


RECEIVED

OCT 19 2017

SC Court of Appeals

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II
CIVIL ACTION NO. 16-CI-1075

Opinion and Order
16-CI-1075

ENTERED 
SEP 11 2017
FRANKLIN CIRCUIT COURT AMY FELDMAN, CLERK

DEPARTMENT OF REVENUE, FINANCE
and ADMINISTRATION CABINET,
COMMONWEALTH OF KENTUCKY

PETITIONER

v.

OPINION AND ORDER

RENT-A-CENTER EAST, INC. and
RENT-WAY, INC.

RESPONDENTS

This matter is before the Court on a Cross-Motions for Summary Judgment. At issue in this case is whether the Respondents' optional Waiver Agreement is subject to the Commonwealth's sales and use taxes. The parties fully briefed the issues, and the Court then took the case under submission. Upon review of the record and parties' pleadings, and after being sufficiently advised, the Court hereby **GRANTS** Respondents' Motion for Summary Judgment and **DENIES** Petitioner's Motion for Summary Judgment, for reasons more fully detailed below.

BACKGROUND

Respondents Rent-A-Center East, Inc. and Rent-Way, Inc.¹ (Rent-A-Center) are "rent to own" companies based in Texas and operating in the Commonwealth. Rent-A-Center rents and sells furniture, appliances, electronics, and various other household goods to consumers. In order for a customer to rent property from Rent-A-Center, the customer must execute a Rental Purchase Agreement (Rental Agreement) and pay a Rental Purchase Fee (Rental Fee) in weekly installments. The Rental Fee includes the delivery, installation, and incidental costs required for

¹ Rent-Way, Inc. was acquired by Rent-A-Center East, Inc. in 2006 and the companies merged in 2009.

the rental property. A customer typically pays the Rental Fee on a weekly basis until the terms of the terms of the Rental Agreement are fulfilled. The terms of the Rental Agreement render the customer liable for the fair market value of the rental property if it is lost, stolen, damaged, or destroyed during the course of the Rental Agreement. The customer must pay the initial Rental Fee when the Rental Agreement is executed. Rent-A-Center remits sales tax on the entire amount of the transaction.

Rent-A-Center offers customers the opportunity to purchase a Waiver Agreement (Waiver) as a supplement to the Rental Agreement. The Kentucky Rental Purchase Act, codified as KRS 367, requires waiver agreements to be separate and optional to the rental purchase agreements. Rent-A-Center's Waiver does not act as insurance for rental property; instead it waives a customer's liability for any damage, destruction, or loss of the property through lightning, fire, smoke, wind, flood, or theft. The customer's choice to execute a Waiver does not alter the parties' property rights contained in the Rental Agreement. The Waiver does not limit or expand the customer's right to use and enjoyment of the property, entitle the customer to replacement property if loss occurs, or entitle the customer to repairs if the property is damaged. The only consideration a customer receives for executing the Waiver is a promise from Rent-A-Center to release the customer's liability, in certain circumstances, for damaged and lost property.

Like the Rental Agreement, the customer pays a weekly fee for the Waiver. Although Rent-A-Center offers the Waiver when the Rental Agreement is executed, a Waiver is not necessary to complete the transaction. A customer may execute or terminate the Waiver at any point during the course of the Rental Agreement without notice. Rent-A-Center lists Waiver Fees

as an additional and separate charge on customers' receipts and accounts for the Waiver in a separate account from the Rental Agreements.

The Rental Agreement allows customers to acquire ownership of rental property after paying a specified number of weekly Rental Fees. Rent-A-Center also allows customers to purchase rental property outright, within 90 days of the Rental Agreement's execution, for the stated purchase value of the property, less any Rental Fees already paid during the course of the Rental Agreement. In either purchasing scenario, Rent-A-Center does not apply Waiver Fees to the purchase price.

The Department issued an audit of Rent-A-Center which resulted in an assessment of additional sales and use tax owed, pursuant to KRS 139.200, for Rent-A-Center's failure to include Waiver Fees in its taxable gross receipts. Following a protest conference between the parties, the Department issued a Final Ruling upholding its assessments. Rent-A-Center appealed to the Kentucky Board of Tax Appeals and the Board issued its Final Order on September 6, 2016, stating the waiver fees are not subject to sales taxation. The Department now appeals the Board's Final Order.

