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MERCER COUNTY
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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MERCER COUNTY

Docket No. C 132-08

ANNE MILGRAM,
Attorney General of New Jersey,
David Szuchman,
Director of the New Jersey
Division of Consumer Affairs,
and Cheryl Fulmer Acting Director
of the New Jersey Division of Taxation,

Civil Action

Plaintiffs

MOTION DECISION

v.

RED JACKET TOBACCO,
LESLEY A. HOAG, individually,
and as principal and
owner of RED JACKET TOBACCO

Defendants

MARIA M. SYPEK, P.J. Ch.

October 2, 2009

ON THE BRIEFS: Cathy A. Melitski, DAG
Office of the Attorney General on behalf of Plaintiffs

No Submission by Defendants

This matter comes before the Court on Plaintiff's Motion for Final

Judgment by Default filed by the Office of the Attorney General, Anne Milgram, and the Court not receiving any opposition to said motions and having reviewed all documents submitted and for good cause shown the Court makes the following findings:

This matter arises from a complaint filed on October 10, 2008 by Anne Milgram, Attorney General of New Jersey, David Szuchman, Director of the New Jersey Division of Consumer Affairs and Cheryl Fulmer, acting Director of the New Jersey Division of Taxation, ("Plaintiffs") against Red Jacket Tobacco ("Red Jacket") and Lesley A. Hoag ("Ms. Hoag") individually and as principal and owner of Red Jacket (collectively "Defendants") and others for violations of the Cigarette Tax Act, N.J.S.A. 54:40A-1 et. seq.; the Tobacco Product Manufacturers' Responsibility Act ("Responsibility Act"), N.J.S.A. 52:4D et. seq.; the Cigarette Sales Tax Act, N.J.S.A. 54:40A-46A et. seq.; and the New Jersey Consumer Fraud Act ("CFA"), N.J.S.A. 56:8-1 et. seq., as well as its Advertising Regulations, N.J.A.C. 13:45A-9.1 et seq.

On October 14, 2008, the Deputy Attorney General ("DAG"), Cathy A Melitski, served the Summons and Complaint to Defendants by both

certified and regular mail.¹ See Cert. of Cathy A. Melitski, Exh. B. On November 3, 2008, the certified mail packages were returned and marked "Refused",² See id., Exh. B. On November 12, 2008, the DAG filed a Certification of Service with the Court. See id., ¶ 5. Pursuant to R. 4:4-4(b)(1)(C), service to Defendants was effectuated, because the Summons and Complaint were mailed simultaneously by certified mail and by ordinary mail to both Defendants. See id., Exh. B.

Plaintiffs filed its First Amended Complaint against Defendants in this Court on February 20, 2009 containing the same allegations and correcting the spelling of Ms. Hoag's first name from "Leslie" to "Lesley". See Cert. of Cathy A. Melitski, ¶ 6 & Exh. C. On March 3, 2009, the DAG served the First Amended Complaint to Defendants by both certified and regular mail.³ See id., Exh. D. On March 16, 2009, the certified mail packages were returned and marked "Refused".⁴ See id., Exh. A. On March 19, 2009, the DAG filed a Certification of Service of the First Amended Complaint with the Court. See id., ¶ 7 & Exh. D. Pursuant to R. 1:5-4(b), if an addressee refuses to accept delivery of certified mail, service to

¹ There were four packages mailed to Defendants and addressed as follows: (1) Leslie Hoag, P.O. Box 572, Salamanca, NY 14779-1479, (2) Leslie Hoag, 264 River Street, Salamanca NY 14779-1479, (3) Leslie Hoag, Principal of Red Jacket Tobacco, P.O. Box 572, Salamanca, NY 14779-1479, and (4) Leslie Hoag, Principal of Red Jacket Tobacco, 264 River Street, Salamanca NY 14779-1479.

² Plaintiffs failed to include copies of these returned and marked "Refused" packages.

³ There were two packages mailed to Defendants and addressed as follows: (1) Lesley A. Hoag, P.O. Box 572, Salamanca, NY 14779-1479, and (2) Lesley A. Hoag, 264 River Street, Salamanca NY 14779-1479.

