

Pleasantville Food & Gas, Inc. v One Pleasantville Rd., LLC

2010 NY Slip Op 30337(U)

February 5, 2010

Supreme Court, Nassau County

Docket Number: 016173/2009

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. IRA B. WARSHAWSKY,
Justice.**

TRIAL/IAS PART 8

PLEASANTVILLE FOOD & GAS, INC. and
DAKHAIL EL JAMAL,

Plaintiffs,

INDEX NO.: 016173/2009
MOTION DATE: 12/01/2009
MOTION SEQUENCE: 002 and 003

-against-

ONE PLEASANTVILLE ROAD, LLC and
MONTGOMERY DISTRIBUTORS, LLC,

Defendants.

The following papers read on this motion:

Notice of Motion, Affidavit & Exhibits Annexed	1
Notice of Cross-Motion & Affirmation in Opposition to Motion to Reargue and in Support of Cross-Motion	2

PRELIMINARY STATEMENT

Defendants move to reargue the Decision and Order of this Court dated November 16, 2009 on the grounds that the Court overlooked or misapplied prevailing case law interpreting the Petroleum Marketing Practices Act (PMPA) 15 U.S.C. § 2801, et seq. Defendant contends that PMPA does not apply to this proceeding since Plaintiff is not a franchisee within the meaning of that statute. Defendants argue in the Affidavit of counsel that New York General Business Law (GBL) is also inapplicable to the matter.

BACKGROUND

Plaintiff Dakhil El Jamal, as president of Pleasantville Food & Gas (PF &G), entered into a Retail Gasoline Station Lease Agreement on July 1, 2004 and a Lease Commission Contract

with Montgomery Distributors, LLC. The term was for five years expiring June 30, 2009, and called for PF&G to pay monthly rent and increases in real estate taxes, water and sewage charges. The Commission Contract called for delivery of gasoline to the premises by Montgomer. PF&G then sold the gasoline and deposited the proceeds into an account to which Montgomery had access. Montgomery paid PF&G a commission ranging from \$0.065 to \$0.10 per gallon.

The monthly rental ranged from \$4,880.00/mo. in year 1 to \$5,850/mo. in year 5. On February 25, 2009 One Pleasantville Rd., LLC (OPR) notified Plaintiffs that at the expiration of the lease on June 30, 2009, the rental payments would increase to \$9,666/mo., together with tax contributions, for a total of \$11,974.43/mo. Plaintiff made a July 8, 2009 payment to Montgomery in the amount of \$7,512.77. By letter dated July 29, 2009 OPR “as Landlord elects to terminate your tenancy of the above described premises now held by you under monthly hiring”. Plaintiff then tendered an additional check in the amount of \$7,512.77 for August rental. Defendants rejected the offer and brought a summary proceeding to recover possession of the subject premises in Village of Pleasantville District Court.

DISCUSSION

Defendants contend that Plaintiffs are not entitled to the protection of either the Petroleum Marketing Practices Act (15 U.S.C. § 2801) (PMPA) or General Business Law (§ 199) (GBL). Whether or not Plaintiffs are entitled to the application of these statutes depends on whether or not they are franchisees within the definition of either statute.

Petroleum Marketing Practices Act, 15 U.S.C. § 2801

PMPA was enacted to establish “protection for franchises from arbitrary and discriminatory termination or non-renewal of their franchises”.¹ There is an essential element of independence which must be present to determine whether or not a franchisor-franchisee relationship exists, and “(t)he court will look beyond the label the parties attach to the relationship and examine whether defendant clothed plaintiff with sufficient independence to

¹ *Issa v. Getty Petroleum Marketing, Inc.*, 18 Misc.3d 1107(A) (Sup. Nassau, 2007), citing S.Rep. No. 731, 95th Cong., 2d Sess. 15, reprinted in 1978 U.S. Code Cong. & Ad. News 873, 874.

bring them within the protection of the PMPA”.² The indicia of entrepreneurship essential to constitute a “retailer” who “purchases” gasoline from “distributor” have been stated that a purchaser is required to:

- pay for the gasoline inventory until it was sold;
- take title;
- pay ad valorem taxes on the gasoline inventory;
- bear the risk of the loss of the gasoline (except for its own carelessness);
- retain any funds from the sale of the gasoline to motorists;
- set prices or assume the market risk in fluctuations in gasoline prices;
- pay sales taxes or extend credit to motorists on resale; and
- hold a gasoline retailers business license.³

In its Memorandum of Law submitted in conjunction with the original motion, Defendant sets forth the contents of the Commission Contract which show that Plaintiff is not a purchaser within the meaning of the PMPA.⁴ They are enumerated as follows:

1. Plaintiff does not act as a traditional purchaser, but rather as a commission agent, since it does not determine what gasoline it will purchase and then make arrangements for specific purchases;
2. Plaintiff does not negotiate, contract, arrange credit or pay for the gasoline; it is done by Montgomery;
3. Title to the product is reserved exclusively to Montgomery;
4. Plaintiff is at no risk of loss of the gasoline, except for causes under its control;
5. Plaintiff does not pay a fixed price for the gasoline; all proceeds are deposited to Montgomery’s account, for which he receives a commission;

² *Id.*, citing *Johnson v. Mobil Oil Corp.*, 553 F.Supp. 195 (S.D.N.Y. 1982) and *Roberts v. Exxon Corp.*, 427 F.Supp. 389 (W.D.La. 1977).