STANDARD OF REVIEW

Summary Judgment is appropriate when the court concludes there is no genuine issue of material fact for which the law provides relief. CR 56.03. Summary judgment should only be granted when the facts indicate that the nonmoving party cannot produce evidence at trial that would render a favorable judgment. *Steelevest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (1991). The record must be viewed in light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in that party's favor. *Id.* "Summary judgment is proper when it is manifest that the party against whom the judgment is sought cannot

strengthen his own case at a trial and the moving party would be entitled ultimately and inevitably to a directed verdict." *American Inc., Co. v. Horton*, 401 S.W.2d 758, 760-61 (Ky. 1966). In this analysis, "the focus should be on what is of record rather than what might be presented at trial." *Welch v. Am. Publ'g Co. of Ky.*, 3 S.W.3d 724, 730 (Ky. 1999).

DISCUSSION

The General Assembly has not enacted specific legislation to impose a sales tax on intangibles and additional services. KRS 139.200(1)(a) imposes a sales tax upon "all retailers at the rate of six percent of the gross receipts derived from retail sales of tangible personal property." Tangible personal property is defined in KRS 139.010(33) as "personal property which may be seen, weighed, measured, felt, or touched, or which is any other manner perceptible to the senses and includes natural, artificial, and mixed gas, electricity, water, steam, and prewritten computer software." Gross receipts are defined by KRS 139.010(12) to mean:

The total amount or consideration, including cash, credit, property, and services, for which tangible personal property, digital property, or services are sold, leased, or rented, valued in money, whether received in money or otherwise, without any deduction for any of the following:

1. The retailer's cost of the tangible personal property or digital property sold;
2. The cost of the materials used, labor or service cost, interest, losses, all costs of transportation to the retailer, all taxes imposed on the retailer, or any other expense of the retailer;
3. Charges by the retailer for any services necessary to complete the sale;
4. Delivery charges, which are defined as charges by the retailer for the preparation and delivery to a location designated by the purchaser including transportation, shipping, postage, handling, crating, and packing; and
5. Any amount for which credit is given to the purchaser by the retailer, other than credit for tangible personal property or digital property traded when the tangible personal property or digital property traded is of like kind and character to the property purchased and the property traded is held by the retailer for resale.

Whether a customer can, or must, obtain a Waiver with his Rental Agreement is the dispositive issue of this case. For the Waiver to be inseparable from the Rental Agreement, the

customer would not be able to obtain the tangible personal property without execution of the Waiver.

The Department concedes that the Waiver is not tangible personal property. A customer who executes the Waiver creates an intangible right, Rent-A-Center's promise to not pursue legal action in certain situations. The Department takes the position that, although the waiver is an intangible not normally subject to sales and use taxation, payment of the Waiver Fee is a charge necessary to complete the transaction of the tangible personal property, rendering the Waiver taxable as a gross receipt. This Court disagrees. Rent-A-Center is statutorily proscribed, by KRS 367, from requiring a Waiver to complete a Rental Agreement. The Rental Fee is unaffected at all times by the customer's choice whether to execute or decline a Waiver. The Rental Fee includes all the charges under 139.010(12)(2) necessary to complete the sale of rental property to the renter. Even if, as the Department states, approximately eighty-five percent of customers opt into the Waiver with their purchase of rental property, approximately fifteen percent are able to obtain their rental property without the Waiver.

This Court is unconvinced by the Department's "plain language" reading of the Waiver Agreement as a provision of the Rental Agreement. The Waiver may be signed when a customer enters into a Rental Agreement and fees for each agreement may be paid on the same schedule, but the two agreements are not inextricably linked. The Waiver does not interfere with a customer's right to possession or use of his rental property and at no time contributes to the payment of rental property. If the customer damages or loses the rental property, he does not receive a replacement. Executing a waiver entitles the customer to a single consideration from Rent-A-Center, that, if rental property is damaged or lost in certain scenarios, Rent-A-Center will waive claims it might otherwise have available against the customer.

