2016 IL App (5th) 150320-U

NO. 5-15-0320

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT



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| EDWARD KARPOWICZ, Individually and on Behalf of All Other Similarly Situated Illinois Citizens,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>PAPA MURPHY'S INTERNATIONAL, LLC, and P-CUBED ENTERPRISES, LLC,<br><br>Defendants-Appellees. | ) | Appeal from the Circuit Court of Williamson County.<br><br>No. 14-L-131<br><br>Honorable Brian D. Lewis, Judge, presiding. |

JUSTICE WELCH delivered the judgment of the court.
Presiding Justice Schwarm and Justice Chapman concurred in the judgment.

**ORDER**

¶ 1 *Held*: The decision of the circuit court is affirmed where the plaintiff's amended complaint was properly dismissed pursuant to the voluntary payment doctrine and his leave to file a second amended complaint was properly denied.

¶ 2 The plaintiff-appellant, Edward Karpowicz, appeals the circuit court's dismissal with prejudice of his first amended complaint for a putative class action against defendant-appellees Papa Murphy's International, LLC (PMI), and P-Cubed Enterprises, LLC (P-Cubed), alleging that both defendants violated the Illinois Consumer Fraud and

Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/1 *et seq*. (West 2014)). The plaintiff also appeals the circuit court's denial of his motion for leave to file a second amended complaint. For the following reasons, we affirm.

¶ 3 PMI is a franchisor that grants franchises for the operation of pizza stores that sell "take-and-bake" pizzas, uncooked pizzas that the consumer takes to bake at home. P-Cubed is a franchisee of PMI. The plaintiff's August 7, 2014, complaint alleged that on July 30, 2014, PMI charged him $.80 tax on his $9 purchase of a pizza from a Papa Murphy's located at 207 Harvard Drive, Edwardsville, Illinois. The plaintiff attached a copy of his sales receipt indicating that on July 30, 2014, he purchased a pizza in the amount of $11, received a $2 discount, and was charged $9 plus tax in the amount of $.80.[1] As the basis of his claim, the plaintiff cited to the Retailers' Occupation Tax Act (35 ILCS 120/2 *et seq*. (West 2014)) and its accompanying administrative regulation, Title 86, part 130, section 130.310, which provide that a 1% rate[2] shall apply to food items that are sold by a retailer without facilities for on-premises consumption of food and that are not ready for immediate consumption. The plaintiff's one-count putative class action against PMI claimed that PMI's 9% tax charge was an unfair and deceptive act in violation of the Consumer Fraud Act. The plaintiff sought to represent a class of Illinois citizens who have been charged excessive sales tax by PMI.

[1]The plaintiff's amended complaint likewise stated that a receipt of his purchase was attached as Exhibit B, though this receipt is not in fact attached to the amended complaint.

[2]Local taxes may increase the 1% base sales tax rate.

¶ 4 On August 29, 2014, the plaintiff filed his first amended complaint, adding defendant P-Cubed to the lawsuit. The allegations against PMI in the amended complaint (count I) remained unchanged from the original complaint, while count II made an identical allegation against P-Cubed. The plaintiff alleged that both defendants have a routine practice of charging more than 1% sales tax, and that this unfair and deceptive practice results in collectively substantial losses that will injure the public and the proposed class under the guise that the extracted sales tax is lawful, and "as retail merchants have a self-executing power to terminate the availability of goods by refusing to sell purchasers goods if purchasers fail to tender taxes, and such was a subjective apprehension of potential injury to constitute duress."

¶ 5 Both PMI and P-Cubed moved to dismiss the plaintiff's amended complaint. On November 5, 2014, P-Cubed filed its motion to dismiss count II of the plaintiff's amended complaint pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2014)), arguing that the plaintiff cannot assert a claim to recover taxes that have been remitted to the state, that the amended complaint is fatally deficient because the suit is barred by the voluntary payment doctrine, and that the amended complaint fails to assert a valid claim pursuant to the Consumer Fraud Act. On November 7, 2014, PMI filed its motion to dismiss count I of the plaintiff's amended complaint pursuant to section 2-615, or in the alternative, section 2-619 (735 ILCS 5/2-619 (West 2014)). PMI also submitted a supporting memorandum of law. PMI's motion sought dismissal both because the amended complaint failed to state a valid claim to recover the tax overcharge alleged, and because PMI was the wrong defendant, even if it were a cognizable claim.

