

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CIVIL TERM : PART 16

-----X
CARMINE A. LOPRESTI

Plaintiff

- against -

MASSACHUSETTS MUTUAL LIFE, ET. AL

Defendants
-----X

Index No. 12719/2004

360 Adams Street
Brooklyn, New York
August 18, 2004

B E F O R E :

HONORABLE CAROLYN DEMAREST,
Justice

A P P E A R A N C E S:

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DEBRA SMITH, RPR
OFFICIAL COURT REPORTER

1 THE CLERK: Number six, seven, eight, nine,
2 index number 12719 of 2004, Lopresti versus
3 Massachusetts Mutual Life.

4 MR. GRUBEL: Henry Grubel, G-R-U-B-E-L, 37
5 Prospect --

6 THE CLERK: One second, please.

7 MR. GRUBEL: Good morning, your Honor. Henry
8 Grubel, 37 Prospect Street, Freeport, New York for the
9 plaintiff.

10 MR. RAYLESBERG: Alan Raylesberg,
11 R-A-Y-L-E-S-B-E-R-G, law firm of Chadbourne and Parke,
12 P-A-R-K-E, 30 Rockefeller Plaza, New York 10112, and
13 we're attorneys for the defendants Massachusetts Mutual
14 Life Insurance Company, Openheimer Funds Inc.,
15 Openheimer Funds Distributors Inc.

16 THE COURT: Okay.

17 MR. GELBER: Lawrence with a W, middle
18 initial R., Gelber, G-E-L-B-E-R, attorney of law, 34
19 Plaza Street, Brooklyn 11238. I represent defendant
20 Yankee Financial Group Inc.

21 MR. FELSENFELD: Arthur Felsenfeld, last name
22 F-E-L-S-E-N-F-E-L-D, firm of Andrew's Kurth, 450
23 Lexington Avenue, New York 10017, representing American
24 Express Company, American Centaurian Life Insurance
25 Company, IDS Life Insurance Company of New York,

1 American Express Financial Corporation, American
2 Express Financial Advisers, Inc., and Trause,
3 T-R-A-U-S-E.

4 MR. HOFFMAN: David Hoffman, 374 Stockholm
5 Street, Brooklyn, New York representing Wyckoff Heights
6 Medical Center and Dominick Gio, G-I-O.

7 MR. COBERT: Mitchell Cobert, 61 Miller Road,
8 Morristown, New Jersey representing Geilsamer.

9 THE COURT: Spell your last name, sir.

10 MR. COBERT: C-O-B-E-R-T.

11 THE COURT: Okay. And you're for defendants?

12 MR. COBERT: Mr. Geilsamer, the individual.

13 THE COURT: All right. This is defendants'
14 motions, multiple motions to dismiss, so you -- have
15 you chosen one of you to make the lead argument here?

16 MR. GRUBEL: Yes, your Honor.

17 THE COURT: Go ahead.

18 MR. RAYLESBERG: Mr. Raylesberg. Your Honor,
19 as I said, I'm with the firm Chadbourne & Parke and we
20 represent Massachusetts Mutual Life Insurance Company,
21 Oppenheimer Funds Inc. and Oppenheimer Funds
22 Distributors, Inc.

23 As Your Honor knows all of the defendants,
24 though I am standing here representing my clients, I
25 think it is fair to say, as you will see from the

1 papers, that the arguments are fairly common, if not
2 identical, among the various parties.

3 The motion is to dismiss the complaint for
4 failure to state a cause of action, 3211(a)7 motion.
5 As you can see, there has been extensive briefs. You
6 have a lot of briefs in front of you. And since it is
7 all set forth in the briefs, I will try to be brief.

8 THE COURT: Thank you.

9 MR. RAYLESBERG: What this is is a purported
10 anti-trust and tort claim against 14 defendants which
11 alleges a conspiracy among them to injure the
12 plaintiff, who is an insurance salesman who now claims
13 that he can no longer do business with employees at
14 Wyckoff Heights Medical Center.

