

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
MARIE ROBERTS : **ORDER**
 : **DTA NO. 821756**
for Revision of a Determination or for Refund of Sales :
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Period June 1, 2001 through February 28, 2003. :

Petitioner, Marie Roberts, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 2001 through February 28, 2003.

The Division of Taxation, appearing by Daniel Smirlock, Esq. (Michael B. Infantino, Esq., of counsel), brought a motion filed September 27, 2007, seeking an order of dismissal of the petition or, in the alternative, an order of summary determination in the above-referenced matter pursuant to 20 NYCRR 3000.5, 3000.9(a)(1) and (b). Petitioner, appearing by William V. Alesi, Esq., submitted her response on November 19, 2007, which date began the 90-day period for issuance of this order.

After due consideration of the motion and the affirmation in opposition of William V. Alesi, Esq., and all pleadings and proceedings had herein, Winifred M. Maloney, Administrative Law Judge, renders the following order.

ISSUE

Whether the Division of Taxation's motion to dismiss or, in the alternative, motion for summary determination should be granted.

FINDINGS OF FACT

1. Penn Station Grocery, Inc. (PSG or the corporation) and the Division of Taxation (the Division) entered into a four-page closing agreement regarding additional sales and use taxes due from the corporation for the period June 1, 2000 through February 28, 2003 (PSG's closing agreement). On July 21, 2004, petitioner, Marie Roberts (petitioner or Ms. Roberts), signed and printed her name and dated the last page of this closing agreement on behalf of the corporation; however, no title appears next to her printed name. Thomas J. Heinz, the Division's Director of Tax Audits, signed this closing agreement on August 2, 2004.

2. A four-page closing agreement between Marie Roberts and the Division (closing agreement for Marie Roberts), bears petitioner's signature, her printed name without a title, and the handwritten date of July 21, 2004, as well as Mr. Heinz's signature and the handwritten date of August 2, 2004 on the last page. Under the terms of this closing agreement, captioned: "In the Matter of an Audit of MARIE ROBERTS . . . As Officer of PENN STATION GROCERY, INC. . . . for Sales and Use Taxes for the periods between 06/01/2001 - 02/28/2003," petitioner is deemed a responsible person, and is personally liable, for sales and use taxes and interest due from PSG for the period June 1, 2001 through February 28, 2003.

3. Each closing agreement contained seven paragraphs. Paragraph four of each closing agreement provided that:

this agreement shall be final and conclusive of the liabilities of the Taxpayer for the subject taxes and captioned taxable periods, and except upon a showing of fraud, malfeasance, or misrepresentation of a material fact: (a) the case shall not be reopened as to the matters agreed upon or the agreement modified, by any officer, employee, or agent of this state, and (b) in any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, cancellation, abatement, refund or credit made in accordance therewith shall not be annulled, modified, set aside or disregarded.

4. On November 18, 2004, the Division issued a Notice of Determination (notice no. L-024694613-1) to petitioner, as a person responsible for additional sales and use taxes due from PSG for the period June 1, 2001 through February 28, 2003. Following the issuance of a Conciliation Order, dated March 30, 2007, denying her request and sustaining the statutory notice, petitioner filed a petition challenging the Division's determination that she is a responsible person or officer of PSG for the period June 1, 2001 through February 28, 2003.

5. In her petition, petitioner asserted, in relevant part, that she did not knowingly sign the closing agreement, which named her as personally liable for taxes and interest due from PSG, and that her name appeared on it as a result of fraud, malfeasance, misrepresentation of a material fact and mutual mistake. As such, she contends that the closing agreement for Marie Roberts does not bind her and she seeks to have that agreement voided and the matter reopened.

6. The Division subsequently brought this motion, dated September 27, 2007, seeking dismissal of the petition pursuant to 20 NYCRR 3000.9(a)(1)(i), (ii) or (vi) on the grounds that: a defense is founded in documentary evidence, the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition or the petition fails to state a cause for relief; or, in the alternative, summary determination in favor of the Division on the ground that there exist no material issues of fact and its motion must be granted as a matter of law. In support of its motion to dismiss or for summary determination, the Division submitted the affirmation of Michael B. Infantino, Esq., the Division's representative, with attached exhibits including the closing agreements of the corporation and Marie Roberts.

7. The affidavit of petitioner, Marie Roberts, was submitted in opposition to the motion to dismiss or for summary determination. In her affidavit, petitioner, a 70-year old widow with no business or accounting knowledge, asserted that she did not knowingly and voluntarily sign the

closing agreement, which names her as personally liable for sales and use taxes and interest due from PSG, i.e., the closing agreement for Marie Roberts. Although petitioner admitted in her affidavit that she signed PSG's closing agreement, she maintained she did so because her stepson Dominic Catalanotto, one of the operators and managers of PSG, and Jeff Naftol, of the accounting firm Naftol & Weberman, told her that it was necessary for her to sign it since she was listed as president of the corporation. Ms. Roberts averred that Mr. Naftol simply placed several signature pages of what she was told was PSG's closing agreement before her and she signed them. Ms. Roberts asserted in her affidavit that no one ever informed her that she was being deemed a responsible person for PSG's sales and use taxes in any closing agreement or that she was signing a closing agreement in her personal capacity.

