

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C.

PART 5

SPRINT COMMUNICATIONS COMPANY, L.P.

INDEX NO. 154499/14

- v -

MOT. DATE

MOT. SEQ. NO. 001

THE CITY OF NEW YORK DEPARTMENT OF FINANCE et al.

The following papers, numbered 1 to 3 were read on this motion to/for summary judgment
Notice of Motion/Petition/O.S.C. - Affidavits - Exhibits No(s) 1
Notice of Cross-Motion/Answering Affidavits - Exhibits No(s) 2
Replying Affidavits No(s) 3

Plaintiff Sprint Communications Company, L.P. ("Sprint") moves for summary judgment in its favor "providing that since plaintiff is subject to the supervision of the New York State Department of Public Service for purposes of NYC Administrative Code § 11-1101(6), it is subject to the [New York City] Utility Tax" as opposed to the City's unincorporated business tax ("City UBT") under Title 5 of the Administrative Code. Defendants cross-move for summary judgment and findings that "plaintiff is not 'subject to the supervision of the [New York State Public Service Commission ("PSC")]' as that phrase is used in the [] Utility Tax, is not a 'utility' within the meaning of the Utility Tax, and is therefore liable for both the City's Utility Tax and the City's UBT. Issue has been joined but note of issue has not yet been filed; therefore summary judgment relief is available (CPLR § 3212[a]). The court's decision follows.

None of the facts here are in dispute. The only issue in this case is whether plaintiff was subject to PSC supervision at all relevant times. If plaintiff was subject to PSC supervision, it is only liable to pay the Utility Tax. If, as defendants contend, plaintiff is subject to "light regulation" by the PSC, a designation reserved for companies subject to market-driven competition, then plaintiff must pay City UBT.

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Ayotte v. Gervasio, 81 NY2d 1062 [1993]). Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (Rotuba Extrud

Dated: April 25, 2016

HON. LYNN R. KOTLER, J.S.C. (with signature)

- 1. Check one: [X] CASE DISPOSED [] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [X] GRANTED [X] DENIED [] GRANTED IN PART [] OTHER
3. Check if appropriate: [] SETTLE ORDER [] SUBMIT ORDER [] DO NOT POST [] FIDUCIARY APPOINTMENT [] REFERENCE

ers v. Ceppos, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

The Utility Tax is found in Title 11 of the New York City Administrative Code. Admin Code § 11-1102(a) states that every utility, and every vendor of utility services, shall pay an excise tax based upon a percentage of its gross income. A "utility" is defined as "[e]very person subject to the supervision of the department of public service" (Admin Code § 11-1101[6]). A "vendor of utility services" is defined in relevant part as "[e]very person not subject to the supervision of the department of public service, and not otherwise a utility as defined in [Admin Code § 11-1101(6)], who furnishes or sells ... telecommunication services...." (Admin Code § 11-1101[7]).

The PSC is part of the New York State Department of Public Service, which in turn is a department of the State and is established by Public Service Law § 3. The PSC has jurisdiction over "every telephone line which lies wholly within the state and that part within the state of New York of every telephone line which lies partly within and partly without the state and to the persons or corporations owning, leasing or operating any such telephone line" (PSL § 5.1). Additionally, the PSC has "general supervision" over telephone corporations operating within the State of New York (PSL § 94[2]).

The City UBT is based upon "taxable income" as opposed to a tax on gross income, the UBT is based upon "taxable income" (see Admin Code § 11-505). Further, a utility paying the Utility Tax is exempt from paying the City UBT (see Admin Code § 11-502[a]). Conversely, a "vendor of utility services" is liable for both the Utility Tax and the City UBT. *Id.*

In *Cable & Wireless v. City of NY Dept. of Fin.*, (190 Misc2d 410 [NY Sup, NY Co, 2001]), the Hon. Joan Madden held that a reseller of intrastate and interstate telephone services to the public was only subject to minimal PSC regulation and therefore the Utility Tax was not intended to apply to the subject plaintiff. In *Matter of Astoria Gas Turbine Power, LLC v. Tax Commn. of City of N.Y.* (7 NY3d 451 [2006]), the Court of Appeals evaluated the relationship between that subject plaintiff and the PSC and held that the *Astoria Gas* plaintiff was not a public utility because it was exempt from the vast majority of the provisions of the Public Service Law that apply to retail sellers of electricity. The *Astoria Gas* Court noted that "the PSC does not establish rates in [the plaintiff's] wholesale electricity generation market" (*id.* at 456).

