

Opinion

IN THE MATTER OF
VULCANIZED RUBBER AND PLASTICS COMPANY

Docket 6222. Order and opinion, Nov. 29, 1955

Interlocutory order denying respondent's appeal from hearing examiner's denial of its motion to dismiss complaint, etc., since the record contains evidence which, if not overcome by rebuttal, would support a desist order.

Before *Mr. Loren H. Laughlin*, hearing examiner.

Mr. Charles S. Cox for the Commission.

Chapman, Walsh & O'Connell, of Washington, D. C., and *Mr. Joseph Sawyer*, of New York City, for respondent.

Mr. I. Louis Wolk, of Los Angeles, Calif., for Dayton Rubber Co., *amicus curiae*.

Arthur, Dry & Dole, of New York City, for United States Rubber Co., *amicus curiae*.

ORDER DENYING RESPONDENT'S INTERLOCUTORY APPEAL

This matter having been heard by the Commission upon respondent's appeal from the hearing examiner's ruling denying respondent's motion to dismiss the complaint and respondent's request that the Commission order that further hearings herein be suspended until the Commission has acted on the appeal; and

The Commission, for the reasons stated in the accompanying opinion, having concluded that the appeal and request for oral argument thereon, as well as the request that further hearings herein be suspended until the Commission has acted on the appeal, should be denied:

It is ordered, That respondent's appeal, and request for oral argument thereon, from the hearing examiner's ruling denying respondent's motion to dismiss the complaint, and respondent's request that further hearings herein be suspended until the Commission has acted on the appeal, be, and they hereby are, denied.

OPINION OF THE COMMISSION

Per Curiam:

This is an interlocutory appeal by the respondent from the hearing examiner's denial of the respondent's motion to dismiss the complaint.

The complaint charges that the respondent has falsely, deceptively, and misleadingly represented its combs as "rubber" and "hard rubber" products. Extensive hearings have been held and considerable testimony and other evidence in support of the allegations of the com-

plaint have been introduced. After counsel supporting the complaint rested his case, the respondent filed a motion to dismiss the complaint, alleging that counsel in support of the complaint had failed to establish a prima facie case and to prove the existence of any public interest in the proceedings. The hearing examiner denied the motion to dismiss and ordered that further hearing shall commence on November 28, 1955. The respondent has filed an appeal from the examiner's ruling denying the motion to dismiss and has requested the Commission to order that further hearings be suspended pending disposition of the appeal. Respondent has also requested oral argument on the appeal.

Under the Commission's Rules of Practice, Section 3.20, an interlocutory appeal from a ruling of a hearing examiner may be granted only upon a finding that the ruling appealed from involves substantial rights and will materially affect the final decision of the case, and further that a determination of its correctness before conclusion of the trial would better serve the interests of justice. Thus, for the respondent to succeed in this appeal it must have demonstrated to the satisfaction of the Commission not only that the examiner's ruling in some way touches the respondent's substantial rights, but also that the ruling will have some material effect on the final decision of the case and that the interests of justice would be better served by a determination of the correctness of the ruling now rather than at the conclusion of the trial.

The ruling of a hearing examiner denying a motion to dismiss a complaint for failure of proof, made at the conclusion of the case in chief, obviously is not a decision on the merits of the case. Such a ruling is merely a determination that there is in the record reliable evidence which, when considered in connection with reasonable inferences which may be drawn therefrom, and if not overcome by the respondent's evidence, would support an order to cease and desist. The ultimate decision of whether an order to cease and desist will be issued, even in the absence of further evidence, is not reached; and it could well be that a hearing officer, upon full consideration of a proceeding submitted for final decision, after making appropriate determinations concerning the credibility of witnesses, the weight to be given conflicting evidence, and other pertinent questions involved, would dismiss the complaint even though he had theretofore denied a motion to dismiss for failure of the record to establish a prima facie case.

