

Dennis v 44th Enters. Corp.

2019 NY Slip Op 32409(U)

August 7, 2019

Supreme Court, New York County

Docket Number: 153420/2016

Judge: Kathryn E. Freed

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

-----X INDEX NO. 153420/2016

LOUISA DENNIS, individually and on behalf of others
similarly situated,

Plaintiffs-Claimants,

MOTION SEQ. NO. 002, 003

- v -

44TH ENTERPRISES CORP., d/b/a LACE II
GENTLEMEN'S CLUB; ANTHONY CAPECI, and any other
related entities,

Defendants-Stakeholders,

-and-

NEW YORK STATE DEPARTMENT OF TAXATION AND
FINANCE and the COMMISSIONER of the New York State
Department of Taxation and Finance,

DECISION AND ORDER

Cross-Defendants-Claimants,

-and-

METRO ENTERPRISES CORP.,

Cross-Defendant-Claimant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 24, 25, 26, 27, 28,
29, 30, 36, 39, 41, 42, 43, 44, 47, 48, 49, 50, 51, 52, 54, 55, 56, 57, 58, 61, 62, 63, 64, 65, 66, 68, 70, 71,
72, 73, 74, 75, 76, 77, 78, 79, 80

were read on this motion to/for PRELIM. INJ./TEMP. RESTRAINING ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 003) 81, 82, 83, 84, 85,
86, 87, 88, 89, 90, 91, 93, 94, 95, 96

were read on this motion to/for INJUNCTION/RESTRAINING ORDER

Motion sequences 002 and 003 are hereby consolidated for disposition.

In this class action commenced in April 2016 pursuant to Labor Law §§ 190 et seq., 652
and 663, plaintiff Louisa Dennis and other similarly situated individuals (collectively "plaintiffs"

or “plaintiffs-claimants”) who are, or were, employees of 44th Enterprises Corp. (“44th Enterprises”) d/b/a Lace II Gentlemen’s Club (“Lace II” or “the club”) and Anthony Capeci (collectively “defendants” or “defendants-stakeholders”) seek to collect unpaid minimum wages, illegally retained tips, and improperly held wages. Doc. 1. Defendants-stakeholders move (motion sequence 002), pursuant to CPLR 6311, for a preliminary injunction seeking to enjoin the parties to this action from pursuing any administrative tax procedures or other litigation in which the rights and responsibilities of the parties to pay gratuities to entertainers in their nightclubs by way of alternate currency, also known as “scrip”, may be determined, and tolling the time periods in which the defendants-stakeholders must pursue administrative appeals of tax assessments levied by the cross-defendants-claimants New York State Department of Taxation and Finance and its Commissioner (collectively “the DTF”). Defendant-claimant Metro Enterprises Corp. (“Metro”) cross-moves (motion sequence 002) for the same relief requested by the defendants-stakeholders. The DTF opposes the motions by the defendants-stakeholders and Metro and cross-moves (motion sequence 002), pursuant to CPLR 3211(a)(2) and (a)(7), to dismiss an interpleader complaint filed by the defendants-stakeholders. Doc. 53. Additionally, Metro moves, by order to show cause (“OSC”) (motion sequence 003), for a temporary restraining order preventing the DTF from conducting any proceedings in connection with Metro’s tax appeals, including staying a hearing scheduled for July 15, 2019 pending the determination of the OSC as well as the determination of Metro’s cross motion for a preliminary injunction. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motions are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

In the complaint, plaintiffs alleged, inter alia, that they were employed as exotic dancers by 44th Enterprises, which operated as Lace II, an adult entertainment establishment in Manhattan run by its principal, Capeci. Plaintiffs claimed that defendants improperly deducted as “fines” and “fees” monies which should have gone to them as tips. They further alleged that defendants disregarded state law by failing to keep timesheets and payroll records. As a first cause of action, plaintiffs claimed that defendants failed to pay them minimum wage. As a second cause of action, plaintiffs alleged that defendants willfully and unlawfully withheld portions of their tips. As a third cause of action, plaintiffs alleged that defendants made unlawful deductions from their wages for items such as “house fees.” As a fourth cause of action, plaintiffs alleged that defendants failed to provide them with yearly wage notices or required weekly wage statements.