¶ 6 On March 10, 2015, the circuit court heard argument regarding the motions and took the matter under advisement. After consideration of the arguments, pleadings, statutes, and relevant case law, the court granted both defendants' motions to dismiss on April 24, 2015, determining that a Papa Murphy's pizza did not constitute a "necessity" such that the plaintiff's payment of the tax could be deemed to have been made under duress. As such, the court concluded that the voluntary payment doctrine precluded the plaintiff's claim.

¶ 7 On May 22, 2015, the plaintiff filed a motion to reconsider, or in the alternative, that the court grant him leave to file a second amended complaint, asserting as count III a "failure to monitor" claim against PMI. The plaintiff attached no proposed amendment to his request; after PMI pointed out in its response that this failure was sufficient grounds for denying the motion, on June 22, 2015, the plaintiff filed another motion requesting leave to file a second amended complaint, this time attaching a proposed amendment that repeated the two previously dismissed claims and adding a third count against PMI for negligent supervision of a franchise. The court dismissed both motions on July 1, 2015. This appeal followed.

¶ 8 An order granting a section 2-615 motion to dismiss is reviewed *de novo.* *Kanerva v. Weems*, 2014 IL 115811, ¶ 33. A section 2-615 motion to dismiss challenges the legal sufficiency of a complaint; in ruling on such a motion, a court must accept as true all well-pleaded facts in the complaint, as well as any reasonable inferences that may arise from them. *Id.* The critical inquiry is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are sufficient to establish a

cause of action upon which relief may be granted. *Id.* A cause of action should not be dismissed under section 2-615 unless it is clearly apparent from the pleadings that no set of facts can be proven that would entitle the plaintiff to recover. *Id.*

¶ 9 The plaintiff first asserts that the circuit court erred in granting the defendants' motions to dismiss, arguing that his first amended complaint stated a legally viable cause of action for consumer fraud. Both PMI and P-Cubed responded that the plaintiff failed to state a cause of action because his complaint is barred by the voluntary payment doctrine, and because he failed to adequately plead the elements of statutory consumer fraud; PMI additionally asserted in its brief that the plaintiff failed to plead facts that would support a claim of direct or vicarious liability against it. We agree with the trial court and the defendants that the plaintiff's claims in his first amended complaint are barred by the voluntary payment doctrine, and we find it dispositive of the first issue on appeal.

¶ 10 We begin by noting that Illinois courts have long held that a plaintiff may not assert a claim to recover taxes that have been remitted to the state, even if such payment was erroneous.[3] See, *e.g.*, *Hagerty v. General Motors Corp.*, 59 Ill. 2d 52, 59 (1974);

[3]The Retailers' Occupation Tax Act imposes a tax on the occupation of selling tangible personal property for use or consumption in Illinois. The tax is computed as a percentage of the retailers' gross receipts and is remitted to the Illinois Department of Revenue (IDOR). 35 ILCS 120/2 (West 2014). The Illinois Use Tax Act imposes a tax upon a privilege of using tangible personal property purchased at retail from a retailer.