A hearing examiner in ruling on a motion to dismiss for failure of proof, made at the close of the case in chief, like a Federal district court in ruling on a similar motion in a non-jury trial, views the

evidence and inferences reasonably to be drawn therefrom in the light most favorable to the complaint. Thus, an appeal from a ruling denying such a motion should be granted only when it is apparent that there is in the record no substantial evidence in support of the complaint and the ruling was obviously erroneous. The instant appeal does not present this situation. The record in this case contains considerable respectable evidence which, if not overcome by rebutting evidence, would support an order to cease and desist. Moreover, the ruling appealed from, involving as it does only a determination, under the circumstances stated, that a prima facie case has been established, will have no material effect on the final decision of the case. It is also clear that for the Commission to entertain appeals of this nature would be but to encourage the submission of cases for decision piecemeal, with resulting unjustifiable delays; and that, in the opinion of the Commission, would not "better serve the interests of justice." It follows that the respondent's appeal is not one to be granted under § 3.20 of the Commission's Rules of Practice.

In scheduling further hearings in this matter and in stating that he would not defer further hearings during the pendency of the respondent's appeal, the hearing examiner was acting well within the scope of his authority. No sufficient reason appears as to why we should disturb that action.

In the view we take of the respondent's appeal, oral argument in support thereof is not necessary and would serve no useful purpose.

The respondent's appeal and its request for oral argument thereon, as well as its request that further hearings herein be suspended, are denied and an appropriate order will be entered.

Complaint

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IN THE MATTER OF

STANLEY MARTIN AND STEPHEN BALUT TRADING AS
MARTIN-BALUT FUR FACTORYCONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS LABELING ACTS*Docket 6379. Complaint, June 29, 1955—Decision, Dec. 1, 1955*

Consent order requiring furriers in Wilkes-Barre, Pa., to cease violating the Fur Products Labeling Act by failing to comply with labeling requirements; and disseminating advertising in newspapers, etc., which failed to disclose the names of animals producing certain fur and other required information, misrepresented prices as reduced, savings possible to purchasers, and fur products as being from the stock of a liquidating business.

Before *Mr. John Lewis*, hearing examiner.

Mr. John T. Walker for the Commission.

Mr. Donald S. Mills, of Wilkes-Barre, Pa., for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Stanley Martin and Stephen Balut, as individuals and as copartners trading as Martin-Balut Fur Factory, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Stanley Martin and Stephen Balut are individuals and copartners, trading as Martin-Balut Fur Factory, with their office and principal place of business located at 685 Carey Avenue, Wilkes-Barre, Pennsylvania.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents have been, and are now, engaged in the introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce of fur products, and have sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of fur which had been shipped

and received in commerce, as "commerce," "fur," and "fur products" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4 (2) of the Fur Products Labeling Act, and in the manner and form prescribed by the rules and regulations promulgated thereunder.

PAR. 4. Certain of said fur products were misbranded, in violation of the Fur Products Labeling Act, in that they were not labeled in accordance with the rules and regulations promulgated thereunder in the following respects:

(a) Required information was set forth in abbreviated form, in violation of Rule 4 of the aforesaid Rules and Regulations.

(b) Required information was mingled with non-required information on labels, in violation of Rule 29 (a) of the aforesaid Rules and Regulations.

(c) Required information was set forth in handwriting on labels, in violation of Rule 29 (b) of the aforesaid Rules and Regulations.

PAR. 5. Certain of said fur products were falsely and deceptively advertised, in violation of the Fur Products Labeling Act, in that respondents caused the dissemination in commerce, as "commerce" is defined in said Act, of certain advertisements concerning said fur products, by means of newspapers and by various other means, which advertisements were not in accordance with the provisions of Section 5 (a) of the Fur Products Labeling Act, and which advertisements were intended to and did aid, promote, and assist, directly or indirectly, in the sale and offering for sale of said fur products.

