

Davidson v Duane Reade, Inc.
2010 NY Slip Op 34123(U)
September 27, 2010
Supreme Court, New York County
Docket Number: Index No. 116939/2009
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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BORIS DAVIDSON, ILYSA DAVIDSON, on behalf of
themselves and all others similarly situated

DECISION & ORDER

Plaintiffs,

Index No. 116939/2009

-against-

DUANE READE, INC.,

Defendant.

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KORNREICH, SHIRLEY WERNER, J.:

In this action, plaintiffs Boris and Ilysa Davidson (the Davidsons) allege that the defendant, Duane Reade, Inc. (Duane Reade), improperly charged them sales tax on tax-exempt products. Duane Reade moves to dismiss the complaint. The Davidsons oppose the motion.

Background

The Davidsons are consumers of tea and iced tea products. Duane Reade owns and operates a chain of stores that sells such products. On August 18, 2009 and September 21, 2009, the Davidsons purchased from Duane Reade an iced tea product called "Honest Tea." On both occasions, Duane Reade charged the Davidsons 8.875% of the product price as tax (NY tax). The Davidsons claim that "Honest Tea" is exempt from New York State and New York City sales tax. Therefore, they claim that Duane Reade's NY tax charge was unlawful.

On the basis of these allegations, the Davidsons commenced a class action against Duane Reade under CPLR § 901. In their complaint, the Davidsons list four causes of action: (1) deceptive business practices, (2) breach of contract, (3) negligent misrepresentation, and

(4) unjust enrichment. Duane Reade moves to dismiss the Davidsons' complaint on two grounds: (1) the pleadings fail to state a cause of action; and (2) the court should not proceed in the absence of a person who should be a party. CPLR §§ 3211(a)(7) and (a)(10).

Discussion

On a motion to dismiss for failure to state a cause of action, the court must accept the allegations of the complaint as true and afford them the benefit of every favorable inference. *Cron v Hargro Fabrics*, 91 NY2d 362, 366 (1998).

Duane Reade asserts that the Davidsons have not stated a cause of action because a consumer does not have a private right of action to recover improperly collected sales tax from a retailer. Duane Reade further argues that a consumer can only recover an improperly collected sales tax by filing an application for a refund with the New York State Department of Taxation and Finance (the Tax Department). Tax Law § 1139(a). The Davidsons disagree and maintain that applying for a refund with the Tax Department is not their exclusive remedy.

An application for a refund with the Tax Department is the Davidsons' exclusive remedy. A sales tax is paid "to the person required to collect it as trustee for and on account of the state." Tax Law § 1132(a)(1). "A person required to collect tax" includes "every vendor of tangible personal property." Tax Law § 1131(1). "Every person required to collect the tax shall collect the tax from the customer when collecting the price . . . to which it applies." Tax Law § 1132(a)(1). Having collected the tax [the tax collector's] responsibility ends. *Davidson v Rochester Telephone Corp.*, 163 AD2d 800, 802 (3d Dept 1990). "A dissatisfied taxpayer's recourse is against the taxing body." *Id.* The taxpayer may apply for a refund from the Tax Department. Tax Law § 1139(a). The Tax Department shall refund any tax "erroneously,

illegally or unconstitutionally withheld.” *Id.* The Tax Department’s refund,

shall be [the] *exclusive remed[y]* available to any person for the review of tax liability...; 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. Tax Law § 1140. [emphasis supplied]

The Davidsons argue that the facts and legal theory of recovery in *Rochester Telephone* are distinguishable from those at issue here. According to the Davidsons, the tax collector in *Rochester Telephone* obtained and relied on an advisory opinion from the Tax Department. By contrast, the Davidsons argue, the Tax Department did not authorize Duane Reade’s sales tax collection in this case. In fact, the Davidsons argue, Duane Reade collected a sales tax that the law did not authorize it to collect.

The Davidsons’ argument fails. The parties agree that Duane Reade collected the so-called NY tax on an ice tea product that it sold. Whether the collection was authorized ultimately depends on whether the product was exempt from sales tax under New York law. Tax Law § 1115(a)(1) (listing tax exemptions from retail sales). This determination involves a review of the plaintiffs’ tax liability as retail purchasers of ice tea. The “exclusive remed[y] available to any person for the review of tax liability” is the procedure for seeking a refund from the Tax Department. Tax Law § 1140. The court may not review the Davidsons’ tax liability other than in an Article 78 proceeding. *Id.* And the Davidsons cannot bring an Article 78 proceeding because the Tax Department has not made a final determination of their tax liability. CPLR § 7801.

Duane Reade is a “vendor of tangible property.” As such, Duane Reade is “a person

required to collect tax.” Tax Law § 1131(1). As “a person required to collect tax,” Duane Reade collected the sales tax “as a trustee for and on account of the state.” Tax Law § 1132(a)(1). Having collected the sales tax from the Davidsons, Duane Reade’s responsibility ended. *Rochester Telephone, supra* at 802. The Davidsons’ only recourse is against the Tax Department. *Id.* They may apply for a refund from the Tax Department, who shall refund the sales tax to the Davidsons if it was erroneously or illegally withheld. Tax Law § 1139(a). In sum, the Davidsons do not have a private right of action against Duane Reade. The Davidsons’ only remedy is to pursue and exhaust the procedures for seeking a refund with the Tax Department. Tax Law § 1139(a)(1). Accordingly it is,

ORDERED that the motion by defendant Duane Reade, Inc., to dismiss the complaint of Boris Davidson and Ilysa Davidson is granted and the Clerk is directed to enter judgment dismissing the complaint with prejudice.

Dated: September 27, 2010

ENTER



J.S.C.