Here, the court finds that plaintiff is not subject to the type of PSC regulation within the meaning of Admin Code § 11-1101[6] which would transform plaintiff into a utility. The court reaches this holding by rejecting plaintiff's interpretation of Admin Code § 11-1101[6] which would obviate the City Legislature's intent when it enacted the Utility Tax. When interpreting a statute, "courts are obliged to effectuate the intent of the legislature, and when the statutory language is clear and unambiguous, it should be construed so as to give effect to the plain meaning of the words used" (*People v. Barden*, 117 AD3d 216 [1st Dept 2014] [internal quotations and citation omitted]). Here, the court finds that the term supervision as employed by Admin Code § 11-1101[6] does not mean any kind of regulation as plaintiff argues. Indeed, the *Astoria Gas* and *Cable & Wireless* Courts interpreted the term "subject to the supervision of the department of public service" in Admin Code § 11-1101[6] to distinguish between regulatory and supervisory control. While the *Cable & Wireless* Court may be a court of coordinate jurisdiction that this court is not bound to follow, the Court of Appeals' holding in *Astoria Gas* is precedential. In any event, this court does agree with the *Cable & Wireless* Court's well-reasoned holding.

Further, this holding is consistent with the City Legislature's intent. Since plaintiff admits that it does not have a monopoly in New York with respect to local or long distance calling. In an article provided to the court by defendants, Professor Walter Hellerstein explained that the Utility Tax was intended to compensate the public for the unique advantages gained by the monopolistic industries:

The rationale for imposing utility gross receipt taxes upon the telecommunications industry... was essentially the same as the rationale for imposing gross receipt taxes upon utilities in general. The telecommunications industry rapidly developed into a regulated monopoly protected from competition by the state, and special taxes were viewed in part as payment for the public franchise. Special taxation of the telecommunications industry was also justified as recompense for the use of public rights-of-way for telephone and telegraph lines and poles. Telephone companies were often granted the power of eminent domain to build their networks, which provided further justification for subjecting them to special taxes.

Hellerstein & Levine, Utility Gross Receipts Taxes and Interexchange Telecommunications Carriers, 40 Tax Notes 529, 530 (Aug. 1, 1988).

Further, although plaintiff argues that its rates are regulated by the PSC because it filed rate tariffs with the PSC, such regulation is not equivalent to the PSC establishing plaintiff's rates (see i.e. *Astoria Gas, supra*). Indeed, plaintiff admits that although the PSC has the power to suspend a tariff and postpone its implementation, the PSC did not suspend any of plaintiff's tariffs during the years at issue, 2008-2010. As defendants correctly point out, the record reveals that PSC merely oversees plaintiff's rate rather than establishing those rates.

To the extent that plaintiff has identified a number of ways in which the PSC regulates it, the court finds that the PSC's actions amount to mere light regulation which does not qualify as the type of supervision contemplated by Admin Code § 11-1101[6] (see i.e. *Cable & Wireless, supra*).

Accordingly, plaintiff's motion is denied and defendant's cross-motion is granted.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that defendants cross-motion for summary judgment is granted; and it is further

ORDERED that defendants' are entitled to the following declarations:

- [1] Plaintiff is not 'subject to the supervision of the [New York State Public Service Commission ("PSC")] as that phrase is used in the [] Utility Tax;
- [2] Plaintiff is not a 'utility' within the meaning of the Utility Tax; and
- [3] Plaintiff is liable for both the City's Utility Tax and the City's UBT

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: April 25, 2016
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.