15 The complaint, however, your Honor, is
16 totally conclusory. There are no factual allegations
17 to support these charges. There is not even a single
18 substantive reference in the complaint of my clients.

19 In opposition, the plaintiff effectively
20 admits he's pleaded no facts and his opposition brief
21 consists of not addressing directly any of the
22 arguments that we made.

23 THE COURT: All right, Mr. Raylesberg, I have
24 read these briefs and I'm familiar with what your
25 arguments are and the position of the plaintiff and I

1 understand you represent one of the insurers, that one
2 of the insurance companies that was involved in
3 supplying services to the employees, the mutual funds
4 plans.

5 MR. RAYLESBERG: Well, to be accurate, your
6 Honor, my clients are Massachusetts Mutual plus
7 Oppenheimer Funds Inc. and Oppenheimer Funds
8 Distributors. It is correct that as alleged when
9 Wyckoff decided to reduce the number of providers,
10 Oppenheimer Funds, quote, unquote, remains as one of
11 the providers.

12 That is not Mass Mutual, it's a separate
13 point, and we have noted that in a footnote. He's sued
14 them with -- there's just no nexus whatsoever for Mass
15 mutual. Technically, Oppenheimer Funds Inc. and
16 Oppenheimer Funds Distributors Inc., there is really no
17 nexus either, but, frankly, that goes beyond the issues
18 on the motion to dismiss, in a sense that I think we
19 are taking the allegations to be true and taking
20 testimony to be true. You do need to have facts.

21 And if you're familiar with the papers, let
22 me just say this. I think it is fair to say that the
23 complaint pleads basically three facts.

24 Number one, it pleads that Mr. Lopresti, the
25 plaintiff, is an insurance salesman. Number two, it

1 pleads that until recently he sold certain products
2 known as tax sheltered annuities on behalf of a company
3 known as Nacolah and he sold those products to
4 employees of the Wyckoff Hospital as part of the
5 retirement plan.

6 Number three, he alleges, as your Honor
7 recognizes, that in November 2003, Wyckoff announced
8 that it was limiting the number of vendors who will be
9 allowed to sell these products, limit it to some of the
10 various defendants, and that he's been eliminated from
11 selling the products as a result.

12 THE COURT: All right. My question here,
13 Counsel, is is it your contention that he would have no
14 standing to bring any of the complaints that are being
15 raised here?

16 He's saying that it is a violation of the
17 anti-trust laws. He alleging some damages, but it
18 seems that he's alleging them on behalf of the
19 employees who are now allegedly disadvantaged because
20 they can no longer have the benefits of this free
21 existing arrangement.

22 I'm trying to get you to address that as to
23 what the -- what rights the employees had, if you know,
24 or if you're prepared with respect what was done here,
25 that is to terminate some of the providers.

1 MR. RAYLESBERG: Well, first of all, I don't
2 read the complaint that way. I read the complaint as
3 plain and simple as Mr. Lopresti bringing a claim that
4 he's been damaged because he doesn't get sales
5 commissions.

6 THE COURT: I understand that, but he is
7 alleging something under the Anti-trust laws, from what
8 I understand, and contending that this, in turn, is
9 disadvantaging the market, and all these other things--

10 MR. RAYLESBERG: That I can address. We set
11 it out in great detail, I believe, in the briefs, but
12 to allege successfully in a complaint in violation of
13 the anti-trust laws, you need the three facts that
14 satisfy the elements of an anti-trust claim under the
15 Donnelly Act.

16 Basically, as to what's in the briefs, there
17 are at least three elements that need to be pleaded.
18 One is you need to plead that there is a relevant
19 market for anti-trust purposes. It's a term of
20 anti-trust laws that relevant market has to be both in
21 terms of product and geography.

22 Number two, very fundamental anti-trust law,
23 there has to be injury to competition, not an injury to
24 a competitor. It's not sufficient under the anti-trust
25 laws to say, "I've been hurt." You have to show that

1 competition has been injured in a relevant market.

