[Cite as *Ingrassia v. Ganley Mgt. Co*, 2010-Ohio-3883.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94266

CHARLES INGRASSIA

PLAINTIFF-APPELLANT

vs.

GANLEY MANAGEMENT CO., ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-699768

BEFORE: Cooney, J., Blackmon, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: August 19, 2010

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COLLEEN CONWAY COONEY, J.:

{¶ 1} Plaintiff-appellant, Charles Ingrassia ("Ingrassia"), appeals the trial court's decision to grant in part the motion to dismiss by defendants-appellees, Ganley Management Co. ("Ganley Management") and Ganley Westside Imports, Inc. ("Ganley Westside") (collectively referred to as "defendants"). Finding no merit to the appeal, we affirm.

{¶ 2} On July 27, 2009, Ingrassia filed a class action complaint against the defendants for an injunction. The class action was brought on behalf of

Ingrassia, individually, and on behalf of a class of consumers who have or will have their motor vehicle serviced by the defendants.

{¶ 3} On July 9, 2009, Ingrassia entered into a work order agreement with Ganley Westside for services and repair of his wife's motor vehicle for $1,883.46. Ingrassia received a 15% customer satisfaction discount in the amount of $278.61. Ganley Westside charged Ingrassia $145.89 in sales tax, which was based on the prediscounted amount.[1] Ingrassia alleges that by including the discounted amount of $278.61, for purposes of sales tax calculation, defendants overcharged him $21.58.

{¶ 4} With respect to the class action, the complaint was brought on behalf of all consumers and others who (1) have purchased or may yet purchase motor vehicle servicing goods or services from defendants; (2) have received or may receive a discount in connection therewith; and (3) have been charged or may yet be charged sales tax on the discounted amount in conjunction with such purchase.

{¶ 5} Ingrassia and the class sought to enjoin the defendants from charging sales tax on the discount portion of their service agreement in violation of R.C. 5739.01(H)(1)(c). They allege that by including the discount amount as part of the total price for purposes of sales tax calculation,

[1]Ingrassia paid a total of $1,750.74 for the repairs.

defendants violated Ohio tax law and wrongfully, falsely, and knowingly represented to purchasers that this charge is legal, with the intent of inducing purchasers to rely upon such representation to their detriment, in violation of the Ohio Consumer Sales Practices Act ("CSPA").[2]

{¶ 6} In response, the defendants moved to dismiss the complaint under Civ.R. 12(B)(1) and (6). The defendants argued that the trial court lacked jurisdiction over the complaint and, therefore, Ingrassia failed to state a claim upon which relief can be granted. They maintained that the remedy for an alleged overcharge in sales tax is to apply to Ohio's tax commissioner for a refund under R.C. 5739.07, and Ingrassia failed to do so.[3] The defendants further argued that Ingrassia's class action claim must be dismissed for failure to properly plead the requirements of a class action under the CSPA.

{¶ 7} Ingrassia opposed defendant's motion, arguing that his complaint is for injunctive relief, not damages. He further argued that the requirements of a class action for injunctive relief are different than the

[2] Ingrassia also brought an individual claim under the CSPA against the defendants for their alleged failure to return certain timing and drive belts replaced by Ganley Westside.

[3] The defendants also argued that Ganley Management is not a proper party because it did not have any dealings with Ingrassia or any other consumer, it did not charge any sales tax, and it does not direct, control, or own Westside Ganley or any other dealership.

requirements for damages. The defendants responded, arguing that by limiting his claim to injunctive relief, Ingrassia's remedy is through Ohio's Court of Claims, which hears claims against the state of Ohio and its agencies.

{¶ 8} The trial court granted defendants' motion to dismiss as to Ingrassia's class action CSPA violation claim, and denied defendants' motion to dismiss as to Ingrassia's individual CSPA violation claim.[4]

{¶ 9} It is from this order that Ingrassia appeals, raising one assignment of error, in which he argues that the trial court erred by dismissing his class action complaint for an injunction.

Standard of Review

{¶ 10} We apply a de novo standard of review to the trial court's granting of a motion to dismiss under Civ.R. 12(B)(1) for lack of subject matter jurisdiction and Civ.R. 12(B)(6) for failure to state a claim. See *Internatl. Total Serv., Inc. v. Garlitz*, Cuyahoga App. No. 90441, 2008-Ohio-3680, ¶6, citing *Dzina v. Avera Internatl. Corp.*, Cuyahoga App. No. 86583, 2006-Ohio-1363 and *Madigan v. Cleveland*, Cuyahoga App. No. 93367, 2010-Ohio-1213, ¶20, citing *Perrysburg Twp. v. Rossford*, 103 Ohio

[4]The trial court also found "no just reason for delay."