Defendants joined issue by their answer filed June 26, 2017. Doc. 12.

On April 5, 2018, defendants-stakeholders commenced an interpleader action against plaintiffs-claimants and Metro and sought a declaratory judgment against the DTF. In the interpleader complaint, defendants-stakeholders alleged, inter alia, that the DTF levied over \$11 million in tax assessments against them “for failing to withhold and pay sales tax, in part, on the exact same tip monies [p]laintiffs-[c]laimants seek to recover.” Doc. 23 at par. 1. They further alleged that, while it was in business, Lace II, which closed in 2017, offered live exotic dance performances on an open stage in the club, as well as in private party rooms available for rent. Although patrons of the club were permitted to tip plaintiffs in cash, 44th Enterprises, as a service to its patrons, contracted with Metro to allow patrons to convert charges on their credit cards to “an alternate internal currency known as ‘scrip.’” Doc. 23 at par. 21. Patrons were able to use the scrip to tip the dancers but not to rent party rooms or to buy drinks. Doc. 23 at par. 23. Metro

charged customers a 20% service fee to convert their credit card charges into scrip. Doc. 23 at par. 28. Metro also charged dancers a 10% service fee when it provided them with cash in exchange for scrip. Doc. 23 at par. 29. Defendants-stakeholders claim that they never collected the scrip proceeds from Metro or the dancers and never included scrip transactions in its gross receipts. Doc. 23 at par. 31.

Defendants-stakeholders asserted that the DTF has issued sales tax assessments against them totaling over \$11 million, including: 1) \$1,183,041.72 to 44th Enterprises for scrip transactions processed by Metro at Lace II, none of which were recorded on 44th Enterprises' books or in its gross receipts; 2) \$156,000 to 44th Enterprises based on underreported sales related to private room rental charges at Lace II; \$4,275,255.13 to Capeci in his capacity as an officer of MLB Enterprises Corp. ("MLB"), a separate company which contracts with Metro to process scrip for patrons, which resulted from scrip transactions processed by Metro, none of which was recorded on MLB's books or in its gross receipts. Doc. 23 at par. 35. Defendants-stakeholders alleged that, according to the DTF, the full amount of scrip transacted in the club was subject to sales tax on the ground that it constituted an amusement charge pursuant to Tax Law § 1101(d)(2) and (3).

Although 44th Enterprises and Capeci attended a conciliation conference with the DTF, the DTF upheld the tax, and they alleged that they intended to appeal the DTF's finding. Doc. 23 at pars. 38-39. They maintained that they did not have \$11 million to pay in the event the administrative hearing resulted in a finding that they owed this amount. Doc. 23 at par. 40. Additionally, they maintained that they had contracts with the dancers pursuant to which the dancers agreed to accept scrip from patrons and in which the parties agreed that the dancers were allowed to retain all gratuities paid to them by patrons. Doc. 23 at par. 41.

In the first cause of action in the interpleader complaint, defendants-stakeholders asserted that, since plaintiffs-claimants, the DTF, and/or Metro may have claims related to the ownership of the money which they allegedly owed (Doc. 23 at pars. 42-43, 48-49), this Court should “prohibit any and all [claims] against the subject funds in another forum to avoid the possibility of inconsistent judgments and so that a single determination can be made in this lawsuit.” Doc. 23 at par. 50.

As a second cause of action in the interpleader complaint, defendants-stakeholders alleged that 44th Enterprises and Capeci were not required to exhaust all administrative remedies because: 1) they were challenging the applicability of a sales tax statute and the amusement tax was not applicable to them (Doc. 23 at pars. 53-54); and 2) they lacked the money to proceed with an Article 78 appeal or to post a bond in the amount of the assessed tax, thereby effectively rendering the administrative process futile. Doc. 23 at par. 55. 44th Enterprises and Capeci further alleged that they were entitled to a judgment declaring, inter alia, that the DTF lacked the authority to hold them liable: 1) “for sales tax arising from the conversion of credit to scrip by Metro or tips paid by patrons to entertainers using scrip” (Doc. 23 at par. 70); and 2) “for sales tax arising from the rental of party rooms.” Doc. 23 at par. 71.

