufficient to allege

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[8] Because of the Court's conclusion that plaintiff's allegations of exclusive contracts are sufficient to plead unlawful monopoly power, the Court need not address defendant's arguments regarding predatory pricing in resolving the present motion to dismiss.

antitrust injury under the standard outlined above. Thus, defendant's motion to dismiss Count III on this ground is due to be denied.

D.

Defendant contends that the United States Supreme Court's decision in Verizon Communications, Inc. v. Trinko, LLP, 124 S. Ct. 872 (2004) bars plaintiff's antitrust claims. (Doc. #19, pp. 13-15).

In Trinko, a class of AT&T telephone customers filed a lawsuit under the Sherman Act alleging that Verizon Communications was harming all AT&T customers by denying AT&T access to its network in violation of the Telecommunications Act of 1996. The Telecommunications Act imposes certain duties upon local telephone companies in order to facilitate market entry by competitors and establishes a complex regime for monitoring and enforcement of those duties. Prior to the 1996 Act, Verizon was not required to give its competitors access to its local network and did not do so. The Court held that Verizon's alleged violations of its duties under the Telecommunications Act did not constitute a valid antitrust claim under antitrust standards that preexisted the enactment of the Telecommunications Act. Trinko, 124 S. Ct. at 878-80. In other words, the Court concluded that the duties created by the Telecommunications Act could not be enforced through the antitrust laws.

Trinko to plaintiff's claims in this case. In short, the Court concludes that defendant has not shown that the Supreme Court's reasoning in Trinko bars plaintiff's antitrust claims. Thus, defendant's motion to dismiss plaintiff's antitrust claims on this basis is due to be denied.

VII.

Defendant contends that plaintiff's request for declaratory relief that defendant's exclusive contracts violate Fla. Stat. § 718.1232 must be dismissed because the exclusive contracts that defendant has with multiple dwelling units such as condominium associations "do not prohibit any particular resident from contracting with competing franchised cable operators to attain service."[9] (Doc. #19, pp. 16-17).

Section 718.1232 of the Florida Statutes provides, in relevant part, that "[n]o resident of any condominium dwelling unit . . . shall be denied access to any available franchised or licensed cable television service[.]" The Complaint alleges that defendant "enters into exclusive contracts with developers of condominiums and planned unit developments governed by an association to prevent

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[9] Defendant also contends that plaintiff's request for declaratory relief that these exclusive contracts violate Florida's Antitrust Statute, Fla. Stat. § 542.18 must be dismissed for the same reason that plaintiff's claim for violation of this statute must be dismissed. (Doc. #19, p. 16 n.8). The Court disagrees because, as explained above, the Court has concluded that plaintiff's claims under Florida's Antitrust Statute are not due to be dismissed.

the retail purchasers of condominiums and homes within the developments from being free to choose another cable provider." (Doc. #2, ¶14). Attached to the Complaint is a copy of one of these exclusive agreements, which provides, among other things, that the exclusive license granted to defendant by the condominium association to provide cable "shall extend to each residential unit, dwelling and lot[.]" (Doc. #2, Ex. 1, p. 1).

Defendant contends that its exclusive contracts are not enforced against any individual condominium owners. Defendant's argument, however, relies on disputed facts outside the confines of the Complaint. Such facts, which are not contained in the Complaint, are not properly considered when deciding a motion to dismiss. GJR Invs., Inc. v. County of Escambia, Fla., 132 F.3d 1359, 1364 n.6 (11th Cir. 1998). Further, defendant has not offered any evidence in support of these assertions such that the Court would be required to convert the motion to one for summary judgment. Fed. R. Civ. P. 12(b) (last sentence). In short, defendant's argument goes to the merits of plaintiff's claims and cannot be determined on a motion to dismiss.

Accordingly, it is now

ORDERED:

1. Defendants' Motion To Dismiss (Doc. #13) is **DENIED** as moot.

2. Defendants' Motion To Dismiss (Doc. #14) is **DENIED** as moot.

3. Defendants' Corrected Motion To Dismiss Amended Complaint (Doc. #18) is **DENIED.**

4. Defendant's Corrected Motion To Dismiss Amended Complaint (Doc. #20) is **DENIED** as moot.

5. Plaintiff's Motion For Dismissal of Its Claims Without Prejudice Against Comcast Corporation (Doc. #24) is **GRANTED** as follows. Pursuant to Fed. R. Civ. 41(1)(1), the Complaint (Doc. #2) is **DISMISSED WITHOUT PREJUDICE** with respect to Comcast Corporation only.

DONE AND ORDERED at Fort Myers, Florida, this 23rd day of September, 2004.

John E. Steele

JOHN E. STEELE
United States District Judge

Copies:
Hon. Douglas N. Frazier
Counsel of record