2 And, number three, you need to show a
3 conspiracy or some form of combination or arrangement
4 between multiple parties in order to -- to show that
5 that conspiracy or arrangement had this impact on
6 competition in a relevant market.

7 THE COURT: Okay, now, I know from reading
8 your briefs that most of you contend that you had
9 nothing to do with this decision, that Wyckoff
10 unilaterally made the decision to cut the number of
11 providers for their own administrative purposes.

12 So, it may be that you don't want to respond
13 to this, but having reviewed the reply, you respond to
14 the plaintiff. He's saying this is unique, this is a
15 new -- whole new world, but there ought to be a rule
16 here, there ought to be a way to address this, and
17 that's why I'm trying to see whether you have anything
18 you want to say about -- with respect to all of these
19 various providers that are alleged to have been
20 involved in it.

21 MR. RAYLESBERG: I can address that, Your
22 Honor. I understand your question.

23 First of all, let me just say -- I am not
24 going to speak for Wyckoff; Mr. Hoffman can speak for
25 Wyckoff. This is, as we see it, to be clear, a motion

1 to dismiss the complaint, so that it isn't our burden
2 now to come back and prove a negative.

3 The issue is he pled to facts -- plain and
4 simply, your Honor, what the plaintiff's done is he's
5 come in here, he's laid out the scenario that you've
6 characterized, and he's saying, look, this must be a
7 violation. This is a case of first impression, etc.

8 The fact of the matter is if you go through
9 the elements that I have just mentioned, there are no
10 facts at all in this complaint that would support any
11 of the elements, much less all three of the elements.

12 If you start with the one that's probably the
13 easiest to understand, the conspiracy, the notion that
14 the defendants -- again, I'll speak for my clients, but
15 it may be the same for the others -- that the
16 defendants engaged in some sort of a conspiracy with
17 Wyckoff.

18 There is not a single factual allegation in
19 the complaint that supports that. There's not even a
20 reference to my clients in the complaint. You could
21 ask Mr. Grubel, the complainant, he won't be able to do
22 it. He really, in opposition, is saying, your Honor, I
23 acknowledge I don't have those facts, but I should get
24 the opportunity to take discovery in order to see if,
25 in fact, that it happened.

1 And we've cited a lot of cases, your Honor,
2 including Second Department cases for the proposition
3 that that is not enough to allow discovery to go
4 forward. This is in our reply brief which we filed
5 with you yesterday. I hope you have it. We have
6 another copy.

7 THE COURT: Oh, yes, Counsel, you're
8 Chadbourne Parke, right?

9 MR. RAYLESBERG: Correct. You have it, okay.
10 In any event, we have cases that are cited in that
11 brief that are quite clear that you can't come in on a
12 complaint and based on conjecture, speculation, and
13 surmise, say: Okay, I need discovery.

14 Now, I want to also add, your Honor, putting
15 aside the conspiracy point, that in the opposition
16 papers, there is really no argument at all addressed to
17 the fact that the complaint does not allege a relevant
18 market or alleged injury to competition.

19 The complaint -- and we have laid it out in
20 the briefs -- repeatedly talk about injury to Lopresti.
21 You have to have a market and he doesn't even
22 articulate what the market is. The closest he comes is
23 he's saying the anti-trust market is employees at
24 Wyckoff Hospital for tax sheltered annuities.

25 That cannot be, your Honor, anti-trust

1 market, because on a product basis, there are other
2 products that can go to the employee besides tax
3 sheltered annuities. And on a geographic basis, again,
4 we have a lot of cases that say this, you can't have a
5 single building, in effect, a single hospital as a
6 geographic market. It's like saying, you know, if you
7 were in the shoe business that you can have an
8 anti-trust violation involving a brown loafer at a
9 single store on Court Street.

10 Mr. Lopresti may have lost commissions.

11 Mr. Lopresti may be economically disadvantaged because
12 he has lost commissions, but I submit, your Honor, far
13 from being a case of first impression, that is a case
14 that has no facts at all to support it.