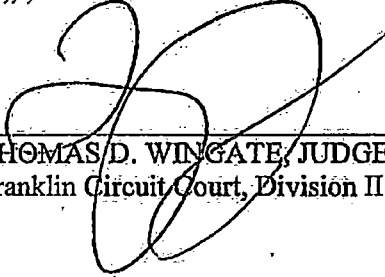
In its Final Order, the Board noted that tax imposition statutes must be narrowly construed. This Court agrees. The Waiver, an intangible right paid separately from the Rental Agreement, is not subject to sales and use taxation.

CONCLUSION

WHEREFORE, after being sufficiently advised, the Court hereby **GRANTS** Respondents' Motion for Summary Judgment and **DENIES** Petitioner's Motion for Summary Judgment. There is no genuine issue of material fact that Rent-A-Center's Waiver is not tangible property, nor is it necessary to complete the transaction of tangible personal property. The Waiver is not subject to sales and use taxation and the Final Order of the Kentucky Board of Tax Appeals is upheld.

This is a final and appealable judgment and there is no just cause for delay.

So **ORDERED** this the 8th day of September, 1k;;1, 2017.



THOMAS D. WINGATE, JUDGE
Franklin Circuit Court, Division II

CERTIFICATE OF SERVICE

11th I hereby certify that a true and correct copy of the foregoing Order was mailed, this day of September, 2017, to the following:

Hon. Mark F. Sommer
Hon. Jennifer Y. Brown
400 West Market Street, 32nd Floor
Louisville, Kentucky 40202

Hon. Richard W. Bertelson, III
PO Box 423
Frankfort, Kentucky 40602


Amy Feldman, Franklin County Circuit Court Clerk

Bryson M. Geer
(Admitted in NC & SC)
T 843.534.4306
bryson.geer@nelsonmullins.com

151 Meeting Street | Sixth Floor
Charleston, SC 29401-2239
T 843.853.5200 F 843.722.8700
nelsonmullins.com

October 17, 2017

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1220 Senate Street
Columbia, SC 29201

RECEIVED
OCT 19 2017
SC Court of Appeals

RE: Rent-A-Center East, Inc., and Rent Way, Inc., Appellants v. South Carolina
Department of Revenue, Respondent.
SC Appellate No.: 2016-001210
Our File No. 17856/09003

Dear Ms. Kitchings:

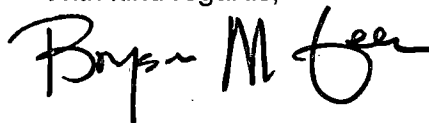
Pursuant to Rule 208(b)(7) of the South Carolina Appellate Court Rules, Appellants Rent-A-Center East, Inc. and Rent-Way, Inc. (collectively "Appellants") hereby notify the Court of a pertinent and significant authority that has been issued since briefing was completed in the above-referenced case:

Ky Dept. of Rev. v. Rent-A-Center East, Inc. and Rent-Way, Inc., Op. no. 16-CI-1075 (Ky Cir. Ct. Sept. 11, 2017), *appeal filed*, October 10, 2017.

Appellants respectfully request that this case supplement its Final Brief regarding the discussion at pp. 26-28 on whether the Waiver of liability is subject to sales tax.

By copy of this letter, we are serving opposing counsel with a copy of this decision, and as a convenience to the Court, we are enclosing five copies of it. We appreciate the Court's consideration of this matter.

With kind regards,



Bryson M. Geer

BMG:gh
Enclosure

cc: Sean G. Ryan, Esq.
Lauren Acquaviva, Esq.

The Honorable Jenny Abbott Kitchings
October 17, 2017
Page 2

bcc: Hugh L. Tollack, II (hugh.tollack@rentacenter.com)

Hasler

FIRST-CLASS MAIL

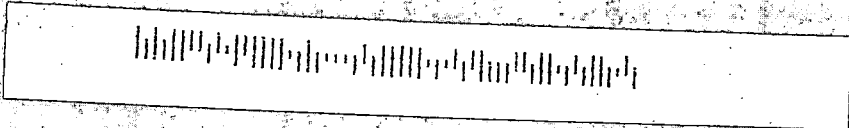
10/17/2017

US POSTAGE

\$02.24⁰



ZIP 29401
011D11645519



NELSON MULLINS

Post Office Box 1806
Charleston, SC 29402-1806

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

17856/09003

RECEIVED
OCT 19 2017
SC Court of Appeals