Filed 3/28/12 Granados v. County of Los Angeles CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

WILLY GRANADOS, Plaintiff and Appellant, v. COUNTY OF LOS ANGELES, Defendant and Respondent	B200812 (Los Angeles County Super. Ct. No. BC361470)

APPEAL from an order of the Superior Court of Los Angeles County, Anthony J. Mohr, Judge. Reversed in part, affirmed in part.

Wolf Haldenstein Adler Freeman & Herz, Francis M. Gregorek and Rachele R. Rickert; Tostrud Law Group, Jon A. Tostrud; Chimicles & Tikellis, Timothy N. Mathews; Cuneo Gilbert & Laduca and Sandra W. Cuneo for Plaintiff and Appellant.

Jones Day, Elwood Liu, Brian D. Hershman , Brian M. Haffstadt, Katie A. Richardson and Erica L. Reilley for Defendant and Respondent.

INTRODUCTION

In this class action plaintiff Willy Granados challenges the legality of the telephone user tax (TUT) he and other class members paid to the County of Los Angeles (County). Granados appeals an order of dismissal entered after the trial court sustained the County's demurrer to his complaint. We reverse in part and affirm in part.

Before filing a tax refund action the plaintiff must first file a claim containing the information required by Government Code section 910 (section 910). The trial court ruled that Granados could not file a section 910 claim on behalf of the class he purports to represent and, based on that ruling, sustained the County's demurrer to each of the complaint's five causes of action. When the trial court sustained the County's demurrer, however, it did not have the benefit of *Ardon v. City of Los Angeles* (2011) 52 Cal.4th 241 (*Ardon*). Under *Ardon*, Granados can file a class claim for a TUT refund. The County concedes this point.

Granados's complaint, however, does not state sufficient facts to support the fourth cause of action for violation of due process and fifth cause of action for a writ of mandate. These causes of action are based on Granados's assertion that he cannot obtain a clear and certain remedy if the TUT is ultimately found unlawful. Granados concedes that in light of *Ardon*, these causes of action are moot. Accordingly, we affirm the order of dismissal with respect to the fourth and fifth causes of action in the complaint but reverse the order with respect to the remaining causes of action.

FACTS

1. *Allegations in the Complaint*

The complaint alleges the following. Pursuant to Los Angeles County Code section 4.62.060, subdivision (a) the County imposes a five percent TUT on amounts paid for telephone services by persons or entities located in unincorporated areas in the County. The TUT is paid for by service users (taxpayers) and collected by service providers (telephone companies). If a service user refuses to pay the TUT, the County can impose a 25 percent penalty. Granados is a resident of an unincorporated area of the County who has paid and continues to pay the TUT.

Los Angeles County Code section 4.62.060, subdivision (d) excludes from the TUT amounts paid for telephone services exempt from the tax imposed under section 4251 of title 26 of the Internal Revenue Code (Federal Excise Tax). Under numerous federal court decisions and a 2006 Internal Revenue Service notice, the Federal Excise Tax only applies to long distance service charged by time and distance. Today, however, "most long distance telephone service is charged under a postalized fee structure where the amount of the charge depends only upon the amount of elapsed transmission time and not the distance of the call." The Federal Excise Tax and thus the TUT cannot be imposed on such services. The County has nevertheless unlawfully collected and continues to collect the TUT from Granados and other class members on telephone service exempt from the Federal Excise Tax.

Los Angeles County Code section 4.62.190[1] sets forth a means of obtaining a refund of TUT improperly collected. This section provides:

"A. Whenever the amount of any tax has been overpaid or paid more than once or has been erroneously or illegally collected or received by the tax administrator under this chapter, it may be refunded as provided in this section.

"B. Notwithstanding the provisions of subsection A of this section, a *service supplier* may, with prior written approval from the tax administrator, claim a refund or take as credit against taxes collected and remitted the amount overpaid, paid more than once, or erroneously or illegally collected or received when it is established that the service user from whom the tax has been collected did not owe the tax; provided, however, that neither a refund nor a credit shall be allowed unless the amount of the tax so collected has either been refunded to the service user or credited to charges subsequently payable by the service user to the person required to collect and remit. A service supplier that has collected any amount of tax in excess of the amount of tax imposed by this chapter and actually due from a service user, may refund such amount to the service user . . . .

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[1] We quote Los Angeles County Code section 4.62.190 (section 4.62.190) as set forth in the complaint. Section 4.62.190 was amended after the complaint was filed.

"C. No refund shall be paid under the provisions of this section unless the claimant establishes his right thereto by written records showing entitlement thereto." (Italics added.)

This refund provision does not provide a mechanism for an individual service user (i.e., taxpayer) to seek a refund of illegally collected TUT. Further, under section 799 of the Public Utilities Code, taxpayers cannot require service providers to seek refunds on their behalf.

On August 25, 2006, Granados sent a letter to the County demanding on his own behalf and on behalf of similarly situated taxpayers a refund of the TUT improperly collected and a cessation of improper collection of the TUT. The County did not respond to this claim.

Based on these allegations, the complaint sets forth five causes of action. The first cause of action is for declaratory and injunctive relief preventing further collection of the TUT.

