BUSINESS AND FRANCHISE LAW REPORT

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RE: DECISION OF THE NEW YORK APPELLATE DIVISION
NEW YORK PETROLEUM MARKETING PRACTICES ACT

In *Issa v. Getty Petroleum Marketing, Inc*. the court applying the liberal pleading standards under New York law permitted the plaintiff gas station owner to amend its complaint to include claims based on the Petroleum Marketing Practices Act ("PMPA").

Franchisee gas station owners and operators should note some of the following points raised by the court:

- PMPA was established to protect franchisees from arbitrary and discriminatory termination or non-renewal of their franchise;
- When evaluating application of the PMPA and whether or not a franchisor and franchisee relationship exists, the courts look to the plaintiff/franchisees responsibility for losses associated with the sale of fuel and the ultimate entrepreneurial responsibility assumed by the franchisee

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Decided on December 18, 2007

Supreme Court, Nassau County

Ibrahim Issa, Thruway Management, Inc., Denver Auto Repair, Inc., Brookdale Auto Repair Center, Inc., and Tillotson Auto Repair, Inc., Plaintiffs,

against

Getty Petroleum Marketing, Inc., Defendants.

5230/06

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Leonard B. Austin, J.

Plaintiffs, Thruway Management Inc. ("Thruway"), [*2]Denver Auto Repair, Inc., ("Denver"), Brookdale Auto Repair Center, Inc. ("Brookdale"),[FN1] and Tillotson Auto Repair, Inc., ("Tillotson"), are dealers, operators and lessees of gas stations in the Bronx. Plaintiff, Ibrahim Issa ("Issa"), is the principal owner of those stations.

On this motion, Thruway, Tillotson and Issa seek to amend the first amended verified complaint to add a new cause of action under the Petroleum Marketing Practices Act, 15 U.S.C. §2801, *et seq.* ("PMPA") for improper termination of their purported franchise agreements. Denver and Brookdale voluntarily withdrew their motion for leave to amend because their agreements have not been terminated.

Pursuant to the Lessee Commission Contract ("Lease") and subsequent Assignment Agreements, Issa entered into an agreement with Defendant, Getty Petroleum Marketing Inc. ("Getty"), for the sale and distribution of gasoline and other petroleum products on a retail basis to a motoring public. Pursuant to ¶14 of the Lease, Plaintiffs were granted a lease to utilize the marketing premises and license to utilize and market gasoline under the "Getty" trademark.

Specifically, ¶7 of the Lease provided that Getty would set the prices for the products whereupon Issa will receive a commission for each gallon sold. Pursuant to ¶6, Getty, in its sole discretion, reserved the right to deliver gasoline on a Cash-On-Delivery ("C.O.D.") basis or via electronic wire transfer of funds ("E.F.T.") from the respective Plaintiffs' bank accounts to Getty's bank account. Under ¶16, Plaintiffs were not permitted to sell product brands other than Getty. According to ¶23 and ¶26, Plaintiffs' employees had to wear Getty uniforms and were obligated to maintain the premises in operation 24 hours a day.

Under ¶11, Plaintiffs maintained their independent management status and were solely responsible for any costs, expenses, licensee fees and taxes in connection with operation of the gas stations. Plaintiffs were charged with the obligation to maintain all of the necessary licenses and permits. Plaintiffs accepted financial responsibility for any loss ensuing as a result of shortages due to "drive-offs" and credit chargebacks (¶32).

Finally, ¶41 provided that the title to the products was to remain with Getty until they were sold to ultimate consumers.

On March 10, 2006, Getty notified Plaintiffs that they were being placed on C.O.D. basis pursuant to ¶6 of the Lease. The claimed basis for the change in payment method was Plaintiffs' deficiencies in making payments. Simultaneously, Getty served a ten day Notice to Cure with regard to deficiencies at each facility. As a result, Getty ceased delivering gasoline until Plaintiffs complied with the C.O.D. payment term or paid the deficiencies. Finally, on March 8, 2006,[FN2] Getty [*3]served Notice of Termination on Plaintiffs.

Thruway argues that all deficiencies were satisfied and that there is no current indebtness for the Thruway premises. Issa maintains that he had sufficient funds to

satisfy his deficiencies but for the pending matrimonial action that had frozen the sum of over $38,000.00 precluding repayment to Getty. Plaintiffs insist that they have offered Getty to retain all its commission checks and pay them on account for any arrears and indebtness that was properly due. Nevertheless, Getty has refused to resume delivery on an E.F.T. basis. Accordingly, Plaintiffs maintain that Getty's Notice to Cure letter was a sham and artifice to terminate each station.