St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶5. Under this standard of review, we must independently review the record and afford no deference to the trial court's decision. *Herakovic v. Catholic Diocese of Cleveland*, Cuyahoga App. No. 85467, 2005-Ohio-5985.

Civ.R. 12(B)(1)

{¶ 11} Civ.R. 12(B)(1) provides that: "[e]very defense, in law or fact, to a claim for relief in any pleading, * * * shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter * * *."

Civ.R. 12(B)(6)

{¶ 12} In order for a trial court to dismiss a complaint under Civ.R. 12(B)(6) for failure to state a claim upon which relief may be granted, it must appear beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle the plaintiff to relief. *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 493, 2006-Ohio-2625, 849 N.E.2d 268, citing *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 245, 327 N.E.2d 753. Also, a reviewing court accepts as true all material allegations of the complaint and makes all reasonable inferences in favor of the plaintiffs. *Maitland v. Ford Motor Co.*, 103 Ohio St.3d 463, 465,

2004-Ohio-5717, 816 N.E.2d 1061. "[A]s long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss." *York v. Ohio State Hwy. Patrol* (1991), 60 Ohio St.3d 143, 145, 573 N.E.2d 1063.

{¶ 13} Ingrassia claims that the trial court has jurisdiction because the class is not seeking "damages" under R.C. 1345.09(B), but rather the class is seeking injunctive relief under R.C. 1345.09(D).[5] He claims that the requirements for these two different types of class actions are distinguishable, and the issuance of an injunction is appropriate upon the showing of a single violation. He cites *Brown v. E. Ohio Heating Co.* (Sept. 23, 1981), Summit App. No. 10176, in support of his position. However, *Brown* is distinguishable from the instant case.

{¶ 14} In *Brown*, Ohio's Attorney General at that time, William Brown, filed suit against East Ohio Heating Company and its employees, alleging that they violated R.C. 1345.02(B)(7) of the CSPA when an employee

[5]R.C. 1345.09(B) provides that: "[w]here the violation was an act or practice declared to be deceptive or unconscionable by rule adopted under [R.C. 1345.05(B)(2)] before the consumer transaction on which the action is based, or an act or practice determined by a court of this state to violate [R.C. 1345.02, 1345.03, or 1345.031] and committed after the decision containing the determination has been made available for public inspection under [R.C. 1345.05(A)(3)], the consumer may rescind the transaction or recover, but not in a class action, three times the amount of the consumer's actual economic damages or two hundred dollars, whichever is greater, plus an amount not exceeding five thousand dollars in noneconomic damages or recover damages or other appropriate relief in a class action under Civil Rule 23, as amended."

represented to a consumer that a replacement or repair was needed, when in fact it was not needed. The trial court issued an injunction, and the defendants appealed.

{¶ 15} The Ninth District Court of Appeals affirmed the trial court's decision, finding that R.C. 1345.07 provides for an injunctive remedy for any proven violation of R.C. 1345.02. However, in the instant case, Ingrassia seeks injunctive relief under R.C. 1345.09(D), not under R.C. 1345.07, which governs injunctions in cases brought by the attorney general.[6] Thus, Ingrassia's reliance on *Brown* is misplaced.

{¶ 16} In support of their position, defendants rely primarily on *Parker v. Giant Eagle, Inc.*, Mahoning App. No. 01 C.A. 174, 2002-Ohio-5212, arguing that Ingrassia's class action belongs before the Ohio Court of Claims. We find the court's reasoning in *Parker* to be persuasive.

{¶ 17} *Parker* involved the analogous situation in which the plaintiff, Kathleen Parker, filed a class action against Giant Eagle, alleging that Giant Eagle improperly calculated the sales tax after making a deduction for double coupons, resulting in a tax overcharge on her grocery bill. Parker claimed that the double-coupon amount should have been deducted from her total

[6] R.C. 1345.09(D) provides that: "[a]ny consumer may seek a declaratory judgment, an injunction, or other appropriate relief against an act or practice that violates this chapter."

grocery bill prior to calculating the sales tax. She requested monetary damages and requested a preliminary and permanent injunction to prevent Giant Eagle from continuing to collect excessive sales tax on double-coupon sales. The trial court dismissed the case for failure to state a claim under Civ.R. 12(B)(6). Id. at ¶1-2.