As a third cause of action, defendants-stakeholders claimed that, by requiring 44th Enterprises to “withhold and pay a portion of scrip paid by patrons to [dancers] as sales tax”, the DTF was violating their right to substantive and procedural due process under the Fourteenth Amendment of the United States Constitution by compelling them to violate the New York Labor Law in order to comply with the Tax Law. Doc. 23 at pars. 77-80. They also sought an injunction prohibiting the DTF from applying Tax Law §§ 1101(a)(3), 1101(d)(2) and (d)(3) and 1105 to scrip transactions. Doc. 23 at par. 80.

The fourth cause of action was essentially the same as the third except insofar as it alleged a violation of defendants-stakeholders' rights under the New York State Constitution. Doc. 23 at pars. 82-83. Defendants-stakeholders also claim that they are entitled to an injunction prohibiting the enforcement of Tax Law §§ 1101(a)(3), 1101(d)(2) and (d)(3) and 1105 to scrip transactions. Doc. 23 at par. 83.

Defendants-stakeholders further demanded, inter alia, that this Court authorize a party to "receive the subject funds pending the determination of this litigation and that, upon the delivery of the property to such person," that they be discharged of liability to all claimants. Doc. 23 at 15.

On April 10, 2018, defendants-stakeholders moved (motion sequence 002), pursuant to CPLR 6311, for a preliminary injunction enjoining the parties to the captioned action from pursuing any claims, including administrative tax procedures, in which the rights, responsibilities or obligations of the parties arising from gratuities paid in scrip to dancers at defendants-stakeholders' clubs may be determined and tolling the time periods within which they must pursue administrative remedies related to tax assessments levied by the DTF. Doc. 24. In support of the motion, defendants-stakeholders argue that, if the rights of the parties to the litigation were to be determined by another tribunal, this Court's ability to conclusively determine the issues raised by the interpleader action would be compromised. Doc. 30 at 2. Defendants-stakeholders maintain that it is imperative that the interpleader action be resolved because the dancers argue that they are entitled to additional gratuities, whereas the DTF asserts that it is entitled to sales tax on the funds which the dancers claim they are owed, and that this situation is further complicated by the fact that Metro, an outside company, processed gratuities paid in scrip. Doc. 30 at 2.

On June 28, 2018, Metro answered the interpleader complaint and asserted a claim-in-interpleader. Doc. 45. Metro asserted, inter alia, that it has a claim to the proceeds of scrip

transactions pursuant to agreements it has with clubs it services, with the dancers, with banks and credit card companies through which it processes scrip, and with patrons of the club who purchase scrip. Doc. 45 at par. 7. Metro maintains that, in 2011, after the DTF audited the predecessors-in-interest to Lace II and Metro for the years 1999-2004, during which time scrip was used, it advised those entities that neither the club operator nor the provider of the scrip were required to pay sales tax on the scrip transactions. Doc. 45 at par. 8. However, asserts Metro, in 2016 the DTF changed its position and assessed in excess of \$11 million in sales tax and interest against Lace II, Capeci, Metro and its principal, John Scarfi. Doc. 45 at par. 9. Specifically, on November 30, 2016, the DTF issued a notice of determination to 44th Enterprises pursuant to Tax Law § 1138 reflecting that, based on an audit, it owed sales tax of \$501,699.02, plus penalties and interest, as well as additional penalties in the amount of \$156,000 for the period March 1, 2010 through February 28, 2014. Doc. 55. On December 1, 2016, after an audit, the DTF also issued a notice of determination pursuant to Tax Law § 1138 to Capeci, as an officer of MLB, finding that he owed sales tax in the amount of \$1,798,108.53, plus penalties and interest, for the same time period. Doc. 55. Metro represented that 44th Enterprises and Capeci were pursuing an administrative challenge to the 2016 assessment. Doc. 45 at par. 10.

