UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

United States of America and
State of Michigan,

Plaintiffs,

v.

W.A. Foote Memorial Hospital,
d/b/a Allegiance Health,

Defendant.

_____/

Case No. 15-cv-12311

Judith E. Levy
United States District Judge

Mag. Judge David R. Grand

OPINION AND ORDER DENYING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT [64, 68] AND PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT [73, 74]

Before the Court in this civil antitrust case are defendant W.A. Foote Memorial Hospital's motion for partial summary judgment (Dkts. 64, 68), and plaintiffs United States of America and the State of Michigan's motion for summary judgment. (Dkts. 73, 74.) A hearing was held on April 24, 2017, and oral argument was heard.

For the reasons set forth below, the motions are denied.

I. Background

Plaintiffs are the United States of America and the State of Michigan. Defendant W.A. Foote Memorial Hospital, d/b/a Allegiance Health, is a Michigan corporation with a general acute-care hospital in Jackson County, Michigan. Former defendant Hillsdale Community Health Center ("HCHC") is also a Michigan corporation with a general acute-care hospital located in Hillsdale County, Michigan. (Dkt. 1 at 5.)[1]

During the relevant period, Allegiance Health and HCHC were horizontal competitors in many areas—"Allegiance has offered . . . virtually all of the services offered by HCHC, which were predominantly lower acuity services." (Dkt. 74-3 at 7.) But Allegiance also offered a number of higher acuity services that HCHC did not, primarily in the areas of oncology, cardiovascular, and orthopedic care.

Plaintiffs allege that, since at least 2009, Allegiance Health and HCHC have had an agreement "that limits Allegiance's marketing for competing services in Hillsdale County" to eliminate or reduce competition for patients in that County. (Dkt. 1 at 7–8.) As evidence,

[1] Hillsdale Community Health Center was dismissed with defendants Community Health Center of Branch County, and ProMedica Health System, Inc., on October 21, 2015, pursuant to a settlement agreement. (*See* Dkt. 36.)

plaintiffs identified numerous documents related to oncology, cardiovascular, and orthopedic services, all of which allegedly demonstrate that defendant agreed with HCHC not to market or to limit marketing in Hillsdale County. (*Id.*) The agreement was allegedly enforced by Allegiance's management, including CEO Georgia Fojtasek and Vice-President of Marketing Anthony Gardner, who allegedly assured HCHC in writing and orally that the agreement would be enforced, and that any marketing materials distributed were a mistake. (*Id.* at 8.) Further, defendant's staff and executives allegedly "discussed the agreement in numerous correspondences and business documents." (*Id.* at 8–9.) As a result of the alleged agreement, Hillsdale patients, physicians, and employers were "deprived" of information regarding healthcare choices and of free health screenings and educational materials. (*Id.* at 9.)

On June 25, 2015, plaintiffs filed this complaint, arguing the alleged agreement between Allegiance and HCHC illegally restrained competition. (Dkt. 1 at 1.) Plaintiffs alleged the agreement was an unreasonable restraint of trade in violation of section 1 of the Sherman Act, 15 U.S.C. § 1, and was both *per se* illegal and illegal under an

abbreviated or "quick look" rule of reason analysis. (*Id.* at 12.) Plaintiffs also alleged the agreement unreasonably restrained trade and commerce in violation of section 2 of the Michigan Antitrust Reform Act, MICH. COMP. LAWS § 445.772.

On January 12, 2017, defendant filed a motion for partial summary judgment, arguing the *per se* antitrust principles and "quick look" test should not be applied as a matter of law because the evidence does not demonstrate (1) the alleged agreement clearly has substantial adverse effects on competition and (2) an observer with even a rudimentary understanding of economics would readily conclude the alleged conduct has substantial anticompetitive effects and no plausible procompetitive justification. Instead, defendant argues the full rule of reason analysis should be used to determine whether the alleged agreement violates the Sherman Act. Further, defendant argues that no agreement exists; rather, defendant has engaged in unilateral conduct as part of a business strategy to obtain referrals for its higher acuity services. (Dkts. 64, 68.)

On January 19, 2017, plaintiffs filed a motion for summary judgment, arguing the evidence demonstrates (1) that an agreement exists; (2) the agreement amounts to a horizontal market allocation that

is *per se* unlawful; and (3) the agreement is illegal under a "quick look" rule of reason analysis. (Dkt. 73, 74.) Although the parties do not discuss the Michigan claim in detail, the Michigan statute tracks the Sherman Act, and a violation of the Sherman Act is therefore also a violation of the state law. *In re Cardizem CD Antitrust Litig.*, 105 F. Supp. 2d 682, 692 (E.D. Mich. 2000). At the April 24, 2017 hearing, each of the parties concurred with this understanding.

II. Legal Standard

Summary judgment is proper when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The court may not grant summary judgment if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The court "views the evidence, all facts, and any inferences that may be drawn from the facts in the light most favorable to the nonmoving party." *Pure Tech Sys., Inc. v. Mt. Hawley Ins. Co.*, 95 F. App'x 132, 135 (6th Cir. 2004) (citing *Skousen v. Brighton High Sch.*, 305 F.3d 520, 526 (6th Cir. 2002)).