Plaintiffs further claim that by virtue of the change in the delivery term from C.O.D. to E.F.T., Defendant converted its relationship with each Plaintiff from a commission marketer to a franchised dealer who is protected from wrongful and arbitrary termination under the PMPA.

DISCUSSION

"Leave to serve amended pleadings shall be freely given' absent prejudice and surprise resulting from the delay. (CPLR 3025[b]; see, *Fahey v. County of Ontario*, 44 NY2d 934; Faracy v. McGraw Edison Corp. 463)." *Northbay Construction Co., Inc. v. Bauco Construction Corp.*, 275 AD2d 310, 311 (2nd Dept. 2000). See also *Nikac v. Rujak*, 276 AD2d 443 (2nd Dept. 2000) and *Goldstein v. St. John's Episcopal Hosp.*, 267 AD2d 426 (2nd Dept. 1999).

The determination of whether to deny or permit an amendment to the pleadings is one addressed to the discretion of the court. *Liendo v. Long Island Jewish Med. Ctr.*, 273 AD2d 445 (2nd Dept. 2000); and *Henderson v. Gulati*, 270 AD2d 308 (2nd Dept. 2000).Getty does not claim, and the record does not indicate, any evidence of prejudice or surprise. The amendment is based on the same facts and occurrences that were previously set forth in the first amended verified complaint. *De Forte v. Allstate Ins. Co.*, 66 AD2d 1028 (2nd Dept.1978). Also, the parties have not conducted any discovery as of yet.

It is well settled that amendment should be denied only when the claim as amended would be "palpably improper or insufficient as a matter of law." *Amica Mutual Ins. Co. v. Hart Alarm Systems, Inc.*, 218 AD2d 835, 836 (3rd Dept. 1995). See also, *Ricca v. Valenti*, 24 AD3d 647, 648 (2nd Dept. 2005). Nevertheless, "the merits of a proposed amendment will not be examined unless the insufficiency or lack of merit is clear and free from doubt." *USA Nutritionals, Inc. v. Pharmalife, Inc*., 293 AD2d 526 (2nd Dept. 2002). "Once a *prima facie* basis for the amendment has been established, that should end the inquiry, even in the face of a rebuttal that might provide the ground for a subsequent motion for summary judgment." *Hospital for Joint Diseases, Orthopedics Institutes v. James Katsikis Environmental Contractors, Inc.*, 173 AD2d 210 (1st Dept. 1991). See also, McKinney's *CPLR Practice Commentary* C3025:11.

Here, Plaintiffs' proposed amended cause of action, [*4]pursuant to PMPA, is not palpably improper or totally devoid of merit. Leave to amend to add a new cause of action under PMPA for wrongful termination and in violation of certain notice requirements should be granted.

PMPA was enacted to establish "protection for franchisees from arbitrary and discriminatory termination or non-renewal of their franchises." S. Rep. No. 731, 95th Cong., 2d Sess. 15, reprinted in 1978 U.S. Code Cong. & Ad. News 873, 874. To effectuate this purpose, PMPA sets forth various grounds and accompanying notice requirements for termination and non-renewal. *Bellmore v. Mobil Oil Corp*., 783 F.2d 300, 304 (2nd Cir. 1986).

Plaintiffs insist that the change of the credit term from post-sale E.F.T. to pre-sale C.O.D. satisfies the "*purchase*" requirement that is necessary to define Plaintiffs as a "*retailer*" under the PMPA. Plaintiffs continue, because they were required to pay for

fuel upon delivery and prior to its sale to the motoring public they effectively purchased the fuel and became retailers as defined by the PMPA.

Getty responds that ¶ 6 of the Lease provides for the title to the fuel to remain with it at all times until sold to ultimate customers irrespective of the credit terms. Getty explains that the change from E.F.T. to C.O.D. did not alter the parties' relationship but merely acted as a security for the amounts that the dealer is obligated to remit to Getty post-sale.

"The court will look beyond the label the parties attach to the relationship and examine whether defendant clothed plaintiffs with sufficient independence to bring them within the protection of the PMPA." *Johnson v. Mobil Oil Corp.*, 553 F.Supp. 195, 197 (S.D.NY 1982); and *Roberts v. Exxon Corp.*, 427 F.Supp. 389, 390 (W.D.La. 1977).