Metro also asserts that it and Scarfi are challenging the 2016 assessment. Doc. 45 at par. 11. Specifically, Metro and Scarfi attended a conciliation conference which resulted in a finding in favor of the DTF and they appealed the same. *Id.* Additionally, they appealed an order of the Supreme Court, Albany County (Weinstein, J.) entered August 29, 2017 which, in a declaratory judgment action styled *Metro Enters. Corp. and John Scarfi v New York State Dept. of Taxation and Finance*, Supreme Court, Albany County Index Number 901347/17 (“the Albany County action”), determined that, although plaintiffs were not required to exhaust their administrative

remedies, the complaint failed to state a cause of action and thus had to be dismissed. Doc. 65.

Metro also consented to the injunctive relief requested by Lace II and Capeci. Doc. 45 at 5.

Metro also cross-moved (motion sequence 002) for a preliminary injunction pursuant to CPLR 6311 for the reasons set forth in its answer and claim-in-interpleader. Doc. 48. In support of the motion, Metro submits an affidavit by Scarfi in which he states, inter alia, that Metro charged a percentage fee for scrip transactions and that it treated income from scrip transactions as such on its income tax returns. Doc. 50. Metro also submits the affidavit of its expert, David Brunori, a tax professor, who opines that neither Metro nor Scarfi are liable for state sales tax arising from the sale of scrip. Doc. 51.

On July 13, 2018, the DTF opposed the motions by the defendants-stakeholders and Metro for a preliminary injunction and cross-moved (motion sequence 002) to dismiss the interpleader complaint pursuant to CPLR 3211(a)(2) and (a)(7). Doc. 53. The DTF argues that, since the defendants-stakeholders failed to exhaust their administrative remedies in challenging the 2016 assessment, this Court lacks subject matter jurisdiction over this dispute and must thus dismiss the interpleader complaint and deny the motions seeking injunctive relief. Doc. 54 at 2, 5-10. It further asserts that the declaratory judgment and constitutional claims are not exempt from the exhaustion requirement. Doc. 54 at 11-13. Additionally, the DTF argues that neither 44th Enterprises, Capeci, nor Metro have established the criteria for a preliminary injunction. Doc. 54 at 16-19.

In an affirmation in support of the cross motion and in opposition to the motion for an injunction, counsel for the DTF argues that the notices of determination it issued are not final because they have not yet been sustained by the tax appeals tribunal and that, if the tax appeals

tribunal sustains the assessments, 44th Enterprises and Capeci will only be able to challenge such finding through Article 78 review. Doc. 55 at par. 10.

In opposition to the DTF's motion to dismiss and in reply to the DTF's opposition to the motion for injunctive relief, the defendants-stakeholders argue that 44th Enterprises never records scrip on its books and does not count scrip in its gross receipts; rather it treats scrip as a gratuity belonging to the dancer who receives it, less the service and processing fees deducted by Metro. Doc. 62. They assert that it is not necessary for them to exhaust their administrative remedies before challenging the assessment in court because the Tax Law is "wholly inapplicable" to the facts pleaded in the declaratory judgment action. Doc. 62 at 5. They further assert that it is not necessary to exhaust their administrative because they are not contesting the amount of tax due, but rather are challenging the applicability of sales tax provisions to scrip transactions and party room rentals. Doc. 62 at 6. Additionally, they maintain that, since they lack the finances to post a bond required to appeal an administrative tax determination, an exhaustion of administrative remedies would be futile and is thus not a prerequisite to filing a declaratory judgment action. Doc. 62 at 10. Further, the defendants-stakeholders argue that they have raised valid constitutional challenges regarding the application of sales tax laws to scrip gratuities. Doc. 62 at 11. 44th Enterprises also argues that it is not seeking to enjoin the tax itself, but rather desires preliminary injunctive relief tolling the time in which it can challenge the validity of the tax assessments. Doc. 62 at 12.