⁴ Plaintiffs have included copies of these returned and marked "Refused" packages.

Defendants is deemed complete on mailing of ordinary mail, March 3, 2009.

See id., Exh. D.

On April 3, 2009, Default was entered against Defendants because Defendants failed to answer or otherwise move as to the complaint. See id., Exh. F. Entry of Default is governed by R. 4:43-1. The first requirement for entry of Default is that the defendants must have been served with process so that the court will have personal jurisdiction over those defendants. R. 4:4-4. Additionally, the plaintiff must provide the court with an affidavit reciting the date of service and the time within which the defendants may provide their answer. R. 4:43-1. Last, notice of the motion for Default must be served on the defendants. Id.

The Deputy Attorney General ("DAG"), Cathy A. Melitski, certifies that she caused to be mailed via certified and regular mail to Defendants, Red Jacket Tobacco and Lesley A. Hoag, a copy of the filed entry of default on April 3, 2009. See Cert. of Cathy A. Melitski, ¶ 10. Copies of the April 3, 2009 letters addressed to Defendants are attached to the Certification of Cathy A. Melitski. See id., Exh. F. Based on the above rule the Court is satisfied that default was properly entered.

By way of the present motion Plaintiffs request the entry of Final Judgment by Default seeking permanent injunctive relief, civil penalties,

attorneys' fees, and investigative costs. The Court will now consider the claims asserted by the State of New Jersey.

LIABILITY

The Plaintiffs assert that the Final Judgment by Default should find that Defendants violated the Cigarette Tax Act, N.J.S.A. 54:40A-3. See Cert. of Aziza Salikhov, ¶¶ 1-3. The Cigarette Tax Act requires a person selling cigarettes in New Jersey to obtain the appropriate license. N.J.S.A. 54:40A-3. Plaintiffs assert that Defendants operate an out-of-state mail order cigarette sales business and sold cigarettes to an Investigator posing as a New Jersey consumer on at least two occasions without a license.⁵

In support of the assertion that Defendants operate a mail order cigarette sales business, Plaintiffs state that Defendants sold cigarettes to the Investigator on at least two occasions. The first occasion occurred on June 26, 2008 when the Investigator ordered five (5) cartons of cigarettes (50 packs of 20 cigarettes or 1,000 cigarettes total) from Defendants by calling the number listed on Defendants Money Mailer Advertisement.⁶ See Cert. of Aziza Salikhov, ¶ 29. On or about July 14, 2008, the Investigator

⁵ The New Jersey consumer referred to is an Investigator, Aziza Salikhov, employed by the New Jersey Department of Law and Public Safety, Division of Consumer Affairs ("Division"). The Division began an investigation into Defendants mail order cigarette business after the Attorney General received a money mailer advertisement for Red Jacket Tobacco. See Cert. of Aziza Salikhov, ¶¶ 1-3. Ms. Salikhov is in charge of the investigation.

⁶ Red Jacket Tobacco contracted with Money Mailer to send advertisements to New Jersey consumers through the mail soliciting "TAX FREE CIGARETTES DELIVERED TO YOUR DOOR." See Cert. of Aziza Salikhov, Exh. D.

received the cigarettes she ordered from Defendants. See id., ¶ 39. The second occasion occurred on October 6, 2008 when the Investigator ordered two (2) cartons of cigarettes (20 packs of 20 cigarettes or 400 cigarettes total) from Defendants by calling the same number. See id., ¶¶ 49, 51, & 55 & Exh. K. On October 16, 2008, the Investigator received the cigarettes she ordered from Defendants. See id., ¶ 56. This evidence supports Plaintiffs' assertion that Defendants were operating a mail order cigarette sales business.

Further, Plaintiffs argue that Defendants were operating this mail order cigarette sales business out-of-state and without a license. In support of this, Plaintiffs assert that on or about June 10, 2008, the Investigator searched for different variations of the name "Red Jacket Tobacco" in the New Jersey State Business Gateway Service, Corporate and Business Information Reporting Database of the New Jersey Department of the Treasury by a general business entity name; by associated name; by a UCC debtor name and location; by trade name; and trade name location. See id., ¶ 5. The Investigator's search returned nothing, but the Investigator continued her search to determine whether the Defendants were out-of-state cigarette sellers.