The second cause of action is for money had and received and the third cause of action is for unjust enrichment. In these causes of action, Granados seeks a refund of improperly collected TUT on his own behalf and on behalf of all members of the class.

The fourth cause of action is for violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The complaint alleges that because the County "provides neither an adequate pre-deprivation nor post-deprivation relief" to taxpayers for unlawfully collected taxes, the County has violated the due process rights of Granados and all class members.

Finally, the fifth cause of action is for a writ of mandate. The complaint alleges the County "is obligated, but has failed, to provide adequate pre-deprivation or post-deprivation remedies for the illegal collection of the [TUT]." Plaintiff seeks a writ of mandate requiring the County to provide an adequate remedy.

2. *Procedural History*

On November 6, 2006, Granados filed his complaint against the County. The County demurred to the complaint on January 3, 2007.

In its memorandum in support of the demurrer, the County argued the complaint failed to state facts sufficient to constitute a cause of action for four reasons. First, the County argued that Granados could not assert a pre-lawsuit claim with the County on behalf of the entire class and thus the class claims are barred due to plaintiffs' failure to exhaust administrative remedies.

The County's second argument was that the complaint states no cause of action in equity because a refund suit is an adequate remedy at law.

Next, the County argued the fourth and fifth causes of action failed because the County was not required to provide a pre-deprivation remedy and Granados had an adequate post-deprivation remedy, namely a refund suit.

Finally, the County argued the complaint failed to state a cause of action because the TUT was not unlawful.

On April 13, 2007, the trial court sustained the demurrer with 60 days leave to amend. The transcript of the hearing on demurrer indicates the trial court sustained the demurrer mainly on the ground that Granados could not file a pre-lawsuit claim on behalf of the class. The court, however, rejected the County's argument that equitable relief was unavailable on the ground that declaratory relief was available if the TUT was indeed unlawful.

On May 8, 2007, the trial court held a hearing on an ex parte application filed by Granados. At that hearing Granados's counsel stated that Granados would not amend his complaint before the expiration of the 60-day period granted by the court.

On June 12, 2007, the trial court entered an order of dismissal prepared by the Granados's counsel. Granados filed a timely appeal of the June 12, 2007, order of dismissal.

On August 20, 2008, after the parties filed their briefs in this court, we stayed the appeal pending the resolution of the *Ardon* case in the California Supreme Court. The *Ardon* opinion was published on July 25, 2011.

On August 26, 2011, we lifted the stay and requested additional briefing regarding the affect of *Ardon*, if any, on the issues in this case. Both parties responded by filing additional briefs, which we have considered.

DISCUSSION

1. *Standard of Review*

We review the complaint de novo to determine whether it alleges facts stating a cause of action under any legal theory. (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43.) We assume all of the facts alleged in the complaint are true and make all reasonable inferences from those facts in favor of plaintiff. (*Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 883; *Kruss v. Booth* (2010) 185 Cal.App.4th 699, 713.) "However, the assumption of truth does not apply to contentions, deductions, or conclusions of law and fact." (*C.R. v. Tenet Healthcare Corp.* (2009) 169 Cal.App.4th 1094, 1102.)

2. *Under Ardon, Granados Can File a Section 910 Class Claim*

The California Supreme Court held in *Ardon* that a taxpayer can file a section 910 class claim against a municipal governmental entity for a refund of local taxes. (*Ardon, supra*, 52 Cal.4th at p. 245.) In its supplemental brief, the County conceded that "the lower court's decision concluding otherwise must be reversed . . . ."

The County also stated in its supplemental brief that "two other points warrant mention." The first is that the County amended its code in 2007 and that under this amended code there are very specific requirements for asserting a class claim. We do not express an opinion regarding the 2007 amendment because the County does not contend Granados's claim was governed by that amendment.

The County also argued that "because the class claim issue was the only basis on which the trial court sustained the demurrer below, any of [Granados's] arguments beyond that issue were not considered by the trial court and should not be considered here." Granados asks this court to rule on the County's argument in the trial court that the TUT was lawful.

We decline to address the issue of whether the TUT was lawful for two reasons. First, the trial court did not specifically address the issue. Second, the County has not pursued that argument on appeal and has offered no briefing on the issue.

3. *The Complaint Does Not State Sufficient Facts to Support the Fourth and Fifth Causes of Action*

At oral argument plaintiff conceded that his fourth cause of action for violation of due process and fifth cause of action for a writ of mandate are moot because plaintiff has an adequate "post-deprivation" remedy in light of *Ardon*, namely a class claim for a tax refund.[2] The trial court therefore correctly sustained the County's demurrer to these causes of action.

[2] The fourth and fifth causes of action are based on *McKesson Corp. v. Florida Alcohol & Tobacco, Div.* (1990) 496 U.S. 18.

DISPOSITION

The order of dismissal dated June 12, 2007, is reversed with respect to the first, second, and third causes of action of the complaint, and affirmed with respect to the fourth and fifth causes of action of the complaint. In the interests of justice, both parties shall bear their own costs on appeal.

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KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.