15 There is another case in Eastern District of
16 New York we reference, similar kind of case has been
17 brought by Mr. Lopresti. He may be very unhappy that
18 he is out of commissions, but you need to have a legal
19 remedy.

20 THE COURT: You're saying that he has brought
21 another action in the Eastern District?

22 MR. RAYLESBERG: Not involving these parties.
23 I've referenced that. We referenced that in a footnote
24 that he's brought a similar kind of claim in Eastern
25 District not against these parties, totally different

1 parties. Again, a bunch of institutional deep pocket
2 type defendants. Motions to dismiss are pending in
3 that case, but it's a similar complaint that he lost
4 the opportunity to continue to earn commissions.

5 My point, your Honor, is that in order to
6 come into court and sustain a cause of action, there
7 have to be facts that lead you to there. You can't
8 just come in and say: I've been hurt, I no longer get
9 commissions.

10 Anti-trust violation is a serious charge and
11 the tort claims which are probably easier to grasp, to
12 have a tort claim, there has to be tortious conduct.
13 There is not a single factual reference in the
14 complaint to any conduct by my clients, much less
15 tortious conduct.

16 THE COURT: Are you speaking now for
17 everybody? Is there anybody else who needs to
18 supplement this argument before I ask to hear from the
19 plaintiff's attorney?

20 MR. GELBER: I represent Yankee Financial
21 Group, your Honor. They're a stock brokerage firm out
22 on the island, on Long Island. They also sell
23 insurance products.

24 All I want to supplement, all I want to say
25 is that they're also not mentioned anywhere in the

1 complaint. They're mentioned inside paragraph, I
2 think, six, seven, eight, which are identifying
3 paragraphs in one paragraph.

4 THE COURT: What's the name of your client
5 again?

6 MR. GELBER: Yankee Financial Group. They're
7 described as a brokerage firm. In another paragraph,
8 they're described as having been the employer of one of
9 the other defendants, which they're no longer.

10 In the third paragraph, there's some
11 allegation that they're somehow affiliated with Mass
12 Mutual, which we didn't even understand because
13 publicly available records on the internet that are
14 published by NASD called the Central Registration
15 Depository indicate who the real owners of any real
16 brokerage firm are and there's no reference.

17 We would have expected that Mr. Grubel, that
18 Mr. Grubel would have checked it out before filing his
19 complaint, so we don't even know.

20 THE COURT: You say you're not affiliated
21 with any of the other defendants?

22 MR. GELBER: Absolutely not. We're an NASD
23 member firm. We're not an insurance company. We're a
24 stock broker, basically.

25 THE COURT: Were you one of the providers

1 through Wyckoff? Was your company a provider of these
2 services through Wyckoff?

3 MR. GELBER: My client sells insurance
4 products, they sell stocks, they sell investments, so
5 they have a couple of these accounts. We also only
6 note that in his opposition papers, Mr. Grubel
7 acknowledged that the decision of Wyckoff was
8 unilateral.

9 THE COURT: Yes, I'm aware of that.

10 MR. GELBER: So, we're at a total loss
11 understanding how a unilateral decision can somehow
12 involve us in a conspiracy. The last thing I want to
13 say, very briefly, is the complaint refers to
14 agreements and secret meetings and so forth in a very,
15 very generalized conclusory fashion.

16 We don't know what agreement he's talking
17 about. We don't know what meeting he is talking about.
18 There's no specificity alleged or asserted anywhere, so
19 I don't even know why my client is in this.

20 THE COURT: Okay, very good. Very briefly,
21 counsel?

22 MR. HOFFMAN: Your Honor, I represent Wyckoff
23 and I only want to say one thing, and that is on the
24 face of this complaint, there are nonsufficient facts
25 upon which we could defend the case, and that is the

1 standard to be applied in determining whether a cause
2 of action should be dismissed for failure to state a
3 cause of action. And that's why this complaint ought
4 to be dismissed before the plaintiff is afforded the
5 privilege of conducting discovery.