Specifically, on August 20, 2008, the Investigator called the post office in the city and state located on Defendants Money Mailer Advertisement to determine the identity of the PO Box holder.⁷ From this call, the Investigator learned that Lesley A. Hoag of Oxspring Enterprises rented the PO Box. See id., ¶¶ 9-12. Eventually, the Investigator located Lesley Hoag on manta.com. See id., ¶ 13. This website listed “Lesley Hoag” as a principal” of Red Jacket Tobacco, a tobacco company, and also listed “Leslie Hoag” as a contact person on the company profile page. See id., Exh. C. The Investigator began a search using variations of the name “Lesley Hoag”, in the New Jersey State Business Gateway Service, Corporate and Business Information Reporting Database of the New Jersey Department of the Treasury, to see if she was registered as an officer or registered agent of a corporation or a sole proprietor. But, the search returned nothing. See id., ¶ 14. As a result, the Investigator concluded that Defendants were out-of-state cigarette sellers.

Out-of-state cigarette sellers must be a licensed wholesale dealer or licensed distributor to sell cigarettes into New Jersey.⁸ See Cert. of Chief Edward Vrancik, ¶¶ 5-9. The Cigarette Tax Act requires a person selling

⁷ The money mailer lists PO Box 572, Salamonca, NY as the address.

⁸ Chief Edward Vrancik is employed by the New Jersey Department of Treasury, Division of Taxation (“Taxation”) and Chief of the Miscellaneous Tax Branch/Office of Criminal Investigations (“Miscellaneous Tax”) within Taxation. He has been the Chief since August 2008. See id., ¶ 1. As part of his job he oversees the financial audit process on cigarette and tobacco products, retailers, wholesale dealers, and distributors. id. Part of the audit process includes checking whether a business is properly licensed.

cigarettes in New Jersey to obtain the appropriate license. N.J.S.A. 54:40A-3. However, Plaintiffs assert that Defendants sale of these cigarettes was made without the appropriate license. In support of this assertion, Plaintiffs refer the Court to Miscellaneous Tax's records. See id., ¶16. These records demonstrate that Defendants have never applied for a distributor or wholesale dealer license and have never been issued a distributor or wholesale dealer license. See id., ¶¶ 6-13. Yet, Defendants have transacted business in the State of New Jersey on at least two occasions. See Cert. of Aziza Salikhov ¶¶ 35-40, 55-57. Since the Miscellaneous Tax records indicate that Defendants have never applied for and have never been issued a distributor or wholesale dealer license, the Court finds that Defendants sale of these cigarettes was made without a license. Moreover, based on the Certification of Chief Edward Vrancik and the Certification of Investigator Aziza Salikhov, the court finds that Defendants were out-of-state cigarette sellers that sold cigarettes into New Jersey on at least two occasions without a license. Based on the above facts and evidence, it is clear that Defendants made cigarette sales into New Jersey without a license in violation of the Cigarette Tax Act, N.J.S.A. 54:40A-3.

In addition to the Cigarette Tax Act, N.J.S.A. 54:40A-3 Plaintiffs next assert that the Final Judgment by Default should find that Defendants

violated the Responsibility Act, N.J.S.A. 52:4D-8.b. The Responsibility Act, N.J.S.A. 52:4D-1 et seq., requires tobacco product manufacturers to annually certify the cigarette brands they want to sell in New Jersey and all cigarette brands that the Attorney General approves for sale in New Jersey are posted on the New Jersey Attorney General Tobacco Product Manufacturer's Directory ("Directory") on the Internet at http://www.nj.gov/oag/oag_tobacco.html. Moreover, pursuant to N.J.S.A. 52:4D-8.b., it is unlawful for any person to "sell, offer or possess for sale in this State, cigarettes of a tobacco products manufacturer or brand family not included in the directory established pursuant to the Act [the Attorney General Tobacco Manufacturer Directory] (hereinafter, "Directory")."

