

**State of N.Y. ex rel. RD Litig. Assoc., LLC v
Amazon.com, Inc.**

2023 NY Slip Op 32814(U)

August 15, 2023

Supreme Court, New York County

Docket Number: Index No. 100015/2016

Judge: James E. d'Auguste

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. James d'Auguste

PART 55

Justice

-----X

STATE OF NEW YORK EX REL. RD LITIGATION
ASSOCIATES, LLC.,

Plaintiff,

- v -

AMAZON.COM, INC., AMAZON.COM LLC, AMAZON
FULFILLMENT SERVICES, INC., AMAZON.COM
SERVICES, LLC, BEST BUY CO., INC., BEST BUY
STORES, L.P., BESTBUY.COM, LLC, TARGET
CORPORATION, ADORAMA, INC.,

Defendants.

-----X

INDEX NO. 100015/2016

MOTION DATE 12/23/2022,
12/23/2022,
12/23/2022,
12/23/2022

MOTION SEQ. NO. 006 007 008
009

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 006) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 96, 97, 109, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 417, 421, 425, 450

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 007) 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 100, 103, 110, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 418, 422, 426, 451

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 008) 66, 67, 68, 69, 70, 71, 72, 73, 74, 101, 104, 111, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 419, 423, 427, 452

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 009) 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 102, 105, 112, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393,

394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 420, 424, 428, 453

were read on this motion to/for

DISMISSAL

Motion Sequences 006, 007, 008, and 009 are consolidated for disposition.

In this action under the New York False Claims Act (“NYFCA,” Finance Law §§ 187, *et seq.*), defendants Amazon.com Inc., Amazon.com LLC, Amazon Fulfillment Services, Inc., Amazon.com Services LLC (“Amazon”) (Motion Sequence 006), Target Corporation (“Target”) (Motion Sequence 007), Adorama, Inc. (“Adorama”) (Motion Sequence 008), and Best Buy Co., Inc., Best Buy Stores, L.P., and Bestbuy.com (“Best Buy”) (Motion Sequence 009) move to dismiss the amended complaint.¹ Plaintiff-relator RD Litigation Associates, LLC opposes the motion, essentially seeking the reconsideration of a prior decision of the Court in a related action - *People of the State of New York v. B&H Foto & Electronics Corp.* (Index No. 452106/2019) (“*State v. B&H*”). For the foregoing reasons, the motions to dismiss are granted.

On or about January 6, 2016, plaintiff-relator RD Litigation Associates, LLC (“RD Litigation”) filed the instant action under seal pursuant to the NYFCA, alleging that many major retailers, including Amazon, Best Buy, Target, Adorama, and B&H Foto (“B&H”) failed to remit the full sales tax on items subject to a so-called “Instant Savings Program.” The “Instant Savings Program” is an incentive program in which manufacturers provide credits against wholesale orders to retailers to incentivize retail sales. The retailers often choose to, but are not required to, pass on the value of the credits as savings to the retail purchaser. When B&H discounted items participating in the “Instant Savings Program,” B&H would usually discount the retail price of the item to increase sales. B&H calculated sales tax based on the sale price, rather than the full retail price. Plaintiff-relator alleged that the “Instant Savings Program” is the functional

¹ The parties filed consolidated briefings that address common arguments among all defendants. In addition, the parties filed supplemental briefs that address individual arguments specific to each defendant.

equivalent of a manufacturer's coupon (which requires remittance of sales tax based on the full pre-discount value), and, therefore, B&H owed sales tax on the full retail price rather than the sale price. The Office of the Attorney General ("OAG") investigated these allegations. In 2019, the OAG decided to supersede the plaintiff-relator and file an action against B&H - *State v. B&H*. Defendant B&H moved to dismiss, and this Court issued a decision and order dated September 21, 2021 granting dismissal of the complaint. *People v. B&H Foto & Electronics Corp.*, NYLJ, Oct. 1, 2021 at p.17, col.1, 2021 NYLJ LEXIS 988 [Sup. Ct., New York Co. 2021]. In *State v. B&H*, the Court agreed with B&H that the "instant savings" program did not constitute a manufacturer's coupon, and therefore, B&H did not owe sales tax on the pre-discount price of the item. *Id.* at *7-9. The OAG declined to appeal the dismissal.