In a reply affirmation in opposition to the DTF's cross motion to dismiss and in further support of the cross motion for injunctive relief, counsel for Metro argues, inter alia, that the DTF does not oppose Metro's cross motion. Doc. 63. Counsel maintains that Scarfi and Brunori clearly set forth in their affidavits why the scrip exchange transactions are not subject to sales tax. Doc.

63. He further asserts that the DTF concedes that it appealed the same issues to the Appellate Division, Third Department and that the DTF does not dispute that Metro filed administrative appeals. Doc. 63. Counsel stresses that, in its August 29, 2017 order, the Supreme Court, Albany County rejected the DTF’s argument and determined that a declaratory judgment action was properly commenced to determine whether the transactions in question were subject to sales tax. Doc. 63 at 6.

In a reply memorandum of law in further support of its cross motion to dismiss, the DTF reiterates its argument that a party seeking to challenge a tax assessment, such as 44th Enterprises and Capeci, must exhaust its administrative remedies before seeking to commence a declaratory judgment to determine whether a party owes a tax. Doc. 64. The DTF argues that the “wholly inapplicable” exception does not apply herein because neither 44th Enterprises nor Capeci can make a legitimate claim that the DTF has no legal authority to assess sales taxes. Doc. 64 at 5. It also asserts that the futility exception is not available to the defendants-stakeholders because that exception does not apply where a statute has an exclusive remedy provision. Doc. 64 at 7. The DTF also argues that, since defendants-stakeholders are making an “as-applied” challenge to the Tax Law, rather a facial challenge, they must still pursue an administrative challenge to the statute. Doc. 64. It also maintains that, because Metro did not raise any claims of its own against the DTF, there was no claim by Metro which the DTF could have moved to dismiss. Further, maintains the DTF, recent judicial decisions have held that scrip transactions in adult entertainment establishments are subject to sales tax. The DTF points out that, although the August 24, 2017 order in the Albany County action allowed Metro to pursue a declaratory judgment, finding that it was a taxable entity, the court also held that the issue of whether the tax applied to Metro had to be raised through the DTF’s administrative process. Doc. 64 at 12.

By order entered April 18, 2019, the Appellate Division, Third Department affirmed the dismissal of the complaint in the Albany County action (“the Third Department order”). In *Metro Enters. Corp. v New York State Dept. of Taxation and Finance*, 171 AD3d 1377 (3d Dept 2019), the Appellate Division reasoned that Metro failed to exhaust all of its administrative remedies, which it was required to do in challenging a tax assessment. The court also determined that there were “myriad questions of fact regarding the relationship between plaintiffs, the dancers and the registered clubs”, and that, “[g]iven these questions, we are unable to conclude whether or to what extent plaintiffs’ receipts are taxable.” *Id.* at 1380.

By correspondence dated April 26, 2019, Metro’s attorney wrote to this Court to assert that the Third Department order holding, inter alia, that it was “unable to conclude whether or to what extent [Metro’s] receipts are taxable”, and that the Albany County action had to be dismissed on the jurisdictional ground that Metro failed to exhaust its administrative remedies, “further underscore[d] the competing nature of the claims to the interpleaded funds” as well as “the need for injunctive relief to prevent against the possibility of inconsistent rulings.” Doc. 68. The same day, counsel for the defendants-stakeholders wrote to this Court to also ask permission to submit papers based on the Third Department order. Doc. 69.

On May 1, 2019, counsel for the DTF wrote to this Court to object to the submission of further papers by Metro, 44th Enterprises and Capeci on the ground that the order of the Third Department clearly held that the claims against the DTF had to be exhausted administratively. The DTF further asserted that, since the claims asserted by Metro against the DTF in this matter are the same as those addressed in the Albany County action, the Third Department’s holding that Metro’s claim must be exhausted collaterally estops Metro from relitigating this issue and thus its “claim-in-interpleader” must be dismissed. Doc. 70.

On May 2, 2019, Metro's attorney wrote to this Court to assert, inter alia, that there is nothing in the Third Department order which prevents Metro from seeking relief in the interpleader action. Doc. 71.