CONCLUSIONS OF LAW

A. The Division's motion seeks dismissal of the petition pursuant to 20 NYCRR 3000.9(a)(1)(i), (ii) or (vi) on the grounds that: a defense is founded in documentary evidence, the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition and the petition fails to state a cause for relief; or, in the alternative, summary determination in favor of the Division on the ground that there exist no material issues of fact and its motion must be granted as a matter of law. The alternative grounds raised by the Division's motion to dismiss the petition all relate to the closing agreement for Marie Roberts, the terms of which make petitioner personally liable for sales and use taxes due from Penn Station Grocery, Inc. The Division maintains that petitioner executed the closing agreement relating to her individual liability for sales and use taxes due from Penn Station Grocery, pursuant to Tax Law § 171(18), to resolve all issues. It points out that, by its terms, this closing agreement is final and conclusive as to petitioner's liability for the sales and use taxes due from the corporation for the period June

1, 2001 through February 28, 2003, and except upon a showing of fraud, malfeasance, or misrepresentation of a material fact, the agreement may not be reopened or modified as to the matters agreed upon. As such, the Division contends that the Division of Tax Appeals lacks authority to provide petitioner with a hearing. Furthermore, the Division asserts that petitioner, in her petition, has not alleged any fraud, malfeasance, or misrepresentation of a material fact by any employee of the Division, either in the inducement or execution of this closing agreement, and, therefore, the petition should be dismissed because it fails to state a cause for relief. Alternatively, the Division claims that summary determination should be granted in its favor because no triable issue of fact or law exists.

B. 20 NYCRR 3000.9(c) provides in relevant part that where not otherwise in conflict with this Part, a motion to dismiss filed pursuant to this section shall be subject to the same provisions as motions filed pursuant to section 3211 of the CPLR. A motion to dismiss for failure to state a cause of action is permitted under CPLR 3211(a)(7). Under the CPLR,

the sufficiency of a pleading to state a cause of action or defense will generally depend upon whether or not there was substantial compliance with Section 3013 providing that ‘Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.’ (*Foley v. D’Agostino*, 21 AD2d 60, 248 NYS2d 121, 124 [1964].)

Consequently, if a pleading (1) provides sufficient notice of the events out of which the claim arose and notes (2) the material elements of the claim, it is an acceptable CPLR pleading (Siegel, NY Practice § 208, at 343 [4th ed]) and will withstand a motion to dismiss for failing to state a cause of action.

C. Petitioner has stated a claim or cause of action. The petition challenges the validity of the closing agreement for Marie Roberts and the Notice of Determination

issued to petitioner, as a responsible person for the sales and use taxes due from the corporation. In her petition, petitioner asserted that she did not knowingly and voluntarily sign the closing agreement for Marie Roberts. She alleged fraud in the execution of this closing agreement. In as much as the Division is the other party to this closing agreement, the petition was adequate to inform the Division of Taxation of the claim or cause of action that the Division was to defend against.

D. The Division argues that summary determination should be granted in this matter because no triable issue of fact or law exists. In reviewing a motion for summary determination, an administrative law judge is constrained by the following guidelines:

The motion shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact. Where it appears that a party, other than the moving party, is entitled to a summary determination, the administrative law judge may grant such determination without the necessity of a cross-motion (20 NYCRR 3000.9[b][1]; *see also*, Tax Law § 2006[6]).

Furthermore, a motion for summary determination made before the Division of Tax Appeals is “subject to the same provisions as motions filed pursuant to section three thousand two hundred twelve of the CPLR.” (20 NYCRR 3000.9[c]; *see also Matter of Service Merchandise Co.*, Tax Appeals Tribunal, January 14, 1999.) Summary determination is a “drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue” (*Moskowitz v. Garlock*, 23 AD2d 943, 259 NYS2d 1003, 1004 [1965]; *see Daliendo v. Johnson*, 147 AD2d 312, 543 NYS2d 987, 990 [1989]). Because it is the “procedural equivalent of a trial” (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177, 179 [1989]), undermining the notion of a “day in court,”

summary determination must be used sparingly (*Wanger v. Zeh*, 45 Misc 2d 93, 256 NYS2d 227, 229 [1965], *affd* 26 AD2d 729 [1966]). It is not for the court “to resolve issues of fact or determine matters of credibility but merely to determine whether such facts exist” (*Daliendo v. Johnson*, 543 NYS2d at 990, *supra*). If any material facts are in dispute, if the existence of a triable issue of fact is “arguable,” or if contrary inferences may be reasonably drawn from undisputed facts, the motion must be denied (*Glick & Dolleck, Inc. v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93, 94 [1968]; *Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879, 881 [1960]).

E. From all the evidence submitted on this motion, there is no doubt that material and triable issues of fact exist. In her affidavit, petitioner asserts that she did not knowingly and voluntarily sign the closing agreement in her name individually. Petitioner’s affidavit sets forth the circumstances of her execution of several signature pages for what she was told was the closing agreement for the corporation. She asserts that no one informed her that she was being deemed a responsible person for PSG’s sales and use taxes or that she was executing a closing agreement in her name, personally. Given the absence of any affidavit from an employee of the Division who was involved in the inducement and execution of the closing agreement for Marie Roberts, the assertions in petitioner’s affidavit raise issues of fact which simply cannot be resolved on a motion. Accordingly, the Division’s motion is denied.

F. The Division of Taxation’s Motion to Dismiss the Petition or for Summary Determination is denied, and a hearing on the issues will be scheduled in due course.

DATED: Troy, New York
February 14, 2008

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE