INDEX
No. 12308-06

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 14 NASSAU COUNTY

PRESENT:
HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: 6-1-07
Submission Date: 6-1-07
Motion Sequence No.: 002/MOT D

JOHN LAWLOR, ESQ. on behalf of himself and all others similarly situated,

Plaintiff,

- against -

CABLEVISION SYSTEMS CORPORATION and CSC HOLDINGS, INC.,

Defendants.

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ORDER

The following papers were read on Defendants' motion to reargue:

Notice of Motion dated May 3, 2007;
Affirmation of William M. Savino, Esq. dated May 3, 2007;
Defendant's Memorandum of Law;
Affirmation of Michael Gilmore, Esq. dated May 25, 2007;
Defendant's Reply Memorandum of Law.

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Defendants move to reargue from the Court's order of March 22, 2007 which denied their motion to dismiss and, upon reconsideration, seeks an order dismissing the complaint for failure to state a cause of action.

BACKGROUND

Plaintiff, John Lawlor ("Lawlor"), brings this action on behalf of himself and other similarly situated seeking to recover taxes and fees paid to Defendant, Cablevision Systems Corporation ("Cablevision"), for business internet service.

Lawlor became a subscriber to Cablevision's Optimum Online internet for business service in 2002. From the time he first subscribed to the service through April 7, 2005, his monthly bill contained charges for "Taxes and Fees." Lawlor alleges that Cablevision had no legal right to charge or collect these fees and seeks to recover improperly collected fees and taxes for himself and the other members of the class.

From 2002 through April 7, 2005, Cablevision's business internet service was provided by Cablevision Lightpath, Inc. ("Lightpath"). Lightpath was a local telephone company subject to the regulation of the New York State Public Service Commission. Lightpath is a wholly owned subsidiary of Defendant, CSC Holdings, Inc. ("CSC").

Local telephone companies are obligated to collect and pay the franchise tax and surcharges imposed by Tax Law §§184,184-a and the gross receipts tax and surcharge imposed by Tax Law §§186-a, 186-c. These taxes were reflected on Lawlor's monthly cable bill. Lightpath presumably collected the taxes and remitted them to the State of New York.

In April 2005, CSC Optimum began to provide Optimum Online service for business. Since CSC Optimum was not a local telephone company, subject to Public Service Commission regulation, it was not required to collect and pay the taxes and surcharges imposed by Tax Law §§184, 184-a, 186-a and 186-c as was Lightpath. When CSC Optimum began providing Optimum Online for business service, the taxes and fees were no longer included on Lawlor's bill.

Lawlor's internet agreement never mentioned that Optimum Online service would be provided by Lightpath. Lawlor's internet service agreement states, "CSC Holdings, Inc. ("Cablevision") is pleased to provide Optimum Online high speed internet access for Commercial Service." The monthly invoice for this service was issued by Cablevision. The mailing address for the bill was to Cablevision.

The only mention of Lightpath in any of the material was in the work order for the installation of the cable modem required for the service. The work order header reads "Lightpath a service of Cablevision brings you Business Optimum Online." However, the "Terms and Conditions" provisions of the work order makes repeated references to "Cablevision's Cable Modem Internet Service."

The complaint alleges three causes of action sounding in violation of General Business Law §349 (first cause of action); fraud (second cause of action); and unjust enrichment (third cause of action).

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Defendants moved to dismiss the complaint. In its order of March 22, 2007, this Court found the first cause of action stated a cognizable cause of action and denied Defendants' motion. Defendants assert that reargument should be granted because the Court misconstrued the law in holding that the General Business Law §349 theory of recovery set forth a viable cause of action. Defendants argue that the General Business Law protects consumers of goods or services purchased for personal, family or household use; not business customers.

DISCUSSION

A motion to reargue must be so designated, shall be based upon an assertion that the court overlooked or misapprehended matters of law or fact when it decided the prior motion and shall be made within thirty (30) days of service of the order with notice of entry from which reargument is sought. CPLR 2221 (d).

A motion to reargue is addressed to the discretion of the court and may granted upon a showing that the court overlooked relevant facts or misapplied or misapprehended the applicable law or for some other reason improperly decided the prior motion. Carrillo v. PM Realty Group, 16 A.D.3d 611 (2nd Dept. 2005); Hoey-Kennedy v. Kennedy, 294 A.D.2d 573 (2nd Dept. 2003); and Foley v. Roche, 68 A.D.2d 558 (1st Dept. 1979). Reargument is based solely upon the papers submitted in connection with the prior motion. New facts may not be submitted or considered by the

court. James v. Nestor, 120 A.D.2d 442 (1st Dept. 1986); and Philips v. Village of Oriskany, 57 A.D.2d 110 (4th Dept. 1997).

Defendants assert that since only businesses could obtain Optimum Online for business. Thus, it is not a consumer oriented transaction and is not within the ambit of General Business Law §349.

General Business Law §349 does not preclude an action by a business. Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y.2d 20 (1995). To plead a cause of action under this statute, the business must allege that the defendant's conduct is consumer oriented, deceptive or misleading in a material way and plaintiff sustained injury as by reason of the deceptive or misleading conduct. *Id.;* and Cruz v. Nynex Information Resources., 263 A.D.2d 285 (1st Dept. 2000). To fall within the ambit of General Business Law §349, the business must allege deceptive or misleading consumer related conduct that would be actionable by an individual consumer. *Id.*

Lower courts have found that a business may bring an action under General Business Law §349 when it has been has sustained damages as a result of misleading or deceptive conduct. See, Schroders, Inc. v. Systems, Inc., 137 Misc.2d 738 (Sup. Ct. N.Y. Co.1987); and Sulner v. General Accident Fire and Life Assurance Co., Ltd., 122 Misc.2d 597 (Sup. Ct. N.Y. Co. 1984). These are trial level decisions which predate *Cruz.* Their continued viability is questionable post-*Cruz.*

Trial level courts must follow the precedent of an appellate division until its own appellate division or the Court of Appeals decides to the contrary. 28 NY Jur2d *Courts and Judges* §220. The Appellate Division, Second Department has not ruled on whether a business may maintain an action pursuant to General Business Law §349 for deceptive business practices. Therefore, this Court is bound to follow *Cruz* which permits a business to maintain an action under General Business Law §349 only if such action could be maintained by a individual consumer.

Optimum Online for business was only available for business customers and was provided with Optimum Online services by Lightpath. The Optimum Online service for residential customers was provided by a different subsidiary of Cablevision that was not a local telephone company and not subject to the taxes imposed by the Tax Law. Since providing Optimum Online service to business by a local telephone company did not affect consumers, the first cause of action fails to state a cause of action and should have been dismissed.

Reargument must be granted to the extent of finding that the first cause of action is not a basis for sustaining the complaint.

However, Defendants moved to dismiss the complaint in its entirety. When a defendant moves to dismiss the complaint as a whole, the motion must be denied if any of the causes of action plead in the complaint allege a cognizable cause of action. Anand v. Soni, 215 A.D.2d 420 (2nd Dept. 1995); and Martirano Construction Corp. v.

Briar Contracting Corp., 104 A.D.2d 1028 (2nd Dept. 1984). Since the Court found, in deciding the prior motion, that the General Business Law §349 cause of action was sufficient, the Court did not reach the question of whether the second or third causes of action were legally sufficient. Now that the General Business Law §349 cause of action has been found to be legally unsustainable, the Court must now address whether the fraud or unjust enrichment causes of action state a cognizable cause of action so as to sustain the complaint.

The complaint alleges that as a result of Defendants' misrepresentations, Plaintiff and other members of the putative class were required to pay taxes and fees that should not have been charged for internet service. The complaint specifically alleges that Plaintiff and other members of the purported class were defrauded and induced "...into paying sham taxes and/or governmental fees to Cablevision" (Complaint ¶47).

However, the taxes and fees which were billed and collected were taxes and fees imposed upon Lightpath as a local telephone provider pursuant to the aforementioned provisions of the Tax Law. Plaintiff does not contest that Lightpath was a local telephone provider or that it was obligated to collect the taxes and fees charged on the bill. If Lawlor's fraud cause of action is based upon the allegations that Lightpath defrauded Lawlor and other members of the class into paying taxes Lightpath was legally required to collect and pay, then the cause of action is insufficient.

When deciding a motion to dismiss, the court must determine whether plaintiff has a cause of action and not if the cause of action has been properly plead. Guggenheimer v. Ginzburg, 43 N.Y.2d 268 (1977); Rovello v. Orofino Realty Co., 40 N.Y.2d 633 (1976); and Well v. Yeshiva Rambam, 300 A.D.2d 580 (2nd Dept. 2002). If from the facts alleged in the complaint and the inferences which can be drawn from the facts, the court determines that the pleader has a cognizable cause of action, the motion must be denied. Sokoloff v. Harriman Estates Development Corp., 96 N.Y.2d 409 (2001); and Stucklen v. Kabro Assoc., 18 A.D.3d 461 (2nd Dept. 2005).

The court must accept as true all of the facts alleged in the complaint. 511 West 232rd Street Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144 (2002); and Sokoloff v. Harriman Estates Development Corp., *supra*. The complaint must be liberally construed, and the plaintiff must be given the benefit of every favorable inference which can be drawn from the complaint. Leon v. Martinez, 84 N.Y.2D 83 (1994); and Paterno v. CYC, LLC, 8 A.D.3d 544 (2nd Dept. 2004).

The complaint read broadly could be construed as alleging a cause of action for fraud in the inducement. To state a cause of action for fraud in the inducement, plaintiff must allege that the defendant made a misrepresentation of a material fact which was false and known to be false when made, for the purpose of inducing plaintiff's justifiable reliance causing damage. Lama Holding Co. v. Smith Barney Inc., 88 N.Y.2d 413

(1996);and Channel Master Corp. v. Aluminum Limited Sales, Inc., 4 N.Y.2d 403, 407 (1958).

Lawlor was not advised Optimum Online service for business was being provided by Lightpath. He was also not advised that Lightpath was a local telephone company so that the cable service would be subject to taxes. The Court can infer from the pleadings that had Lawlor known the internet services were subject to the taxes imposes upon local telephone companies, he would not have purchased the service. For the purposes of the pleadings, the allegations are sufficient to support a cause of action for fraud. Thus, the complaint cannot be dismissed.

The unjust enrichment cause of action fails to state a cause of action. This cause of action is based upon allegations that Defendants collected taxes which they were not obligated to collect and did not pay it over to the State. Although Lawlor designates the action as one for unjust enrichment, he is actually seeking restitution, recovery of money that Defendants should not in good conscience be permitted to retain. See, Wiener v. Lazard Freres & Co., 241 A.D.2d 114 (2nd Dept. 1998).

It is undisputed that Lightpath is a local telephone company. It is also undisputed that as a local telephone company, Lightpath was obligated to collect and pay the aforementioned taxes. Since Lightpath was obligated to collect these taxes, it was not unjustly enriched. If Lightpath collected the taxes and did not pay the money over to the State, then the State, and not plaintiff, would have the right to these funds.

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Although the Court is granting reargument, the result is the same. That is, even though the first and third causes of action do not state a cause of action, the second cause of action does. Since one of the cause plead in the complaint is not subject to dismissal, the motion to dismiss the complaint was properly denied. See, Anand v. Soni, *supra.*

Accordingly, it is,

ORDERED, that Defendants' motion for reargument is **granted** and, upon reargument, the Court adheres to its prior decision.

This constitutes the decision and order of this Court.

Dated: Mineola, NY
August 7, 2007

Hon. LEONARD B. AUSTIN, J.S.C.