*Adams v. Jewel Cos.*, 63 Ill. 2d 336, 348-49 (1976); *Lusinski v. Dominick's Finer Foods*, 136 Ill. App. 3d 640, 643-44 (1985). A taxpayer can only recover taxes voluntarily paid if such recovery is authorized by statute or by some showing of unjust enrichment. *Hagerty*, 59 Ill. 2d at 59; *Lusinski*, 136 Ill. App. 3d at 643; *Getto v. City of Chicago*, 86 Ill. 2d 39, 48-49 (1981). In the case before us, the plaintiff did not plead either that the defendants retained the tax rather than remitting it to the state, or that the defendants recovered the tax through a refund, which appears to be the only basis for seeking such restitution from the retailer. See *Hagerty*, 59 Ill. 2d at 60 (finding that the retailer was not enriched−"[i]f there was unjust enrichment, it was the State that was enriched"). The plaintiff's contention that his case may proceed even after the funds have been remitted to the state is without support in Illinois law.[4]

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35 ILCS 105/3 (West 2014). The Use Tax Act requires Illinois retailers to collect the tax from customers; the retailer must then remit the tax to the IDOR. *Lusinski v. Dominick's Finer Foods*, 136 Ill. App. 3d 640, 643-44 (1985); 35 ILCS 105/3-45 (West 2014).

[4]The plaintiff cites to *People ex rel. Hartigan v. Stianos*, 131 Ill. App. 3d 575, 581-82 (1985), and *Geary v. Dominick's Finer Foods, Inc*., 129 Ill. 2d 389, 408 (1989). However, both of these cases involve claims for injunctive relief and the involvement of the government itself, neither of which is true of the plaintiff's claims. *Hartigan* is distinguishable because it concerns a decision to allow a plaintiff to proceed with a motion for a preliminary injunction after the Attorney General sought injunctive relief to prevent retailers from continuing to overcharge taxes, not a suit allowing the plaintiff to

¶ 11 Even if the plaintiff could demonstrate that his case can be maintained against a retailer after the taxes have been remitted to the state, we reiterate that the voluntary payment doctrine bars his claim.

¶ 12 The proper procedure for establishing involuntary payment of taxes to the state is set out in the Protest Fund Act, which provides that a consumer who wishes to contest a collection of the use tax can do so by paying under protest and then suing the retailer, the Director of the Department of Revenue, and the Illinois Treasurer to require that the corresponding retailers' occupation tax be paid under protest into a protest fund. 30 ILCS 230/2 (West 2014); *Lusinski*, 136 Ill. App. 3d at 643-44. When a plaintiff fails to follow the procedure outlined in the Protest Fund Act, the only grounds on which he can state a cause of action for a tax refund is to show that the exception to the voluntary payment doctrine applies to his factual situation. *Lusinski*, 136 Ill. App. 3d at 643-44. A taxpayer has paid taxes involuntarily if (1) the taxpayer lacked knowledge of the facts upon which

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recover taxes already remitted to the state. 131 Ill. App. 3d at 581-82. *Geary* is distinguishable because it reached the supreme court upon a specific question certified under supreme court rule−whether the pleading had sufficiently established that the purchases were made under duress, rendering them involuntary for the purposes of the voluntary payment doctrine. 129 Ill. 2d at 392-93. There is no discussion in *Geary* about remittance of taxes or allowing a plaintiff to seek damages from a retailer after the retailer remits the tax to the state.

to protest the taxes at the time he or she paid the taxes, or (2) the taxpayer paid the taxes under duress. *Getto*, 86 Ill. 2d at 48-49.

¶ 13 To reiterate, then, the voluntary payment doctrine provides that, absent fraud, misrepresentation, or mistake of fact, money that is voluntarily paid under a claim of right to the payment and with full knowledge of the facts by the payer cannot be recovered solely because the claim was incorrect or illegal, unless the payment was made as a result of compulsion. *Jenkins v. Concorde Acceptance Corp.*, 345 Ill. App. 3d 669, 675 (2003).

¶ 14 The plaintiff claims that multiple exceptions to the voluntary payment doctrine apply to his case, namely, that he alleged the exception of statutory fraud, that he did not make a knowing, voluntary payment, and that he made the payment under duress.

