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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001312-MR

VIRGIN MOBILE USA, L.P. APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 08-CI-010857

COMMONWEALTH OF KENTUCKY, ON BEHALF OF
THE COMMERCIAL MOBILE RADIO SERVICE
EMERGENCY TELECOMMUNICATIONS BOARD APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON, NICKELL AND STUMBO, JUDGES.

STUMBO, JUDGE: Virgin Mobile USA, L.P. appeals from an Opinion and Order of the Jefferson Circuit Court sustaining the motion of the Commonwealth of Kentucky, on behalf of the Commercial Mobile Radio Service Emergency Telecommunications Board (hereinafter "CMRS") to enforce a supersedeas bond.

Virgin Mobile argues that it is entitled to a refund of amounts mistakenly paid, and that its refund claim has not been adjudicated and is not precluded. For the reasons stated below, we find no error and AFFIRM the Opinion and Order on appeal.

Facts and Procedural History

In the interest of judicial economy, we adopt the factual recitation and synopsis of the underlying statutory scheme as set out in *Virgin Mobile U.S.A., L.P. v. Commonwealth*, 448 S.W.3d 241 (Ky. 2014). The Kentucky Supreme Court stated as follows:

> For many years the General Assembly has provided a mechanism for taxing telephone service to provide funding for the state's system of 911–emergency service. In 1984, the legislature authorized local governments to impose a special tax upon telephone service to finance local 911–emergency systems. *See* KRS[[1]] 65.760. Of course, at that time virtually all telephone communications were conducted through wires strung between poles, and the 911–emergency service systems were designed accordingly. They were not compatible with the new technologies for wireless cellular telephone service.
>
> In 1998, with the burgeoning popularity of wireless and mobile cellular telephone service, the General Assembly created the Commercial Mobile Radio Service Emergency Telecommunications Board, now known as the CMRS Board. The legislature also created the "CMRS fund." To cover the costs associated with the extension of 911–emergency service to mobile telephone users, KRS 65.7629(3) directed the Board to collect a CMRS service charge of $0.70 per month per CMRS connection. KRS 65.7629(3) also provided that "The CMRS service charge shall be collected in accordance with KRS 65.7635 beginning August 15, 1998."

[1] Kentucky Revised Statute.

A "CMRS provider" is an entity that provides mobile telephone service to a mobile phone user. Each CMRS provider was designated by KRS 65.7635(1) as "a collection agent for the CMRS fund." KRS 65.7635(1) mandated that each CMRS provider:

> shall, as part of the provider's normal monthly billing process, collect the CMRS service charges levied upon CMRS connections under KRS 65.7629(3) from each CMRS connection to whom the billing provider provides CMRS. Each billing provider shall list the CMRS service charge as a separate entry on each bill which includes CMRS service charge.
>
> KRS 65.7635(2) clarifies that mobile service providers have no obligation to take legal action against customers who fail to pay the service charge. Rather, the statute provides that actions against delinquent CMRS customers would be "initiated by the state on behalf of the [CMRS] board[.]"

This statutory scheme for assessing and collecting the CMRS service charge was obviously designed and intended to integrate seamlessly into what was then the only mode of selling mobile telephone service to consumers: a CMRS service provider such as AT&T Mobility or Sprint entered into a fixed contract with a customer to provide mobile phone service for an extended period, typically two years. The customer was assigned a mobile telephone number (a "CMRS connection") and was billed each month at the contract rate. Adding the CMRS service charge of $0.70 per month as a separate item on each monthly bill was a simple, almost natural, way to collect the service charge.

It was against this statutory backdrop that Virgin began doing business in Kentucky as a CMRS provider in August 2002. Unlike the conventional providers of mobile telephone service, Virgin structured its service on a new business model, marketing its service to a customer base with different abilities and needs. Virgin

recognized that some potential consumers of mobile telephone service, especially individuals with low incomes, did not have the credit to qualify for an extended contract with a conventional service provider, or had no fixed mailing address for receiving monthly bills; other potential customers included individuals who, for a variety of reasons, could not or would not commit to the conventional fixed-period billing contract. For all of those consumers, Virgin developed a pre-paid mobile telephone service, selling telephones with pre-paid phone service in retail outlets like Wal–Mart.