By so-ordered stipulation dated May 6, 2019 and filed May 13, 2019, this Court permitted the parties to submit additional motion papers addressing the Third Department order. Doc. 75.

In a supplemental brief filed May 10, 2019, 44th Enterprises and Capeci argue that the Third Department order requires the issuance of a preliminary injunction. Doc. 72. The defendants-stakeholders maintain that, since Metro's administrative appeal was to be heard before an administrative law judge ("ALJ") on July 15, 2019, 44th Enterprises required an immediate injunction enjoining the pending tax appeals from proceeding in order to avoid an inconsistent outcome and to avoid potentially inconsistent judgments between Metro, the club and the dancers. Doc. 72 at 2.

In its supplemental brief, Metro, adopting the arguments in 44th Enterprises' supplemental brief, as well as those in its prior submissions, argues that the issues between the parties should be resolved in the interpleader action. Doc. 74.

The DTF also submitted a supplemental brief addressing the Third Department order. Doc. 76. It asserts that Metro and 44th Enterprises cannot use the captioned action or the interpleader action to pursue their claims since they failed to exhaust their administrative remedies. Doc. 76 at 1. Additionally, it asserts that questions of fact relating to the potential tax liability preclude this Court from adjudicating this case and that a factual record relating to the application of the tax be developed through the administrative process. Doc. 76 at 4. DTF further insists that there is no basis upon which this Court can enjoin the administrative tax proceedings currently pending.

Additionally, the DTF maintains that the doctrine of collateral estoppel precludes Metro from raising the argument that the tax is “wholly inapplicable” to it. Doc. 76 at 7.

In a response to the supplemental briefs by Metro and 44th Enterprises, plaintiffs represent that they support the requests by those parties for injunctive relief. Doc. 77. Plaintiffs maintain that, although the issue of whether scrip is a gratuity is to be resolved at an administrative hearing between the DTF and Metro, they are not parties to that hearing and thus cannot be heard on their position regarding whether such monies were tips. Doc. 77.

In reply, the defendants-stakeholders argue that the interpleader action is the best method of determining the rights of all of the parties asserting a claim to the scrip. Doc. 78 at 2. They maintain that, if 44th Enterprises and Metro were to separately pursue their administrative remedies, contradictory findings could result. Doc. 78 at 3.

In a supplemental reply brief (Doc. 80), Metro essentially adopts the arguments set forth by 44th Enterprises in its reply. Doc. 78.

On or about July 1, 2019, Metro moved, by order to show cause (“OSC”) (motion sequence 003), for a temporary restraining order preventing the DTF from conducting any proceedings in connection with its (Metro’s) tax appeals, including staying the hearing scheduled to be held on July 15, 2019 pending the determination of the OSC as well as the determination of Metro’s cross motion for a preliminary injunction (motion sequence 002). Doc. 94. Metro and Scarfi argue that Metro would incur irreparable injury if the TRO were not granted because it would impair Metro’s ability to call witnesses with knowledge of the relationships between the clubs, the scrip vendors and the dancers so that taxability could be determined in accordance with the Third Department order. Doc. 83. They further assert that, if the administrative hearings proceed, 44th Enterprises and Metro could be liable to plaintiffs and the DTF. Doc. 83.

In a separate affidavit, Scarfi argues that the Third Department order “made it even more essential” that the respective rights of the parties be determined in a single proceeding “in order to avoid potential multiple liability on the part of 44th Enterprises and/or Metro to the [dancers] and DTF, payable out of the same interpleaded funds.” Doc. 84 at par. 12. Scarfi further represents that Metro’s counsel in the administrative proceeding requested a consolidation of Metro’s tax appeal with the tax appeal by 44th Enterprises and Capeci relating to separate assessments against those entities. Doc. 84 at par. 14. Scarfi asserts that, by denying Metro’s request for an adjournment, the ALJ effectively denied Metro’s request for a consolidation of the tax appeals, but he states that the ALJ agreed to deem Metro’s tax appeal to be “associated” with the 44th Enterprises/Capeci appeal, provided consent for the consolidation was filed by July 1, 2019 and the matters were ready to be heard on July 15, 2019. Doc. 84 at par. 16.¹

In a memorandum of law in support, Metro argues that a TRO should be granted to preserve the status quo and to prevent immediate and irreparable harm until the pending motion and cross motion for a preliminary injunction are determined. Doc. 91.