6 THE COURT: All right, Mr. Grubel, you're
7 representing the plaintiff. What do you have to say
8 here?

9 MR. GRUBEL: Well, taking the last comments
10 first, all of these defendants will profit from the
11 actions of what they did here.

12 THE COURT: Well, wait a minute. What did
13 they do? They just -- they succeeded in being the
14 survivors in a decision by Wyckoff. How did they do
15 anything wrong?

16 MR. GRUBEL: When I said unilateral
17 decision -- can I take that one second first on
18 unilateral -- I meant not the employees' decision, it
19 was the employer's decision.

20 THE COURT: I am aware of that, but is there
21 a rule that prevents Wyckoff from making this decision
22 in their own interest?

23 MR. GRUBEL: Right now, right now, there is
24 no rule other than the violation of the Donnelly Act,
25 and, yes, that -- the hospital is a marketplace, as in

1 Eagle Spring Water where a landlord -- which is still
2 good law in our state.

3 In Eagle Spring, a landlord told all its
4 tenants that they could not do business with a certain
5 provider of water and water supplies and the tenants,
6 even as a condition of leasing apartments with Webb &
7 Knapp, had to sign in their leases that they would not
8 do business with anybody except the particular
9 organization that Webb and Knapp wanted them to do
10 business with.

11 And the Court held that was a violation of
12 the Donnelly Act, and that is -- remains good law
13 today. And it's plaintiff's position that that is very
14 analogous to what is going on here.

15 THE COURT: That's what you rely on. You're
16 saying there ought to be a law right here to prevent
17 them from doing what they did?

18 MR. GRUBEL: That is correct, your Honor.

19 THE COURT: All right. Do you want to say
20 anything else?

21 MR. GRUBEL: Yes. I think --

22 THE COURT: The Eagle Spring is in here,
23 isn't it?

24 MR. GRUBEL: Yes, it is.

25 THE COURT: Anything else you want to say?

1 MR. GRUBEL: I disagree with their definition
2 here of the market not existing. I disagree with what
3 they said about the anti-trust. You have it all in my
4 papers. And there are not enough facts, yes, we don't
5 know what happened, we have absolutely no idea.

6 All we know is that there were providers and
7 now the hospital has indicated that only these two
8 organizations will now be allowed to provide money --
9 to provide products that the federal government allows
10 people to put their own money away. That is not
11 hospital money, this is the employees' own money,
12 not --

13 THE COURT: Shouldn't the employees have the
14 right to bring that action rather than you?

15 MR. GRUBEL: The employees, whether or not --
16 I addressed that in my brief and I say to you employees
17 are reluctant in this economy to sue their employer,
18 very, very reluctant.

19 THE COURT: Well, do you know whether any of
20 those employees even complained to Wyckoff about what
21 was done here?

22 MR. GRUBEL: They have complained to my
23 client. What they have done with Wyckoff, I have no
24 idea, except Wyckoff signs their check. It's like in
25 Eagle Spring, this is the landlord, you have to do what

1 your landlord tells you to do with your own money.

2 THE COURT: All right, case is marked
3 submitted for decision.

4 MR. HOFFMAN: Your Honor, do you want me to
5 hand up my reply affirmation?

6 THE COURT: Didn't you serve a reply
7 affirmation?

8 MR. HOFFMAN: Just served on the --

9 THE COURT: Obviously, it makes sense to have
10 a decision before discovery proceeds, but what date
11 next week?

12 MR. RAYLESBERG: It was scheduled for next
13 Wednesday.

14 THE COURT: All right, we will adjourn the
15 PC. If the motion is not granted, you will be given
16 notice of a new date.

17 * * * *

18 It is hereby certified that the foregoing is
19 a true and accurate transcript of the stenographic
20 record.

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DEBRA SMITH,
Official Court Reporter

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