Plaintiffs state that the Investigators June 26, 2008 and October 6, 2008 orders included cigarettes not listed on the Directory. In support of this assertion, Plaintiffs state that on June 26, 2008, three (3) of the five (5) cartons (30 packs of 20 cigarettes or 600 cigarettes) were for 305's brand cigarettes manufactured by The Dosal Tobacco Corporation and, on October 6, 2008, two (2) cartons (20 packs of 20 cigarettes or 400 cigarettes) were for 305's brand cigarettes manufactured by The Dosal Tobacco Corporation. See Cert. of Aziza Salikhov ¶ 33 & Exh. F. Dosal Tobacco Corporation, the manufacturer of 305's cigarettes, was not listed on the Directory on June

26, 2008, or October 6, 2008. See id. The 305's brand of cigarettes was not listed on the Directory either. Thus, the Court finds that Defendants sold cigarettes not listed on the Directory and, as a result, violated the Responsibility Act, N.J.S.A. 52:4D-8.b.

In addition to the Responsibility Act, N.J.S.A. 52:4D-8.b., and the Cigarette Tax Act, N.J.S.A. 54:40A-3, Plaintiffs next assert that the Final Judgment by Default should find that Defendants violated the Cigarette Sales Act, N.J.S.A. 54:40A-46 et seq. Pursuant to the Cigarette Sales Act, N.J.S.A. 54:40A-46 et seq., a person shall not sell cigarettes into New Jersey unless the sale is a "face-to-face sale", except that a non "face-to-face sale" of cigarettes may occur if the following conditions are met:⁹ the seller (1) has fully complied with all requirements of the Jenkins Act, 15 U.S.C. §375 et seq., (2) verified, collected or paid all applicable State taxes, and (3) verified that the purchaser is at least 19 years old. Defendants' sold cigarettes through the mail on June 26, 2008 and October 6, 2008. See Cert. of Aziza Salikhov ¶¶ 35, 40, 48-50, 57 & Exhs. G & L. Since Defendants' sale of cigarettes to Investigator was a non face-to-face sale, Defendants

⁹ Pursuant to N.J.S.A. 54:40A-48: A 'face to face sale' means a sale in which the purchaser is in the physical presence of the seller or the seller's employee or agent at the time of the sale. A 'face to face sale' does not include any transaction conducted by mail order, the Internet, telephone, or any other anonymous transaction method in which the buyer is not in the seller's physical presence or the physical presence of the seller's employee or agent at the time of the sale.

must comply with the requirements of the Cigarette Sales Act, N.J.S.A.
54:40A-49.

Specifically, Defendants must meet three requirements of the Cigarette
Sales Act, N.J.S.A. 54:40A-49. First, The Cigarette Sales Act, N.J.S.A.
54:40A-49a, requires Defendants to comply with the Jenkins Act, 15 U.S.C.
§376.

The Jenkins Act, 15 U.S.C. §376 states in pertinent part:

Any person who sells or transfers for profit cigarettes in interstate commerce, whereby such cigarettes are shipped into a state taxing the sale or use of cigarettes to other than a State distributor by or located in such State, or who advertises or offers cigarettes for such sale or transfer and shipment, shall—

- (1) first file with the tobacco tax administrator of the State into which such shipment is made or in which such advertisement or offer is disseminated a statement setting forth his name and trade name, and the address of his principal place of business and any other place of business; and
- (2) not later than the 10th of each day of each calendar month, file with the tobacco tax administrator of the State into which such shipment is made, a memorandum or copy of the invoice covering each and every shipment of cigarettes made during the previous calendar month into such state; memorandum or invoice in each case to include the name and address of the person to whom shipment was made, the brand, and the quantity thereof.