Purchasers of pre-paid mobile service received a mobile telephone with a CMRS connection, and a fixed quantity of wireless telephone service. Since pre-paid CMRS service was purchased at a retail outlet, consumers of the service did not deal directly with a CMRS provider, and thereafter had no relationship with a CMRS provider except for the occasional purchase of additional minutes of phone service. Significantly, users of pre-paid mobile telephones never received a monthly bill. Because their mobile phone service was paid for prior to using it, they never had an unpaid balance for prior phone service for which they could be billed. Under the prepaid-CMRS plan, collecting the CMRS service charge in a manner consistent with the mandate of KRS 65.7635(1) was not physically or conceptually possible because prepaid CMRS users and providers had no "normal monthly billing" cycle. At this point, it is necessary to note that in 2002, the General Assembly amended KRS 65.7629(3), to require the CMRS Board to collect the CMRS service charge from each "CMRS connection" with "a place of primary use, as defined in 4 U.S.C.[[2]] sec. 124, within the Commonwealth." However, the 2002–amendment made no mention of pre-paid mobile service and it made no change whatsoever to the prescribed method of collecting the service charge set out in KRS 65.7635.

With no possible means to collect a CMRS service charge in the statutorily-prescribed method, Virgin made no attempt to collect the service charge from the CMRS

[2] United States Code.

connections that it had sold. Under the assumption that it was responsible for the collection of the service charges, Virgin instead estimated that its customer's [sic] would have owed $[286,807.20] in service charges, and it then paid that amount from its own revenue to the CMRS Board. By 2005, however, based upon industry research, Virgin concluded that, like other states, Kentucky's statutory scheme for collecting the CMRS service charge through the regular monthly billings did not obligate providers of prepaid CMRS to act as a collection agent for the Board. In May 2005, Virgin stopped estimating its customers' monthly service charges making payments to the Board from its own treasury. It then asked the CMRS Board to refund the $286,807.20 previously paid. The Board denied the requested refund, and took no action then against Virgin to compel Virgin to resume payment.

In 2006, Governor Fletcher publicly called upon the legislature to close the "tax loophole on prepaid cell phones" by amending the CMRS service charge statutes. As a result, the General Assembly amended KRS 65.7629(3), effective July 12, 2006. The 2006 amendments expressly stated that prepaid mobile phone service was subject to the CMRS service charge, and it prescribed alternate methods by which the service charge for prepaid CMRS service should be collected and remitted to the Board. It is not contested that after July 12, 2006, Virgin was required to collect the CMRS service charge from its customers using one of the methods prescribed by the amended law, and it has apparently done so.

Based upon its position that it had no duty to collect the CMRS service charge prior to July 12, 2006, Virgin regarded the $286,807.20 previously paid from its own funds as an erroneous overpayment. In October 2006, Virgin again asked the Board to refund the claimed overpayment. When the Board did not promptly respond, Virgin initiated a self-help method of recoupment: it began claiming credits for the "overpayment" by applying its post-July 2006 service charge collections to the claimed overpayment. In effect,

Virgin made no CMRS payment to the Board for nearly two years after July 2006, until it had recaptured from post-July 2006 collections the $286,807.20 it had paid before May 2005. After recouping the $286,807.20, Virgin began remitting current CMRS collections to the Board as they became due.

In October 2008, the Board filed suit in the Jefferson Circuit Court to recover from Virgin "all monthly 911 services charges owed by Virgin Mobile for CMRS connections from 1999 through July, 2006." After both parties moved for summary judgment, in March 2010, the trial court concluded that even under the pre-July 2006 version of KRS 65.7629, Virgin was to collect the CMRS service charge. The circuit court entered summary judgment against Virgin for $547,945.67. That sum consisted of the $286,807.20 that Virgin had recouped from current collections, plus the additional $261,138.47 of service charges that the Board claimed had accrued between May 2005, when Virgin ceased its voluntary payments, and July 2006, when the statutory amendments removed any doubt about Virgin's CMRS obligation to collect the service charges from its customers. The trial court also granted the Board's request for an award of attorneys' fees in the sum of $137,869.03, based upon the provision of KRS 65.7635(5) allowing the trial court to award to the prevailing party "reasonable costs and attorneys' fees" incurred in connection with an action to collect CMRS service charges.

Virgin appealed. The Court of Appeals affirmed the trial court's conclusion that as a "CMRS provider," Virgin had a statutory duty to collect the CMRS service charge from its customers during the pre-July 2006 time frame, and remit them to the Board, notwithstanding the statutory directive that the charge be collected though the provider's "normal monthly billing process." However, the Court of Appeals reversed the award of attorneys' fees upon its conclusion that Virgin "did, in fact, dispute payment of the service charge in good faith."

Id. at 243-46 (footnotes omitted).