³ *Miller v. W.H. Bristow, Inc.*, 739 F.Supp. 1044, 1047 (D.S.C. 1990); See also, *Farm Stores, Inc. v. Texaco, Inc.*, 763 F.2d 1335, 1340 (11th Cir. 1985), cert. den., 474 U.S. 1039 (1985).

⁴ Exh. “B” to Motion at p. 3 et seq.

6. Plaintiff is at no risk for fluctuations in retail prices, and does not set them; It receives a commission of 6 ½, 7 ½, or 10 ½ cents per gallon, depending on the volume, irrespective of the sales price;

7. Plaintiff is not required to insure the gasoline inventory, and has not shown an insurable interest;

8. Plaintiff pays no taxes related to the gasoline; the prices include any and all taxes, fees or other charges required to be collected;

9. Plaintiff's credit is not involved in the sale or delivery; all funds are deposited by Plaintiff and transferred to Montgomery by electronic transfer;

10. Plaintiff is not a licensed retailer or reseller of gasoline; the license is held by Montgomery.

Plaintiff's response is primarily reliance on the Decision in *Issa*.⁵ That Decision merely held that a claim under PAMPA was not "palpably improper", and leave to amend the complaint was granted. Plaintiffs in *Issa* "were responsible for any loss ensuing as a result of shortages due to "drive-offs" and credit chargebacks, were obligated to pay sales taxes and were responsible for maintenance and carrying of licenses necessary for the operation of the Plaintiff's business as a gas station (Lease ¶¶ 9, 21 and 32). Whether Plaintiffs can prove the remaining elements cannot be said from the current record before the Court".⁶ In this case, however, the Commission Contract makes it clear that Plaintiff has little or no independence, is exposed to no market risk, does not set retail prices, does not purchase gasoline, does not pay sales taxes or extend credit on its own account, and is not licensed as a gasoline retailer. Under these circumstances, Plaintiff is not imbued with sufficient independence so as to be entitled to protection afforded franchisees under PMPA.

General Business Law § 199-c (3)

The statute provides as follows:

⁵ Affidavit of Kenneth L. Robinson at ¶ 19.

⁶ Referring to the elements in *Miller v. H.W. Bristow, Inc.*, 739 F.Supp, 1044, 1047 (D.S.C. 1990).

3. No distributor may terminate, cancel or refuse to renew a franchise agreement for any reason unless he has given ninety days' written notice to the dealer of his intent to terminate, cancel or not renew such franchise, provided that in the event of the dealer's default under the terms and conditions of the franchise agreement as set out in paragraph a of subdivision one of this section, the distributor may, alternatively, give the dealer ten days' written notice to cure the default, and if the default has not been cured within such period, the distributor may terminate or cancel the franchise in accordance with the notice requirements of the franchise agreements, provided such notice is given within ten days or any other period mutually agreed upon in writing after the expiration of the ten-day default period.

Defendants in this case have not sought to terminate or refuse to renew a franchise agreement. Neither have they instituted a holdover proceeding in which they have unilaterally terminated a lease. The lease has expired, and no agreement has been reached for the period commencing upon its June 30, 2009 termination. Plaintiff was confronted with a significant increase in rental as of July 1, 2009, which it initially agreed to pay, but, commencing August 1, 2009, began to pay in a reduced amount.⁷

Consignees, such as the Plaintiff, even if not covered by PMPA, may seek protection under §199. In appropriate circumstances they are entitled to ninety days notice and a 10-day notice to cure deficiencies.⁸ In this case, however, the protections are not applicable to nonpayment summary proceedings, which have an independent statutory basis.

Defendants' motion to reargue is granted, and upon reargument, the Court modifies its prior determination and hereby vacates the Preliminary Injunction in favor of the Plaintiff as well

⁷ By letter dated February 25, 2009 One Pleasantville Rd., LLC advised PF & G that commencing July 1, 2009, monthly rental would be \$9,666 and all real estate taxes, \$27,701.15, payable monthly, for a total monthly rental of \$11,974.43. Correspondence dated August 14, 2009 from counsel for Plaintiff offered to tender rental of \$7,512.77. The proceeding for non-payment in the Pleasantville Court ensued.

⁸ *Tarricone v. 980 Washington Street Corp.*, 169 Misc.2d 1072 (Sup. Westchester, App. Term 1996).

as that portion of the Decision and Order dated November 16, 2009 which removed the non-payment proceedings pending in Village Justice Court, Pleasantville, New York.

The cross-motion to modify that portion of the Order setting the bond at \$50,000 is denied, and the Order for the posting of a bond is vacated.

This constitutes the Decision and Order of the Court.

Dated: February 5, 2010



J.S.C.

ENTERED

FEB 09 2010

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**