III. Analysis

Plaintiffs seek summary judgment on Counts I and II of the complaint. (Dkts. 73, 74.) Defendant seeks partial summary judgment on the question of which analytical rule should be used to analyze the alleged agreement between defendant and HCHC. (Dkts. 64, 68.)

Whether An Agreement Exists

Plaintiffs seek summary judgment on the question of whether an agreement exists between defendant and HCHC. Defendant denies an agreement ever existed, arguing any decision to limit marketing was part of a unilateral business strategy designed to improve its relationship with HCHC and thereby obtain referrals for higher acuity services.

To establish a violation of section 1 of the Sherman Act, 15 U.S.C. § 1, a plaintiff must demonstrate "that an agreement between two or more economic entities exists since unilateral conduct would not violate this statute."[2] *In re Se. Milk Antitrust Litig.*, 739 F.3d 262, 270 (6th Cir. 2014). Thus, an "antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the

[2] Section 1 prohibits "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. A violation may be established, however, only when the restraint is "unreasonable." *Care Heating & Cooling, Inc. v. Amer. Std., Inc.*, 427 F.3d 1008, 1012 (6th Cir. 2005).

[defendant] and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" *Re/Man Int'l v. Realty One, Inc.*, 900 F. Supp. 132, 151 (N.D. Ohio 1995) (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)). And where evidence of an agreement is "ambiguous," i.e., "conduct is as consistent with permissible competition as with illegality, a plaintiff 'must present evidence that tends to exclude the possibility' that the alleged conspirators acted independently.'" *United States v. Apple Inc.*, 952 F.2d 638, 689–90 (S.D.N.Y. 2013) (quoting *Monsanto Co.*, 465 U.S. at 764). However, a plaintiff need not show that the "sole inference to be drawn from the evidence" is a conspiracy or agreement. *Id.* at 690. "[T]o survive a motion for summary judgment or for a directed verdict, a plaintiff . . . must present evidence that tends to exclude the possibility that the alleged conspirators acted independently." *Id.* at 697. In other words, a plaintiff must present evidence sufficient to allow the fact-finder "to infer that the conspiratorial explanation is more likely than not." *Id.* at 690.

In this case, plaintiffs put forth a compelling argument that there is an agreement. First, several senior employees of Allegiance refer to their relationship with HCHC as an "agreement" or describe their

relationship in a manner that indicates there is a bilateral understanding that Allegiance will limit marketing in Hillsdale County.[3] For example, after learning of a marketing mailing sent to Hillsdale County, Allegiance CEO Georgia Fojtasek stated, "I told [Duke Anderson, CEO of HCHC] that we specifically agreed to screen out Hillsdale zip codes, that we would find out what happened and be sure the appropriate apologies are send [*sic*]." (Dkt. 99-10 at 6 (Ex. O-2).) Ms. Fojtasek then instructed Anthony Gardner, vice-president for marketing and communications, to "get w/Duke" and work to ensure "this doesn't recur." (*Id.*) This internal communication alone strongly indicates there was an agreement not to market certain services in Hillsdale County, and that such an agreement was enforced by defendant and HCHC.

Further evidence of an agreement is a set of emails between Allegiance employees during which the director of marketing, Suzy

[3] Plaintiffs have submitted numerous emails and documents prepared by Allegiance employees. It is unclear that all of these documents are admissible. The documents referred to by the Court in this section, all of which are part of Exhibit O (Dkt. 99-10) are admissible. There can be no doubt that the statements of the President & CEO, Vice-President for Marketing and Communications, Director of Marketing, and Manager of Physician Recruitment & Liaison are admissible as non-hearsay under Fed. R. Evid. 801(d)(2)(D), as they are statements made by party-opponents and employees or agents within the scope of their employment. *Crane v. Monterey Mushroom, Inc.*, 910 F. Supp. 2d 1032, 1043–44 (E.D. Tenn. 2012).

Turpel, states "[W]e are only allowed to market open-heart per our agreement with Duke." (Dkt. 99-10 at 9 (Ex. O-3).) The manager of physician recruitment & liaison for defendant even characterized Allegiance as having a "gentlemans [*sic*] agreement with Duke." (Dkt. 99-10 at 133 (Ex. O-4).) And as described by Vice-President Anthony Gardner, "Our relationship with HCHC is transactional and one of seeking 'approval' to provide services in their market." (Dkt. 99-10 at 47 (Ex. O-12).) All of these statements, including the remaining clearly admissible statements in Exhibit O, (see, eg., Dkt. 99-10 at 9–17, 44, 49, 62), point convincingly to the conclusion that defendant did not act alone, but entered into an agreement regarding marketing with HCHC. In other words, plaintiffs' evidence "tends to exclude the possibility that the alleged conspirators acted independently."