On March 1, 2022, plaintiff-relator filed an amended complaint, attempting to revamp their allegations regarding instant savings programs. The arguments advanced by plaintiff-relator is a rehash of the legal contentions asserted in *State v B&H*. Plaintiff-relator concedes that the amended complaint seeks to re-litigate the core issue of *State v. B&H* – whether "instant savings" are "manufacturer-funded coupons" that are subject to sales tax on the entire sale price. In addition, plaintiff-relator added an allegation against Amazon asserting that that Vendor Powered Coupons ("VPC") were manufacturer's coupons that are subject to sales tax on the full un-discounted sale price. As discussed in greater detail below, Amazon's VPCs are coupons exchanged between the wholesaler and Amazon Fulfillment Services, Inc. ("AFS"), the wholesale entity for Amazon's online marketplace during the relevant time. On June 14, 2022, this Court issued an order to unseal the action. Defendants Amazon, Target, Adorama, and Best Buy filed motions to dismiss the amended complaint.

As the State of New York is the primary party in interest, and *State v. B&H* arose from this *qui tam* complaint, this action is barred by the doctrines of *res judicata* (claim preclusion). *Res judicata* bars future actions between the same parties or parties in privity based on the same series of transactions, even if based on different theories or seeking a different remedy. *Platon v. Linden-Marshall Constr. Inc.*, 176 A.D.3d 409, 410 [1st Dep't 2010]; *E. Hampton Capital LLC v. Fergusson*, 183 A.D.3d 409, 410 [1st Dep't 2020].

In *qui tam* actions, the State or “the Government remains the real party in interest in any such action.” *Certain Underwriters at Lloyd’s London Subscribing to Policy No. QK0903325 v. Huron Consulting Group, Inc.*, 127 A.D.3d 663, 665 [1st Dep't 2015] (citation and internal quotation marks omitted). As stated by the Second Circuit: “It is the government that has been injured by the presentation of such [false] claims; it is in the government’s name that the action must be brought; [and] it is the government’s injury that provides the measure for the damages.” *Id.*, quoting *United States ex rel. Stevens v State of Vt. Agency of Natural Resources*, 162 F.3d 195, 202 [2d Cir. 1998], *revd on other grounds* 529 U.S. 765 [2000]). “[T]he Supreme Court of the United States has determined that a relator in a *qui tam* suit is one as the ‘partial assignee’ of the [government], but it has observed that the injury, and therefore, the right to bring the claim belongs to the [government itself].” *Id.*, citing *Vermont Agency of Natural Resources v United States ex rel. Stevens*, 529 U.S. 765, 773-777 [2000]. A plaintiff-relator is not a separate plaintiff from the government in a *qui tam* action; the plaintiff-relator is merely a representative of the government – the true party in interest.

Furthermore, the Attorney General is both the constitutional and statutory legal officer for claims of the State. *See, e.g., People ex rel. Spitzer v. Grasso*, 54 A.D.3d 180, 204 [1st Dep't 2008]; *People v Santa Cara Lumber Co.*, 126 A.D. 616, 617-19 [3d Dep't 1908]; *McGee v*

Korman, 70 N.Y.2d 225, 231 [1987]; *Kirby v. State*, 68 Misc. 626, 630-31 [Ct. Cl. 1910] (“The Constitution and the executive law . . . confer upon the Attorney General the power, and impose on him the duty and the obligation, to defend actions and proceedings in which the state is interested in order that the interests of the state may be protected.”); N.Y. Const., Art. V, § 4 (“The head of . . . the department of law [shall be] the attorney-general.”); *see Id.*, Art. IV, § 3 (granting the Attorney General the power to “take care that the laws are faithfully executed” when read in conjunction with Art. V, § 4); and Executive Law § 63 (setting forth the duties of the Attorney General). Pursuant to State Finance Law § 190, the Attorney General decided to supersede and pursue an action against B&H. Although a relator occupies a unique role as a “private attorney general” acting in the public interest, the Attorney General always retains the ultimate authority to dismiss or resolve an action, or seek to limit a relator’s participation, over a relator’s objection. *See*, State Finance Law § 190(5)(b). Once this Court dismissed *State v. B&H*, the Attorney General decided, as the constitutional and statutory legal officer acting on behalf of New York State, not to pursue an appeal. At that juncture when the disposition in the *State v B&H* action became final, any future actions arising under the same theories with the same parties became barred by *res judicata*.

