

Porges v BJ's Wholesale Club, Inc.

2004 NY Slip Op 30039(U)

May 4, 2004

Supreme Court, Kings County

Docket Number: 0048327/3272

Judge: Ariel E. Belen

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At an IAS Term, Part 10, Comm-1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4th day of May, 2004

P R E S E N T:

HON. ARIEL E. BELEN,

Justice.

-----X

JACOB PORGES, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

- against -

Index No. 48327/03

BJ'S WHOLESALE CLUB, INC.,

Defendant.

-----X

The following papers numbered 1 to 3 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	_____1_____
Opposing Affidavits (Affirmations)_____	_____2_____
Reply Affidavits (Affirmations)_____	_____3_____
_____Affidavit (Affirmation)_____	_____
Other Papers_____	_____

Upon the foregoing papers, defendant BJ's Wholesale Club, Inc. moves for an order, pursuant to CPLR 3211 (a) (7), dismissing plaintiff's complaint for failure to state a claim.

In this action, plaintiff seeks to recover, on his own behalf and on behalf of all those similarly situated, an alleged overcharge of sales tax on items purchased from defendant's stores on several days prior to June 4, 2003. On that date, the total local and state sales tax charged by merchants to consumers changed to 8.625% from 8.5%. Plaintiff alleges that

defendant charged customers the new 8.625% rate for several days before the new tax rate became legally effective on June 4, 2003. In his complaint, plaintiff brings causes of action for: (1) negligence; (2) gross negligence; (3) deceptive business practices under General Business Law § 349; and (4) violation of Executive Law § 63 (12).

In its motion to dismiss, defendant argues that plaintiff's claims are preempted by Tax Law §§ 1139 and 1140, which require plaintiff to seek a refund with the state tax commission. Plaintiff argues that because each tax overcharge consisted of a very small amount, requiring each member of the proposed class to file a tax refund request would be overly burdensome. Plaintiff further argues that it would be inappropriate to direct its complaint to the tax authority since the disputed amount is not for "actual legal taxes" but for an amount charged in excess of the legal tax rate.

In considering a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must determine, construing plaintiff's pleadings liberally, whether plaintiff states a cognizable cause of action (*see 511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144). If factual allegations are discerned from the pleadings' four corners which constitute the elements of any cause of action recognizable by law, the motion to dismiss must be denied (*see id.* at 152; *Guggenheimer v Ginzburg*, 43 NY2d 268; *Skillgames LLC v Brody*, 1 AD3d 247).

Tax Law §1139 provides, in relevant part, that "the tax commission shall refund or credit any tax, penalty or interest erroneously, illegally or unconstitutionally collected or paid if application therefor shall be filed with the tax commission." Thus, plaintiff's argument that it would be inappropriate to seek a refund from the tax commission for illegally collected

taxes lacks merit. Tax Law § 1139 applies in cases where the tax was paid by the applicant to either a person required to collect such a tax or directly to the tax commission. Tax Law § 1140 provides:

The remedies provided by sections eleven hundred thirty-eight and eleven hundred thirty-nine shall be exclusive remedies available to any person for the review of tax liability imposed by this article; and no determination or proposed determination of tax or determination on any application for refund shall be enjoined or reviewed by an action for declaratory judgment, an action for money had and received, or by any action or proceeding other than a proceeding under article seventy-eight of the civil practice law and rules.

In *Davidson v Rochester Telephone Corp.* (163 AD2d 800), a taxpaying customer commenced an action against a telephone company for recovery of sales tax on certain charges that the plaintiff claimed were exempt from sales tax. The court found that plaintiff's claims that the tax was improper, illegal and an unjust enrichment were required to be made in an administrative proceeding, and ruled that "[a]s plaintiff has failed to exhaust his administrative remedies, he is not entitled to maintain the instant action" (*id.* at 802). The court also noted that the vendor's responsibility regarding sales taxes ends after the collection of such taxes. "A dissatisfied taxpayer's recourse is then against the taxing body" (*id.*). Although a plaintiff is not required to exhaust administrative remedies where administrative review would be futile (*Watergate II Apartments v Buffalo Sewer Auth.*, 46 NY2d 52), here plaintiff has shown only that administrative review would be inconvenient (*see Cavalieri v Commissioner*, 250 AD2d 973; *550 Central Ave. Deli Corp. v Commissioner*, 188 AD2d

845). Furthermore, where, as here, a statute specifically delineates the steps a party must take to seek judicial relief and includes an exclusive remedy provision, courts lack the discretion to rely on the exceptions to the doctrine of exhaustion of remedies (*Bankers Trust Corp. v New York City Dept. of Fin.*, 1 NY3d 315).

When a retail vendor collects sales tax from a consumer, it is “expressly required to pay to the Tax Commission all sales tax collected, *including any excess of the correct amount*” (emphasis added) (*Saltzman v New York State Tax Comm.*, 101 AD2d 910, 911). Retail vendors collect taxes as trustees for and on account of the state, and the tax commission is statutorily authorized to refund or credit any tax illegally or unconstitutionally collected or paid (*General Electric Capital Corp. v New York State Div. of Tax Appeals*, __ NY3d __, 2004 NY Slip Op 02427). Thus, even though the taxes collected by defendant were in excess of the legally authorized amount, plaintiff must pursue administrative remedies with the tax commission as outlined in Tax Law §§ 1139 and 1140.* Defendant’s motion to dismiss on the ground of preemption is granted.

The foregoing constitutes the decision, order and judgment of the court.

E N T E R,



J. S. C.

* In any event, the court notes that plaintiff’s third and fourth causes of action are without merit. A claim for deceptive business practices under GBL § 349 requires a showing that defendant’s acts were deceptive or misleading in a material way (*see Varela v Investors Ins. Holding Corp.*, 81 NY2d 958). Defendant disclosed the amount of sales tax charged on plaintiff’s receipt, which is not deceptive or misleading in any material way. Executive Law § 63 (12) allows the attorney general to bring an action for fraud but does not provide for causes of actions by individuals.