Upon discretionary review, the Kentucky Supreme Court held that 1) the CMRS service charge did not apply to Virgin Mobile prior to the July 2006 Amendment, 2) Virgin Mobile was not entitled to recoup the pre-2006 overpayment by deducting money from its post-2006 service charge collections, and 3) that the panel of this Court in the first appeal improperly reversed the trial court's award of attorney fees in favor of CMRS. In support of the latter proposition, the Court concluded that the trial court needed to address the attorney fee issue to determine who the prevailing party was. The high Court noted that in one respect, Virgin Mobile had prevailed by establishing that it did not owe any CMRS charges prior to 2006. Conversely, CMRS prevailed in its effort to collect the $286,807.20 that Virgin improperly withheld from its post-July 2006 CMRS collections. As such, the Court remanded the matter to the Jefferson Circuit Court for the entry of a Judgment consistent with the foregoing, and to address the attorney fee issue.

On remand, the Jefferson Circuit Court rendered an Opinion and Order on July 26, 2015, and a Judgment reflecting the Opinion on July 29, 2015. In accordance with the Opinion of the Kentucky Supreme Court, the Jefferson Circuit Court ordered that a Judgment be entered in favor of CMRS against Virgin Mobile in the amount of $286,807.20, with interest accruing at the rate of 12%. It further determined that Virgin Mobile's surety, Berkley Regional Insurance Company, was jointly and severally liable for the Judgment. Finally, the court

awarded to CMRS "its taxable costs" in this action from Virgin Mobile. This appeal followed.

Virgin Mobile now argues that it is entitled to a refund of the amounts mistakenly paid prior to 2006. It maintains that because of its erroneous holding that Virgin Mobile was subject to the CMRS service charge prior to July 2006, the lower court's original decision did not address Virgin Mobile's request for a refund of charges mistakenly paid prior to July 2006. According to Virgin Mobile, it is clear that a refund of the charges Virgin Mobile mistakenly paid prior to July 2006, is now mandated by longstanding principles of common law. Directing our attention to *City of Covington v. Powell*, 59 Ky. 226, 228, 1859 WL 5581 (1859), Virgin Mobile contends that Kentucky common law has long recognized that an action will lie for the recovery of money "not due and payable", and that this principle has been expressly applied to governments. It goes on to argue that its refund claim has not been adjudicated and is not precluded, and that the Kentucky Supreme Court explicitly stated in its August 21, 2014 Opinion that the issue of Virgin Mobile's refund was not before the Court. The substance of its argument is that 1) the issue of repayment of pre-2006 payments has not been heretofore addressed, and 2) applications of common law equity principles require refund of the sums in question.

Analysis

In addressing *City of Covington* and Virgin Mobile's claim of entitled to a refund of pre-2006 payments, the Kentucky Supreme Court stated,

> We do not disagree with the venerable principle cited in *City of Covington* or in the other cases relied upon by Virgin. We find them inapplicable here ***because they all involve the right to a refund, which as noted above, is not the issue here.*** Virgin does not assert these principles in support of an action for a refund of money mistakenly paid between 2002 and May 2005. Instead, Virgin is asserting them as a justification for its underpayment of the CMRS obligations that came due after July 12, 2006. Had Virgin paid those obligations when due, and in a timely fashion filed an action for a refund of the funds it had mistakenly thought it owed, the cited principles and the equities they embody may have favored Virgin's position. But that is not the case before us. (Emphasis added).

Virgin Mobile, 448 S.W.3d at 251.

The Kentucky Supreme Court expressly found that Virgin Mobile was not seeking a refund of money mistakenly paid between 2002 and 2005, but rather was asserting it as a justification for its underpayment of the CMRS obligations that became due in 2006. More to the point, the Court stated that,

> However, instead of remitting the collected money to the Board, Virgin kept it to offset what it then believed, and what we now agree, was money it unnecessarily paid between 2002 and May 2005. Given that Virgin has repaid itself by this means of self-help recoupment, the issue before the Court is not, as Virgin posits, whether it is entitled to a refund of money paid by mistake. ***Virgin now has that money so it is clearly not due a refund.*** (Emphasis added).

Id. at 250.

This holding could not be clearer, and it disposes of Virgin Mobile's argument on this issue. After the enactment of the 2006 Amendment, and concurrent with its conclusion that it improperly paid sums to CMRS prior to 2006,

Virgin Mobile "repaid itself" by not paying fees to CMRS after July 2006, until the pre-2006 monies had been recouped. As such, and as the Kentucky Supreme Court unambiguously found, "Virgin now has that money so it is clearly not due a refund." *Id*. This is the law of the case, *Inman v. Inman*, 648 S.W.2d 847 (Ky. 1982), and Virgin Mobile's attempt to continue litigating matters already resolved finds no support in the record or the law. This issue reached finality when the Kentucky Supreme Court disposed of it in its August 21, 2014 Opinion.

Conclusion

For the foregoing reasons, we AFFIRM the July 26, 2015 Opinion and Order, and the July 29, 2015 Judgment of the Jefferson Circuit Court.

ALL CONCUR.

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