PMPA defines the term "franchise" as "any contract between distributor and *retailer*." 15 U.S.C. §2801(1)(A)(iv) (emphasis added). The term "franchise" includes:

"any contract under which a *retailer* or distributor (as the case may be) is authorized or permitted to occupy leased marketing premises, which premises are to be employed in connection with the sale, consignment, or distribution of motor fuel under a trademark which is

owned or controlled by such refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits such occupancy."

15 U.S.C. §2801(1)(B)(i) (emphasis added).

The term " franchise relationship' means the respective motor fuel marketing or distribution obligations and responsibilities of a franchisor and a franchisee which result from the marketing of motor fuel under a franchise". 15 U.S.C. §2801(2).

Finally, "*retailer*" is defined as, "any person who *[*5]purchases* motor fuel for sale to the general public for ultimate consumption." 15 U.S.C. §2801(7) (emphasis added).

In *Miller v. W.H. Bristow, Inc.*, 739 F.Supp. 1044, 1047 (D.S.C. 1990), the court considered elements that must be present in order to effectuate the "*purchase*" of gasoline as defined under PMPA:

(i) pay for the gasoline inventory until it was sold;

(ii) take title;

(iii) pay ad valorem taxes on the gasoline inventory;

(iv) bear the risk of loss of the gasoline (except for its own carelessness);

(v) retain any funds from the sale of the gasoline to motorists;

(vi) set the price or assume the market risk in fluctuations in gasoline prices;

(vii) pay sales taxes or extend credit to motorists on resale;

and (viii) hold a gasoline retailers business license.

See also, *Farm Stores, Inc. v. Texaco, Inc*., 763 F.2d 1335, 1340 (11th Cir.), *cert. den*., 474 U.S. 1039 (1985).

In this case, Plaintiffs were responsible for any loss ensuing as a result of shortages due to "drive-offs" and credit chargebacks, were obligated to pay sales taxes and were responsible for maintenance and carrying of licenses necessary for the operation of the Plaintiff's business as a gas station (Lease ¶¶9, 21 and 32). Whether Plaintiffs can prove the remaining elements cannot be said from the current record before the Court.

Getty claims that Plaintiffs are not franchisees as defined by the PMPA because they did not possess sufficient indicia of entrepreneurial responsibility. The Eleventh Circuit, citing the District Court decision, held that "the most important indicia of being independent is the presence of economic risks." *Farm Stores, Inc. v. Texaco, Inc.*, *supra* at 1344. Here, Plaintiffs paid taxes, were responsible for maintenance of the facilities, and bore the risk of loss of the entire fuel investment. See also, Lease ¶¶ 22 and 32(b). Additionally, Lease ¶11 expressly designated each Plaintiff as an "independent businessperson."

Finally, Getty asserts that the parties' relationship is governed by the New York Motor Fuel Act (General Business Law §199, *et seq*.), not the PMPA. Under the Supremacy Clause of the United States Constitution, the PMPA, as a federal act, if applicable, supersedes any inconsistent state law. 15 USCS § 2806. See, *Fidelity Fed. Sav. & Loan Assn. v. De La Cuesta*, 458 U.S. 141, 153 (1982).

Thus, it cannot be said that Plaintiffs' claim is palpably improper or insufficient as a matter of law.

Accordingly,it is**,**

ORDERED, that Plaintiffs' motion for leave to amend their complaint to add a cause of action under the Petroleum Marketing Practices Act is **granted**; and it is further,

ORDERED, that Plaintiffs' amended complaint [*6]contained in its moving papers will be deemed served upon service of a copy of this order with notice of entry; and it is further,

ORDERED, that counsel for the parties shall appear for a status conference before this Court on February 8, 2008 at 9:30 a.m.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY_____

December 18, 2007Hon. Leonard B. Austin, J.S.C.

Footnotes

Footnote 1: Plaintiff, Brookdale Auto Repair Center, Inc. is a franchise dealer and lessee located at 1982 Bronxdale Ave., New York, as Defendant points out, and as the street name suggests, Plaintiff may be trying to sue under the name of Bronxdale Auto Repair which is the proper party.

Footnote 2: Plaintiff's moving papers show a date discrepancy as they claim that the Notice of Termination was served prior to the Notice of the Term Change (Proposed Second Amended Verified Complaint ¶¶ 21 and 36).