Federal courts have recognized in federal False Claims Act actions the preclusive effect of final judgments when a plaintiff-relator proceeds in an action and loses. *Stoner v Santa Clara County Off. of Educ.*, 502 F.3d 1116, 1126 [9th Cir. 2007] [internal citations omitted].² This present action mandates an inverse of this outcome and recognizes that a plaintiff-relator is barred from proceeding under *res judicata* when the State superseded plaintiff-relators in the *qui*

² New York Courts routinely analyze the federal False Claims Act when interpreting the New York False Claims Act (*State of N.Y. ex rel. Seiden v Utica First Ins. Co.*, 96 A.D.3d 67, 71 [1st Dep’t 2012]). (“The NYFCA follows the federal False Claims Act [31 USC § 3729 et seq.] and therefore it is appropriate to look toward federal law when interpreting the New York act”); *Dhaliwal v. Salix Pharms., Ltd.*, 752 Fed Appx. 99, 100 [2d Cir. 2019].

tam action and defendants achieved full dismissal. The Attorney General’s decision declining to intervene or supersede as to the remaining defendants in this action is immaterial; the plaintiff-relator is proceeding in this action on behalf of the State of New York and therefore bound by the prior litigation decisions of the Attorney General. *United States ex rel. Forcier v. Computer Scis. Corp.*, 183 F. Supp. 3d, 510, 528 [S.D.N.Y. 2016] [“relator plaintiff ‘stands in the shoes of the government, which is the real party in interest’”] [internal citations omitted].

Moreover, the action is barred by collateral estoppel (issue preclusion) even if the Court were to find that this action is not barred due to *res judicata*. Collateral estoppel prevents “‘a party from relitigating in a subsequent action or proceeding an *issue* clearly raised in a prior action or proceeding and decided against that party ... whether or not the ... causes of action are the same’” *Simmons v Trans Express Inc.*, 37 N.Y.3d 107, 112 [2021] (quoting *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 500 [1984]). B&H was a defendant in the present action. The State of New York superseded against B&H in the separate action under identical theories that plaintiff-relator is pursuing here (except for Amazon’s VPCs), and the Court ruled in B&H’s favor. See, *United States ex rel. Lusby v. Rolls Royce Corp.*, 570 F.3d 849, 853 [7th Cir. 2009] (showing that the United States is bound by the actions of a relator; the United States could not “start afresh” after the relator litigated the action and lost). Notably, plaintiff-relator essentially concedes that, if the Court decides to adopt the legal reasoning put forth in *State v. B&H*, then the Court must dismiss the action on all claims except Amazon’s VPCs. NYSCEF Doc. No. 417, at p.17.

Even if this action were not bound by *State v. B&H* under *res judicata* or collateral estoppel, the Court would still follow the legal analysis of its earlier decision in *State v. B&H*, and plaintiff-relator has not offered a reason to revisit the Court’s prior conclusion. In *State v.*

B&H, the Court focused on whether a disbursement pursuant to “instant savings” is calculated as part of total receipt (and thus subject to New York State sales tax) or considered a reduction in the cost of goods sold. When an item is subject to “instant savings,” the manufacturer offers a credit to the merchant (to be applied to future wholesale orders) for each item sold at retail during a promotional period. The merchant may, but is not required to, offer an equivalent discount to the retail purchaser to encourage sales during the “instant savings” promotional period. As discussed in *State v. B&H*, “instant savings” are not contingent on the merchant extending the discount to the retail customer, and the customer does not provide any additional consideration in addition to the discounted price (such as a coupon). Therefore, “instant savings” cannot be considered taxable receipts subject to New York sales tax, and, accordingly, plaintiff-relator has failed to state a cause of action under the New York False Claims Act.

If the Court were to consider Amazon’s VPCs independently of the other claims related to “instant savings,” the Court would still grant dismissal as to this claim. New York law exempts the remittance of sales tax on property or services purchased “for resale” – known as the “sale for resale” exemption. *See* NY Tax Law § 1101(b); *see* NY Tax Law § 1105(b). AFS purchased items from vendors and operated as a wholesaler for Amazon.com LLC, a separate entity. Customers would purchase items through Amazon.com LLC, and Amazon.com LLC would purchase the item from AFS – the entity that shipped the order. When vendors would use VPCs, vendors would provide a fixed amount of funding to AFS for each order that they fulfilled on behalf of the retail customer for Amazon.com LLC. As the transaction between the vendor and AFS is a wholesale transaction, AFS is not required to remit sales tax on that transaction. Moreover, Amazon’s failure to attach a resale certificate to the motion does not affect Amazon’s ability to seek dismissal on this basis; under the New York tax law, failure to attach proper


documentation of a claimed exempt status does not change the status of that transaction. 20
NYCRR 532.4(b)(6); *see In re C.B. Shoes, Ltd.*, DTA Nos. 803303, 803304, 803305, 1992 WL
15197 [showing that a party can demonstrate non-taxability through other means than producing
resale certificates]. Finally, plaintiff-relator’s argument that this issue is not ripe for resolution is
unavailing.

Accordingly, it is hereby,

ORDERED that Motion Sequences 006, 007, 008, and 009 are granted, and the Clerk is
directed to dismiss this action.

This constitutes the decision and order of the Court.

8/15/2023
DATE


James d'Auguste, J.S.C.

CHECK ONE:

CASE DISPOSED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE