

COMMONWEALTH OF PENNSYLVANIA

PATRICK J. MCGINNIS : BEFORE THE BOARD OF CLAIMS
VS. :
COMMONWEALTH OF PENNSYLVANIA, :
PENNSYLVANIA LIQUOR CONTROL BOARD: DOCKET NO. 4153

OPINION

On October 18, 2016, Plaintiff, Patrick J. McGinnis ("Mr. McGinnis"), filed a complaint against Defendant, Commonwealth of Pennsylvania, Pennsylvania Liquor Control Board ("PLCB"). On November 7, 2016, the PLCB filed preliminary objections and a motion to strike. On December 2, 2016, Plaintiff filed a response opposing the preliminary objections and the motion, and on December 12, 2016, the PLCB filed a reply brief. The matter is ready for decision.

Factual and Procedural Background

Plaintiff's Complaint alleges four counts for breach of contract related to his attempt to purchase wine from the PLCB via the internet. In each count he alleges that, on May 2, 2016, the PLCB made offers to him to purchase bottles of specific wines which he accepted by purchasing quantities of these wines in four separate online transactions.1 Plaintiff alleges he paid a total of \$5,768.73 and that enforceable contracts were created for each of his four purchases.

1 The wines he alleges he purchased and the amounts he paid in each transaction are:

- Count 1 2 bottles of Chateau Leoville Las Casas St. Julien (2009) @ \$ 58/ bottle
2 bottles of Chateau Lafite Rothschild Pauillac (2009) @ \$ 248.01/ bottle
Total with taxes: \$664.64
Count 2 12 bottles of Heitz Wine Cellars Marthas Vineyard Cabernet @ \$24/ bottle
Total with taxes: \$329.66
Count 3 12 bottles of Chateau Lafite Rothschild Pauillac (2009) @ \$248.01/ bottle
Total with taxes: \$3,179.07
Count 4 6 bottles of Chateau Lafite Rothschild Pauillac (2009) @ \$248.01/ bottle
Total with taxes: \$1,595.36

Subsequently, the PLCB notified him that it would not deliver the wine. Plaintiff alleges this action constituted a breach of the contracts and asks that the PLCB be required to either specifically perform the alleged contracts, or pay him damages to place him in the same position as if the contracts had been fully performed. Plaintiff also asks for an award of his attorney fees and costs.

The PLCB has filed four preliminary objections and a motion to strike challenging the Board's subject matter jurisdiction over the matter, asserting demurrers for failure to state legally cognizable claims, and opposing Plaintiff's request for attorney fees and costs. The motion to strike is made on the same bases. Plaintiff opposes the preliminary objections and motion, except for the PLCB's assertion that Plaintiff is not entitled to attorney fees and costs. Plaintiff concedes that the PLCB is correct on the latter issue because he has not alleged bad faith or vexatious conduct by the PLCB and agrees to withdraw these claims from his complaint. P's Resp. ¶¶ 70-74; P's Br. p. 12.

### **Legal Standard**

Under Rule 1028(a)(1), a preliminary objection may be filed on the grounds of "lack of jurisdiction over the subject matter of the action." Pa. R.C.P. 1028(a)(1). The defendant has the burden of supporting its objection to the court's jurisdiction with facts and legal argument. See Schmitt v. Seaspray-Sharkline, Inc., 531 A.2d 801, 803 (Pa. Super. 1987). Once the jurisdictional issue is properly raised, the burden of proving jurisdiction is upon the party asserting it (namely plaintiff). Deyarmin v. CONRAIL, 931 A.2d 1 (Pa. Super. 2007). When a preliminary objection raises the jurisdictional issue, "the trial court's function is to determine whether the law will bar recovery due to a lack of subject matter jurisdiction." Arbor Res. L.L.C. v. Nockamixon Twp., 973 A.2d 1036, 1042 (Pa. Cmwlth. 2009).

Under Pa. R.C.P. 1028(a)(4), a preliminary objection may challenge a pleading on the grounds of legal insufficiency (demurrer). It is well-settled that the adequacy of the pleading is measured by whether or not the pleading fully notifies the adverse party of the issues to be raised at trial. Weiss v. Equibank, 460 A.2d 271 (Pa. Super. 1983). In ruling on a demurrer, the Board must accept as true all well-pleaded material allegations, as well as the inferences reasonably deducible therefrom. Podolak v. Tobyhanna Twp. Bd. of Supervisors, 37 A.3d 1283 (Pa. Cmwlth. 2012). A demurrer will not be sustained unless the Board finds that on the face of the complaint the law states with certainty that no recovery would be possible. Id.; Cohen v. City of Phila., 806 A.2d 905 (Pa. Cmwlth. 2002). Any doubts are to be resolved against sustaining the demurrer. Id. However, in ruling on a demurrer, it is not necessary to accept averments in a complaint that conflict with an exhibit, or to admit averments in a complaint that conflict with the parties' contract. Framlau Corp. v. County of Delaware, 299 A.2d 335 (Pa. Super. 1972); Roban Constr., Inc. v. Housing Authority of Hazleton, 67 Pa. D. & C.2d 130 (C.C.P. 1974).

### **Discussion**

The PLCB's three contested preliminary objections are made on different grounds. First, PLCB argues that the Board lacks subject matter jurisdiction over Mr. McGinnis's claims because his alleged contracts are specifically excluded by 62 Pa. C.S. § 103 from the Board's jurisdiction and because he fails to allege that he complied with 62 Pa. C.S. § 1712.1 by filing an administrative claim with the contracting officer. One PLCB demurrer is based on the PLCB's argument that it is protected by sovereign immunity because, under section 1702 of the Procurement Code, the Legislature has not waived sovereign immunity for claims arising from contracts relating to "alcoholic beverages or liquor purchased for resale by the [PLCB]." 62 Pa. C. S. § 103. In another

demurrer, the PLCB argues that Plaintiff failed to establish any right to specific performance of the contract because the Board of Claims has no power to grant nonmonetary relief.

### **A. Subject Matter Jurisdiction**

Plaintiff relies on Section 1724(a)(1) of the Procurement Code, 62 Pa. C.S. § 1724(a)(1), as the statute supporting his position that the Board has subject matter jurisdiction over his breach of contract claims. P. Br. p. 2. The PLCB contends that Plaintiff cannot satisfy the prerequisites of this provision because of the definitions contained in other related sections of the Procurement Code.

Defendant PLCB argues that the Plaintiff's contract claims are not within the Board's jurisdiction because they are expressly excluded from contracts subject to the Procurement Code (and Board jurisdiction) by reason of the definitions in Section 103. Specifically, the PLCB argues that the only possible category of "contract" asserted by Plaintiff that might fall within that term as it is used in Section 102(b) of the Procurement Code outlining Procurement Code coverage and in Section 1724 of the Code (delineating Board jurisdiction) would be contracts "for disposal of supplies" by a Commonwealth agency. However, the PLCB asserts, the plain meaning of the definition of "supplies" per Section 103 of the Procurement Code states that "alcoholic beverages purchased for resale by the [PLCB]" and subsequently sold to customers are explicitly and unambiguously excluded from the "supplies" subject to the Procurement Code. Accordingly, the PLCB's position is that any contracts involving a retail customer's purchase of wine which the PLCB had previously purchased for resale from its suppliers/distributors fall outside the scope of the Procurement Code and the Board's jurisdiction.

Plaintiff disagrees with the PLCB's interpretation of the definition of "supplies" in Section 103. He reads the provision as saying that the term "supplies" specifically excludes only the

transactions where alcoholic beverages are purchased by the PLCB for resale and insists that the provision is silent with respect to subsequent transactions such as occurs when the PLCB later sells such beverages to a retail customer.

In support of his position, Plaintiff presents a discussion of the meanings of “resale” and “sale”; notes that no definition for “resale” is found in the Procurement Code [62 Pa. C.S. §103], the Liquor Code [47 P.S. § 1-102], or the Statutory Construction Act [1 Pa. S.C. § 1991]; argues that this failure to define the latter term means that the Board must read the term “sale” and “resale” differently; and claims the transactions between the PLCB and its retail customers are “sales” not “resales” and are not instances where liquor is being “purchased for resale” by the PLCB. For these reasons, Plaintiff argues his purchases are not explicitly excluded from the definition of supplies so are, therefore, within Procurement Code coverage and Board jurisdiction. P. Br. pp. 4-5. Plaintiff also points out that the complaint’s allegations and exhibits show that the PLCB levied a 6% sales tax on Plaintiff’s purchases. Cmpl. ¶¶ 11, 17, 29, 38; Exs. 2-5. He argues that because the Tax Code provides that purchases for “resale” are always excluded from sales and/or use tax (while transactions for retail “sales” are charged tax), that if the Board were to find that Plaintiff’s transactions involved a resale, then the PLCB would need to refund the sales tax to any person who paid it on the purchase of alcohol. 72 Pa. C.S. § 7201; P. Br. pp. 5-6. Plaintiff’s reading would mean that contracts between wholesalers and the PLCB would fall outside the “property” defined as “supplies” and would not be within Board jurisdiction, while contracts between the PLCB and retail customers, such as the one at bar, would fall under the Procurement Code and within Board jurisdiction.

In deciding this matter, we note that the Board of Claims has adjudicated cases over the years where the PLCB has been the defendant in a breach of contract action. However this is the

first instance of which we are aware involving a claim by a retail customer of the PLCB. Accordingly, the case at bar is one of first impression.