¶ 15 The plaintiff claims that because he alleged statutory fraud, "a widely recognized exception to the voluntary payment doctrine," his allegation should have defeated the defendants' motions to dismiss. However, the plaintiff fails to cite Illinois law in support of his contentions, and in fact, our courts have rejected the argument that a claim under the Consumer Fraud Act is immune from the voluntary payment doctrine. See *Jenkins v. Concorde Acceptance Corp.*, 345 Ill. App. 3d 669, 677 (2003) (finding that the plaintiff did not allege fraud but that the defendants violated the Consumer Fraud Act, a statute that eliminates many of the elements of common law fraud).

¶ 16 In any event, the plaintiff's amended complaint failed to sufficiently plead a violation of the Consumer Fraud Act. The plaintiff alleged in his first amended complaint that both PMI and P-Cubed have engaged in "an unfair and deceptive practice"

pursuant to the Act, which prohibits unfair or deceptive acts or practices in the conduct of any trade or commerce. 815 ILCS 505/2 (West 2014). To state a cause of action under the Consumer Fraud Act, the plaintiff must allege: (1) a deceptive act or practice by the defendant; (2) that the defendant intended for the plaintiff to rely on the deception; (3) that the deception occurred in the conduct of a trade or commerce; (4) that the plaintiff suffered actual damages; and (5) that the damages were proximately caused by the deceptive conduct. *Flournoy v. Ameritech*, 351 Ill. App. 3d 583, 586 (2004).

¶ 17 Here, the plaintiff did not plead any facts that would demonstrate intent by either defendant for him to rely on a purported deception; the plaintiff states that the defendants have a "routine practice" of overcharging tax and the charge "was intended to cause the Plaintiff to rely on the guise that the sales tax was lawful." However, the plaintiff offers nothing more than the tax charge he paid in July 2014. These are not factual pleadings that can meet the elements of a cause of action. See *Adkins v. Sarah Bush Lincoln Health Center*, 129 Ill. 2d 497, 520 (1989) ("an actionable wrong cannot be made out merely by characterizing acts as having been wrongfully done; the pleading of conclusions alone will not suffice for the factual allegations upon which a cause of action must be based").

¶ 18 The plaintiff also alleges that the creation of a protest fund does not bar recovery if there is not a knowing, voluntary payment, and as he was not provided itemization of his tax payment until after the transaction was complete, his payment was unknowing. However, the plaintiff incorrectly asserts that a receipt is insufficient to put a customer on notice.

¶ 19 In *Lusinski v. Dominick's Finer Foods, Inc.*, 136 Ill. App 3d 640 (1985), the plaintiff sought a refund of taxes paid by the plaintiff to the defendants on the stated value of nonreimbursable discount coupons. *Lusinski*, 136 Ill. App. 3d at 640-41. The plaintiff's complaint was dismissed for failure to state a cause of action, as she did not plead sufficient facts so as to come within the exception to the voluntary payment doctrine. *Id.* at 644.[5] The plaintiff argued that her payment was made without knowledge of facts sufficient to form a basis for protest; she attempted to demonstrate her lack of knowledge of sufficient facts by attaching cash register receipts as exhibits to her complaint. *Id.* The court found that the plaintiff's argument failed for two reasons: first, the receipts were dated subsequent to the date by which the defendants had halted collection of use tax on the relevant items, rendering those receipts irrelevant; second, even if the receipts had been from the appropriate time period, the receipts indicated the value of items purchased, the value of coupons redeemed, and the amount of tax charged. *Id*. This constituted sufficient information for the plaintiff to protest imposition of the tax. *Id*. Here, the plaintiff attached to his complaint a copy of the receipt for the transaction at issue, which showed the date, form of payment, amount charged, amount paid, and amount taxed. Therefore, as in *Lusinski*, the plaintiff's receipt was sufficient to put him on notice; his payment was not "unknowing" pursuant to the exceptions to the voluntary payment doctrine.

[5]As we will discuss below, the *Lusinski* plaintiff also failed to show that she paid the tax under duress. *Lusinski*, 136 Ill. App. 3d at 644-45.