PAR. 6. Among and including the advertisements, as aforesaid, but not limited thereto, were advertisements of respondents which appeared in issues of the "Times Leader," Wilkes-Barre, Pennsylvania, a newspaper having wide circulation in the State of Pennsylvania and other States of the United States.

By means of the aforesaid advertisements, and through others of the same import and meaning, not specifically referred to herein, respondents falsely and deceptively:

(a) Failed to disclose the name or names of the animal or animals producing the fur or furs contained in the fur products, as set forth in the Fur Products Name Guide in violation of Section 5 (a) (1) of the Fur Products Labeling Act.

(b) Failed to disclose that the fur products contained or were composed of bleached, dyed or otherwise artificially colored fur, when such was a fact, in violation of Section 5 (a) (3) of the Fur Products Labeling Act.

(c) Misrepresented prices of fur products as having been reduced from regular or usual prices, where the so-called regular or usual prices were in fact fictitious, in that they were not the prices at which said merchandise was usually sold by respondents, in the recent regular course of their business, in violation of Rule 44 (a) of the aforesaid Rules and Regulations.

(d) Misrepresented, by means of comparative prices and other statements as to "value" not based on current market values, the amount of savings to be effectuated by purchasers of said fur products, in violation of Rule 44 (b) and (c) of the aforesaid Rules and Regulations.

(e) Misrepresented, in violation of Rule 44 (g) of said Rules and Regulations, fur products as being from the stock of a business in the state of liquidation.

PAR. 7. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act, and the Rules and Regulations promulgated thereunder and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on June 29, 1955, charging them with having violated the Fur Products Labeling Act and the rules and regulations issued thereunder, and the Federal Trade Commission Act. After being served with said complaint, respondents appeared by counsel and entered into an agreement, dated October 11, 1955, containing a consent order to cease and desist, disposing of all the issues in this proceeding without hearing. Said agreement has been submitted to the undersigned, heretofore duly designated to act as hearing examiner herein, for his consideration in accordance with Section 3.25 of the Rules of Practice and Procedure of the Commission.

Respondents, pursuant to the aforesaid agreement, have admitted all the jurisdictional allegations of the complaint and agreed that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. Said agreement further provides that respondents waive all further procedural steps before the hearing examiner or the Commission, including the making of findings of fact or conclusions of law and the right to challenge or contest the validity of the order to cease and desist entered in accordance with such agreement. It has also been agreed that the

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Order

record herein shall consist solely of the complaint and said agreement, and that said agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

This proceeding having now come on for final consideration on the complaint and the aforesaid agreement containing consent order, and it appearing that the order provided for in said agreement covers all the allegations of the complaint and provides for an appropriate disposition of this proceeding, the same is hereby accepted and is ordered filed upon becoming part of the Commission's decision pursuant to Sections 3.21 and 3.25 of the Rules of Practice and Procedure, and the hearing examiner, accordingly, makes the following findings, for jurisdictional purposes, and order:

1. Respondents Stanley Martin, and Stephen Balut, are individuals and copartners, trading as Martin-Balut Fur Factory, with their office and principal place of business located at 685 Carey Avenue, Wilkes-Barre, Pennsylvania.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents hereinabove named. The complaint states a cause of action against said respondents under the Fur Products Labeling Act and the Federal Trade Commission Act, and this proceeding is in the interest of the public.

ORDER

It is ordered, That respondents Stanley Martin, and Stephen Balut, individuals and as copartners, trading as Martin-Balut Fur Factory, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising, or offering for sale in commerce, or the transportation or distribution in commerce, of fur products, or in connection with the sale, advertising, offering for sale, transportation, or distribution of fur products which have been made in whole or in part of fur which has been shipped and received in commerce, as "commerce," "fur," and "fur products" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

1. Falsely or deceptively labeling or otherwise identifying any such product as to the name or names of the animal or animals that produced the fur from which such product was manufactured;

2. Failing to affix labels to fur products showing:

(a) The name or names of the animal or animals producing the fur or furs contained in the fur product as set forth in the Fur Prod-