Section 1724(a)(1) grants the Board exclusive jurisdiction to arbitrate claims arising from “[a] **contract** entered into by a Commonwealth agency in accordance with [the Procurement Code] and filed with the board in accordance with section 1712.1 (relating to contract controversies).” 62 Pa. C.S. § 1724(a)(1) (emphasis added). Section 103 of the Procurement Code defines a “contract” to be:

Contract.- A type of written agreement, regardless of what it may be called, for the procurement or **disposal of supplies**, services or construction and executed by all parties in accordance with the act of October 15, 11980 (P.L. 950, No. 164), known as the Commonwealth Attorneys Act.”

62 Pa. C.S. § 103 (emphasis added).

Section 102(b) of the Procurement Code also provides that “This part applies to the disposal of **supplies** of Commonwealth agencies.” 62 Pa. C.S. § 102(b) (emphasis added). Most importantly for this case is the definition of “supplies” found in Section 103 of the Procurement Code:

Supplies.- **Any property**, including but not limited to, equipment, materials, printing, insurance and leases of and installment purchases of tangible or intangible personal property. **The term does not include** real property, leases of real property or **alcoholic beverages or liquor purchased for resale by the Pennsylvania Liquor Control Board.**

62 Pa. C.S. § 103 (emphasis added).

We agree with both parties that the key to resolving this dispute over Board jurisdiction lies with how one reads the definition of “supplies” as put forth in Section 103. Defendant, PLCB, reads the definition to identify the type of property that is included within or excluded from the term “supplies” as used in the Procurement Code. Plaintiff, Mr. McGinnis, on the other hand, wishes the Board to read Section 103 as identifying the type of transaction which is to be excluded from the definition of “supplies” as used in the Procurement Code. That is to say, Plaintiff’s

definition of “supplies” specifically excludes only the PLCB’s actual purchase of the alcoholic beverages that it intends to resell but does not exclude this same property (i.e. the alcoholic beverages) from the term “supplies” when they are subsequently sold by the PLCB. We believe the PLCB has the better argument and makes the correct reading of the definition at issue.

Frankly, we find no lack of clarity or ambiguity in the definition of “supplies” in Section 103. The provision states that “supplies” are “[a]ny property including but not limited to, equipment, materials, printing, insurance, leases of ... tangible or intangible personal property [but] does not include ... real property, leases of real property or alcoholic beverages or liquor purchased for resale by the Pennsylvania Liquor Control Board.” In our view, this definitional provision, without exception, identifies the type of property which can and can’t be considered “supplies” for the purpose of subsequent Procurement Code provisions not the type of transaction. Thus, we understand that once any alcoholic beverages are purchased for resale by the PLCB they are no longer to be considered the type of property included in “supplies” subject to the Procurement Code and retain this quality when later sold to retail customers like Plaintiff.

Plaintiff’s argument that focuses only on the transaction of selling the alcoholic beverage, rather than on the type of property being sold simply ignores the context and plain sense of the provision and disregards the fact that these alcoholic beverages have already been excluded from the definition of “supplies” when first purchased for resale by the PLCB.<sup>2</sup> Plaintiff’s alleged contracts for his purchase of wine from the PLCB are not “contracts” within the Board’s

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<sup>2</sup> Clearly, the PLCB is not an original producer of alcoholic beverages so all the alcoholic beverages it sells to retail customers are alcoholic beverages it originally purchased for resale. See e.g. 47 P.S. §§ 4-406, 4-442.

jurisdiction.<sup>3</sup>

### **B. Other Preliminary Objections**

Because we have determined that the Board lacks subject matter jurisdiction to hear this case, we do not address the remaining preliminary objections or the motion to strike. The complaint is dismissed with prejudice.

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<sup>3</sup> The Plaintiff's reliance on the Tax Reform Code of 1971 to support his attempt to distinguish the term "sale" from "resale" is misplaced for much the same reason as his faulty interpretation of the "supplies" definition. That is to say, the Tax Reform Code of 1971 (Pennsylvania's sales and use tax code) is primarily focused on identifying taxable transactions so the terms "sale" and "resale" in the tax code are used for a different purpose than in the provision here at issue.

**ORDER**

**AND NOW**, this 29<sup>th</sup> day of December, 2016, upon consideration of the preliminary objections and motion to strike filed by the Defendant and the opposition thereto filed by the Plaintiff, it is **ORDERED** and **DECREED** that the preliminary objection for lack of subject matter jurisdiction is **SUSTAINED**. The complaint is **DISMISSED WITH PREJUDICE**.

BOARD OF CLAIMS

ORDER SIGNED

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Jeffrey F. Smith  
Chief Administrative Judge