Despite this evidence, there remain questions of material fact as to whether defendant's actions were a legitimate business strategy instead of an agreement to unreasonably restrain trade. Perhaps the best illustrations of this are the contradictory statements of Allegiance's CEO Georgia Fojtasek. During her deposition, she said, "we were not to market or try to pull away the competing services specific [*sic*] by directly

marketing those in that area." (Dkt. 99-5 at 18.) Although she does not use the word "agreement," the phrasing suggests HCHC instructed defendant not to market or steal clients. But she then states, "That was our strategy," (*id.*), which might suggest unilateral conduct.

Ms. Fojtasek's deposition testimony next fleshes out the "strategy," explaining that there was no agreement, but a unilateral decision to limit marketing in a way that would improve the chance of obtaining referrals from HCHC. (Dkt. 99-5 at 4.) For example, she claimed that the decision to limit marketing in Hillsdale County was an independent choice based on "historic responses" as to what forms of marketing were effective. (*Id.* at 5.) In other words, Allegiance "didn't limit competing," but "just did it in a different way." (*Id.* at 6–7.)

Further, Ms. Fojtasek addressed several of the above-described emails, and testified that they do not show an agreement existed. Instead, they demonstrate how Allegiance operationalized its strategy of developing a relationship with HCHC through which defendant could obtain referrals that were necessary to maintain its open heart program. (*See id.* at 11–12.) For example, with respect to the email in which she discussed apologizing to Duke Anderson for a mailing sent to Hillsdale

County, Ms. Fojtasek explained that, in her view, the apology was just a way of "building the referral relationships," but any decision to limit marketing was a unilateral, internal decision. (Dkt. 99-5 at 18–20.) In other words, in Ms. Fojtasek's view, having a competitor complain was not unusual. And her response was not part of an agreement not to compete; instead, it was a way to smooth over any negative incidents that could potentially reduce the chance that HCHC would refer patients to Allegiance.

In sum, although the record regarding Ms. Fojtasek's statements alone might indicate that an agreement exists, the inconsistencies between the emails and her deposition testimony cannot be resolved absent determinations as to which of her statements or explanations are credible.[4] And "when 'reviewing a summary judgment motion, credibility judgments and weighing of the evidence are prohibited. Rather, the evidence should be viewed in the light most favorable to the non-moving

[4] Defendant has also submitted the deposition testimony of a number of other Allegiance employees and of Duke Anderson, all of whom indicate either that there was no agreement, that they were not in a position to know if an agreement existed, or that they were mistaken about the nature of the relationship between defendant and HCHC. (*See generally* Dkt. 64.) As with Ms. Fojtasek, the credibility of these witnesses must be determined, and prevents the Court from granting plaintiffs' motion for summary judgment.

party.'" *Detroit Med. Ctr. v. Encompass Ins. Co.*, Case No. 09-14821, 2011 WL 3111970, at *5 (E.D. Mich. July 26, 2011) (quoting *Biegas v. Quickway Carriers, Inc.*, 573 F.3d 365, 374 (6th Cir. 2009)). And doing so here demonstrates that questions of material fact remain, especially because it might be economically beneficial for defendant to act either unilaterally or in concert with HCHC because both options might boost referrals or otherwise reduce competition for patients. Thus, the conduct and statements at issue could plausibly indicate defendant's behavior was part of a legitimate business strategy. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 479 U.S. 574, 587 (1986) (within the factual context of the case, whether evidence "makes no economic sense" should impact a court's determination of whether a claim is implausible). But it could also be evidence of an unlawful restraint on trade.

Further, the crux of plaintiffs' argument is that defendant made an agreement with HCHC to limit marketing for competing services in Hillsdale County. But defendant did conduct some marketing for these services there. Plaintiffs argue defendant deserves no credit for this. To decide whether the limited amount of marketing conducted weighs in favor of plaintiffs or defendant, the Court will be required to assess the

credibility of the witnesses and the weight their testimony should be afforded, including any experts whose testimony is admitted at trial. Accordingly, there remain genuine issues for trial as to whether an agreement exists and the terms of any such agreement, and plaintiffs' motion for summary judgment on this issue is denied.

Applicable Antitrust Principles

Plaintiffs argue the alleged agreement must be evaluated using the *per se* rule or, alternatively, the "quick look" analysis. Defendant argues neither of those rules apply, and the alleged agreement must be evaluated using the full rule of reason analysis.

Because the Court is unable to determine whether an agreement exists, and therefore how it may be structured, the Court also is unable to determine which antitrust principle should be used to analyze the legality of any agreement. Accordingly, the Court denies all parties' motions for judgment on the applicability of the *per se* rule, "quick look" standard, and rule of reason.

IV. Conclusion

For the reasons set forth above, defendant's motion for partial summary judgment (Dkts. 64, 68) is DENIED.

Plaintiffs' motion for summary judgment (Dkt. 73, 74) is DENIED.

The Court will entertain further argument on these issues at the bench trial set for October 17, 2017.

IT IS SO ORDERED.

Dated: May 31, 2017
Ann Arbor, Michigan

s/Judith E. Levy
JUDITH E. LEVY
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on May 31, 2017.

s/Felicia M. Moses
FELICIA M. MOSES
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