Basically, the Jenkins Act, 15 U.S.C. §376, requires anyone selling cigarettes from one State to another to report the sale to the State tobacco tax administrator. In New Jersey, the State tobacco tax administrator is the Department of Treasury, Division of Taxation. See Cert. of Chief Edward Vrancik, ¶ 17. The Miscellaneous Tax/OCI Branch receives the cigarette sales reports filed in connection with the Jenkins Act (Jenkins Act Reports"). See id., ¶¶ 17 & 18. Plaintiffs offer evidence that The Miscellaneous Tax/OCI Branch has not received any Jenkins Act reports from Defendants. See id., ¶¶ 19 & 20. Thus, the Court finds that Defendants have failed to report the sale to the Department of Treasury, Division of Taxation, which is New Jersey's State tobacco tax administrator. As a result, Defendants have failed to comply with the Jenkins Act, 15 U.S.C. §376, and are in violation of Cigarette Sales Act, N.J.S.A. 54:40A-49a.

Third, The Cigarette Sales Act, N.J.S.A. 54:40A-40c, requires Defendants to verify that the purchaser is at least 19 years old.

Second, Plaintiffs assert that Defendants violated the Cigarette Sales Act, N.J.S.A. 54:40A-49b, when Defendants did not charge the Investigator the New Jersey Cigarette tax or New Jersey Sales tax on the June 26, 2008 purchase or the October 6, 2008 purchase. The Cigarette Sales Act, N.J.S.A. 54:40A-49b., requires the seller of cigarettes in a non "face-to-face sale" to

verify, collect or pay all applicable State taxes. Miscellaneous Tax's records indicate that Defendants have not verified or paid applicable taxes pursuant to the Cigarette Sales Act, N.J.S.A. 54:40A-49. See Cert. of Edward Vrancik, 21. See Cert. of Chief Edward Vrancik, ¶¶ 21 & 22. Thus, Defendants have failed to comply with the requirement of the Cigarette Sales Act to verify or pay all applicable State taxes due on cigarettes sold into New Jersey and are in violation of N.J.S.A. 54:40A-49b.

Third, Plaintiffs assert that Defendants violated The Cigarette Sales Act, N.J.S.A. 54:40A-40c, by failing to verify that the purchaser, Investigator, was at least 19 years old. The Cigarette Sales Act, N.J.S.A. 54:40A-40c, requires the seller of cigarettes in a non face-to-face sale to verify that the purchaser is at least 19 years old. In support of this, Plaintiffs state that on June 26, 2008, Defendants did not ask the Investigator her age, or ask the Investigator to verify her address, her date of birth, nor did Defendants request the Investigator to provide a statement under penalty of perjury that Investigator, as the purchaser of cigarettes, was at least 19 years old. See Cert. of Aziza Salikhov, ¶¶ 37 & 38. The Defendants did not ask her to provide a copy of her valid driver's license or other government

issued identification.¹⁰ id. The Plaintiffs also state that on October 6, the Defendants did not ask the Investigator to verify that she was at least 19 years old. See id., ¶¶ 52 & 53. Therefore, the Court finds that on at least two occasions Defendants have failed to comply with the requirement of the Cigarette Sales Act, N.J.S.A. 54:40A-49c, to verify that a purchaser of cigarettes is at least 19 years old.

Overall Defendants made at least two non face-to-face sales of cigarettes but failed to comply with all three conditions of a non face-to-face sale under the Cigarette Sales Act, N.J.S.A. 54:40A-49. Namely, the Defendants violated The Cigarette Sales Act, N.J.S.A. 54:40A-49a, by failing to comply with all requirements of the Jenkins Act, 15 U.S.C. §376, The Cigarette Sales Act, N.J.S.A. 54:40A-49b, by failing to verify, collect or pay all applicable State taxes, and The Cigarette Sales Act, N.J.S.A. 54:40A-40c, by failing to verify that the purchaser is at least 19 years old. As a result, the Court finds that Defendants violated the Cigarette Sales Act, N.J.S.A. 54:40A-46 et seq.

In addition to the Cigarette Sales Act, N.J.S.A. 54:40A-46 et seq.,

¹⁰ The Defendants catalogue provides the following statement "we are required by law to have your ID on file. Please send a legible copy of a Driver's license, I.D. Card, Birth Certificate or Passport showing your name, signature, and date of birth... This I.D. can be mailed to us or you can Fax to 716-945-3291. See Cert. of Aziza Salikhov ¶ 30 & Exh. E.