¶ 20 Finally, the plaintiff argues that his claims are not barred by the voluntary payment doctrine because they were made under duress. Duress exists where there is some actual or threatened power believed to be possessed by the payee over the payor from which the latter has no reasonable means of immediate relief except by paying the tax. *Lusinski*, 136 Ill. App. 3d at 645. Our courts have also described duress as existing where the taxpayer's refusal to pay the tax would result in a loss of reasonable access to goods or services considered essential. *Wexler v. Wirtz Corp.*, 211 Ill. 2d 18, 24 (2004) (citing *Geary*, 129 Ill. 2d at 396-400). Specifically, the plaintiff appears to argue that his purchase of a take-and-bake pizza was made under duress because food is a basic human necessity. The plaintiff cites to *Geary v. Dominick's Finer Foods, Inc*., 129 Ill. 2d 389 (1989), in support of his claim.

¶ 21 In *Geary*, the plaintiffs initiated a class action suit alleging that the defendants imposed an illegal tax on feminine hygienic products. *Geary*, 129 Ill. 2d at 392. The Illinois Supreme Court was asked to determine whether the plaintiffs sufficiently pleaded duress under the voluntary payment doctrine when they alleged that tampons and sanitary napkins were necessities. *Id.* The court held that feminine hygiene products "are necessities of life" for postpubescent women, those products were "virtually the only ones available" for women during menstruation, and "[n]o reasonable alternative product exists." *Id*. at 398.

¶ 22 Here, the plaintiff argues that *Geary* supports his argument, because in distinguishing its plaintiffs from the *Lusinski* plaintiff's failure to sufficiently plead duress regarding her tax payment on coupons, the *Geary* court noted that the food coupons in

*Lusinski* were not themselves essential, even though they "could be used for necessities such as food."

¶ 23 The circuit court properly rejected this argument. First, the supreme court did not hold that food was a necessity; it held that coupons were not necessities, whereas feminine hygiene products were necessities. *Id*. at 406. Furthermore, the court made a point not to decide whether any other products were necessities, and "[i]t may be that very few products would be necessities." (Emphasis omitted.) *Id*. at 407. As defendant PMI points out, the plaintiff cannot make a specialty item at a restaurant a necessity simply by identifying it within the broad genus of "food." A Papa Murphy's take-and-bake pizza is not essential in the same way as feminine hygiene products are to menstruating women. The plaintiff did not pay the tax involuntarily; reasonable alternatives exist that fulfill a consumer's basic need for sustenance. We find that the plaintiff failed to sufficiently plead that his tax payment was made under duress.

¶ 24 The plaintiff next argues that the trial court erred in denying leave to file a second amended complaint. A trial court's denial of a motion for leave to amend a pleading is reviewed under an abuse of discretion standard. *Loyola Academy v. S&S Roof Maintenance, Inc*., 146 Ill. 2d 263, 273 (1992). In order to determine whether the trial court has abused its discretion, we look at four factors: (1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified. *Id*.

¶ 25 However, these factors apply only to amendments that have been proposed prior to final judgment. *Tomm's Redemption, Inc. v. Hamer*, 2014 IL App (1st) 131005, ¶ 14. After final judgment, a plaintiff has no statutory right to amend a complaint, and a court commits no error by denying a motion for leave to amend. *Id*. While a pleading may be amended before or after judgment in order to conform the pleadings to the proofs (735 ILCS 5/2-616(c) (West 2014)), a complaint cannot be amended after final judgment in order to add new claims and theories or correct other deficiencies. *Hamer*, 2014 IL App (1st) 131005, ¶ 14.

¶ 26 Here, the plaintiff filed his motion for leave to file a second amended complaint after the trial court granted both defendants' motions to dismiss on April 24, 2015. The plaintiff's proposed second amended complaint offered no new claims or theories against P-Cubed, and an entirely new theory for recovery against PMI to establish vicarious liability for a claim that was already dismissed on the merits. The trial court decision to deny the plaintiff's leave to amend was not an abuse of discretion.

¶ 27 For the foregoing reasons, we affirm the decision of the circuit court of Williamson County.

¶ 28 Affirmed.