By correspondence dated August 5, 2019, counsel for Metro advised that Metro’s administrative hearing took place on July 15, 2019 but that post-hearing motions, including a motion to re-open the hearing, have yet to be filed. Counsel further advised that the hearing involving 44th Enterprises was not to be held until 2020.

¹ There is no indication in the motion papers that consent for the consolidation was filed by July 1, 2019.

LEGAL CONCLUSIONS:**Motion By Defendants-Stakeholders For A Preliminary Injunction****(Motion Sequence 002)**

“A preliminary injunction will only be granted when the party seeking such relief demonstrates a likelihood of ultimate success on the merits, irreparable injury if the preliminary injunction is withheld, and a balance of equities tipping in favor of the moving party.” *1234 Broadway LLC v West Side SRO Law Project*, 86 AD3d 18, 23 (1st Dept 2011). Whether to grant a preliminary injunction is a matter to be determined in the broad discretion of the court. *See Madden Int’l, Ltd. v Lew Footwear Holdings Pty Ltd.*, 143 AD3d 418 (1st Dept 2016); *Cityfront Hotel Assoc. Ltd. Partnership v Starwood Hotels & Resorts Worldwide, Inc.*, 142 AD3d 873 (1st Dept 2016). The “power to issue a preliminary injunction restraining the enforcement of a tax . . . should be exercised in only the most unusual circumstances”, such as “[w]here there has been a deliberate misuse of the taxing power.” *W. T. Grant Co. v Srogi*, 52 NY2d 496, 517 (1981).

Here, as the DTF argues, defendants-stakeholders have not demonstrated, or even alleged, that it intentionally or deliberately misused any tax provision. Docs. 25, 30. Nor have they established a likelihood of success on the merits or irreparable injury, and they have not addressed the balancing of the equities. *Id.*

In asserting that a preliminary injunction must be granted, defendants-stakeholders rely on *Bank of America, N.A. v Morgan Stanley Co. Inc.*, 10 Civ. 6322 (SDNY 2011), in which the court issued a preliminary injunction where a stakeholder was faced with multiple claims directed against a single fund. However, that case is distinguishable, since the relief in that matter was based, in principal part, on the fact that the stakeholder made a jurisdictional showing entitling it

to such relief pursuant to 28 USC 1335(a). Additionally, unlike here, the stakeholder deposited the disputed money into court. Moreover, the motion in that case was unopposed.

Cross Motion By Metro For Preliminary Injunction (Motion Sequence 002)

The DTF correctly asserts that Metro has also failed to establish the criteria necessary for the issuance of a preliminary injunction. Additionally, since the Appellate Division, Third Department held that “Metro may be deemed a ‘recipient of amusement charges’ required to collect sales tax” and that “myriad questions of fact [exist] regarding the relationship between plaintiffs, the dancers and [Lace II]” (*Metro Enters. Corp.*, 171 AD3d at 1390), Metro clearly has not established a likelihood of success on the merits.

The DTF’s Cross Motion To Dismiss The Interpleader Complaint (Motion Sequence 002)

The DTF’s cross motion to dismiss the interpleader complaint is granted. As the DTF asserts, this Court lacks jurisdiction over the claims set forth in that complaint because the defendants-stakeholders failed to exhaust their administrative remedies as required by Tax Law § 1140. *See, e.g. CMSG Restaurant Group, LLC v State of New York*, 145 AD3d 136 (1st Dept 2016), *lv denied* 29 NY3d 929 (2017), cert denied 138 S. Ct. 381 (2017). Tax Law § 1140 provides that:

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.