{¶ 18} On appeal, Parker argued that she was not seeking a tax refund, but rather sought damages from a vendor (Giant Eagle) entrusted by the state of Ohio to collect the proper amount of sales tax. The court held that Parker's lawsuit for money damages should have been filed with the Court of Claims because the excessive sales tax was either already possessed by the State or owed to the State, and the Court of Claims has original and exclusive jurisdiction over a taxpayer's claim for monetary damages. Id. at ¶29.

{¶ 19} The court further held that the Court of Claims would have jurisdiction to entertain Parker's injunction. Id. at ¶31. The court acknowledged that the Court of Claims' jurisdiction is not exclusive under R.C. 2723.01, but in situations where the issuance of "an injunction * * * would affect the State of Ohio's liability for monetary damages [,] * * * such an injunction must also be litigated in the Court of Claims."[7] Id. This is

[7]R.C. 2723.01 provides that "[c]ourts of common pleas may enjoin the illegal levy or collection of taxes and assessments and entertain actions to recover them when collected, without regard to the amount thereof, but no recovery shall be had unless the

because "no court of common pleas may enjoin the illegal collection of taxes until there has been a ruling that there is some illegality in the tax itself or in the collection of the tax. *State ex rel. Tracy v. Franklin Cty. Court of Common Pleas* (1993), 66 Ohio St.3d 644, 645, 614 N.E.2d 1047." Id. at ¶34.

{¶ 20} The court found that "in requesting an injunction in this case, [Parker] has also requested that the Mahoning County Court of Common Pleas declare [Giant Eagle's] method of calculating sales tax to be illegal. * * * A decision by the [common pleas court] regarding the legality of [Giant Eagle's] method of collecting sales tax would undoubtedly affect the State of Ohio's rights with respect to [Parker's] claim for a sales tax refund. Therefore, an injunction issued by the court of common pleas would, in effect, bypass some aspects of the exclusive jurisdiction of the Court of Claims * * *." Id. at ¶34-35. See, also, *Bergmoser v. Smart Document Solutions, L.L.C.* (N.D. Ohio 2007), Case No. 1:05 CV2882 (where vendor collected excess state sales tax and the court found that the customer must attempt to recover the wrongfully collected taxes pursuant to a refund from the State, as opposed to filing suit against the vendor).[8]

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action is brought within one year after the taxes or assessments are collected."

[8]We recognize "that *Parker* relies on [R.C. 5739.07, which] has been amended to allow a consumer to file for a refund with the tax commissioner. Accordingly, *Parker* is inapplicable to the extent it holds that a consumer must file a claim

{¶ 21} The Ohio Supreme Court recently held that when a vendor charges its customer a nonexistent tax, the funds collected are not a tax collected for the benefit of the taxing authority, and in those limited circumstances, the customer may file suit directly against the vendor. *Volbers-Klarich v. Middletown Mgt., Inc.*, 125 Ohio St.3d 494, 2010-Ohio-2057, syllabus. The supreme court, however, distinguished *Parker* and *Bergmoser*, which involved collection of excess sales tax — an existing tax — and stated, "it only makes sense that a taxpayer would be required to file a refund with the taxing authority that imposed the tax to recover those funds." Id. at ¶20.

{¶ 22} Just as in *Parker*, Ingrassia attempts to distinguish his class action claim as a claim solely for injunctive relief. However, it is the State treasury that will ultimately be affected if the trial court issues an injunction against defendants. Therefore, Ingrassia's class action claim must be

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against the state in the Court of Claims. The rationale in *Parker*, however (that a consumer does not have a direct action against a vendor who over-collected or wrongfully collected taxes) is sound. As the *Parker* court notes, if a vendor collects an excessive sales tax, it has a duty to remit it to the state. Id. at ¶29. Accordingly, if a vendor remitted the excessive tax, only the state could ultimately be required to refund it and if the vendor did not remit the excessive tax, the state has a right to those funds regardless. Id. In sum, although *Parker* is premised on an older version of the Ohio Revised Code, the logic underlying the Court's decision still makes sense when read in conjunction with the current version of the statute." *Bergmoser* at fn.2.

brought in the Court of Claims. Accordingly, we find that the trial court's dismissal under Civ.R. 12(B)(1) was proper.[9]

{¶ 23} Thus, the sole assignment of error is overruled.

Judgment is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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COLLEEN CONWAY COONEY, JUDGE

PATRICIA ANN BLACKMON, P.J., and
MARY J. BOYLE, J., CONCUR

[9]Ingrassia also argues that Ganley Management can be sued as a supplier under the CSPA. However, our finding that the trial court lacks jurisdiction over the class action claim renders this argument moot.