Where, as here, a party fails to exhaust its administrative and statutory remedies, it must establish that one of the exceptions to the exclusive remedy requirement was applicable in order to pursue a declaratory judgment action. *See Jacono v Dept. of Taxation and Finance of State of New York*, 80 AD3d 663, 664 (2d dept 2011) (citations omitted). “There are two exceptions to the exclusive remedy requirement: ‘[w]hen a tax statute . . . is alleged to be unconstitutional, by its terms or application, or where the statute is attacked as wholly inapplicable.’” *Bankers Trust Corp. v NY City Dept. of Fin.*, 1 NY3d 315, 321 (2003) (citations omitted).

“To challenge a statute as wholly inapplicable, the taxpayer must allege that the agency had no jurisdiction over it or the matter that was taxed.” *Bankers Trust*, 1 NY3d at 322. No such allegation is made here and, in any event, it is beyond peradventure that the DTF has jurisdiction over the issue of whether the defendants-stakeholders, as well as plaintiffs and Metro, are subject to the taxes in question.

Nor is the exhaustion requirement excused by the constitutional challenges asserted by defendants-stakeholders.

[T]he exhaustion of administrative remedies is not required where an agency's action is challenged as unconstitutional. [However], [t]his exception to the exhaustion rule is itself subject to qualification. A constitutional claim that hinges upon factual issues reviewable at the administrative level must first be addressed to the agency so that a necessary factual record can be established. Further, the mere assertion that a constitutional right is involved will not excuse the failure to pursue established administrative remedies that can provide the required relief.

Dozier v New York City, 130 AD2d 128, 134-135 (2d Dept 1987) (citations omitted).

Since the constitutional claims by the defendants-stakeholders clearly involve factual issues reviewable at the administrative level including, but not limited to, whether scrip

transactions at the club are subject to sales tax, this Court lacks subject matter jurisdiction over the application of the Tax Law to the defendants-stakeholders. Once a full administrative record has been developed and the DTF has decided the taxability issues, defendants-stakeholders may seek judicial review of any adverse finding in an Article 78 proceeding.

In any event, the DTF is not, as defendants-stakeholders assert, violating the constitutional rights of the defendants-stakeholders by “requiring them to violate [the New York Labor Law] in order to comply with [the Tax Law].” Doc. 1 at par 79. As the DTF asserts, “[t]o the extent that [defendants-stakeholders] may provide documentation to the [DTF] that specific scrip transactions constituted gratuities to their dancers, those transactions would not be subject to sales tax payable by [defendants-stakeholders].” Doc. 54 at 15.

Metro’s Motion For A TRO (Motion Sequence 003)

As noted above, Metro moves (motion sequence 003), by OSC, for a TRO preventing the DTF from conducting any proceedings in connection with Metro’s tax appeals, including staying a hearing scheduled for July 15, 2019 pending the determination of the OSC as well as the determination of Metro’s cross motion for a preliminary injunction. The motion is denied as moot insofar as Metro concedes that the hearing was conducted on July 15, 2019 and since Metro’s cross motion for a preliminary injunction (motion sequence 002) is denied for the reasons discussed above.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by defendants-stakeholders 44th Enterprises Corp. d/b/a Lace II Gentlemen's Club and Anthony Capeci seeking a preliminary injunction pursuant to CPLR 6311 (motion sequence 002) is denied; and it is further

ORDERED that the cross motion by defendant-claimant Metro Enterprises Corp. seeking a preliminary injunction pursuant to CPLR 6311 (motion sequence 002) is denied; and it is further


ORDERED that the cross motion by cross-defendants-claimants New York State Department of Taxation and Finance and the Commissioner of the New York State Department of Taxation and Finance seeking to dismiss the interpleader complaint filed by defendants-stakeholders 44th Enterprises Corp. d/b/a Lace II Gentlemen's Club and Anthony Capeci pursuant to CPLR 3211(a)(2) and (a)(7) (motion sequence 002) is granted, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the motion by defendant-claimant Metro Enterprises Corp. seeking a temporary restraining order (motion sequence 003) is denied as moot; and it is further

ORDERED that the parties are to appear for a preliminary conference in this matter on October 29, 2019 at 80 Centre Street, room 280, at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

8/7/2019
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input checked="" type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	