

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

DECISION AND ORDER
02-CV-437A

1,920,000 CIGARETTES,
720,000 CIGARETTES, and
720,000 CIGARETTES,

Defendants.

INTRODUCTION

On June 14, 2002, the government filed the instant civil action *in rem* for forfeiture of 1,920,000 cigarettes, 720,000 cigarettes, and 720,000 cigarettes. The government alleges that the defendant cigarettes are subject to seizure and forfeiture pursuant to the Contraband Cigarette Trafficking Act ("CCTA"), 18 U.S.C. § 2341 et seq., and 18 U.S.C. § 981(a)(1)(C), because they are contraband as defined under the CCTA, and because they are traceable to the proceeds of a wire fraud scheme to defraud states out of cigarette excise tax revenue, in violation of 18 U.S.C. § 1343.

Currently before the Court is a motion to dismiss the complaint, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, brought on behalf of claimants Joyce B. Burns, on behalf of Rancho Equities, LLC ("Rancho

Equities”), Teresa S. Dean and Emery Williams. For the reasons stated herein, the claimants’ motion to dismiss is denied.

BACKGROUND¹

On April 5, 2002, Special Agent (“SA”) John Murnan of the Bureau of Alcohol, Tobacco and Firearms spoke to representatives of American Freightways and Overnight Transportation Company (“Overnight Transportation”)², who informed him that they had questionable shipments of cigarettes at their loading docks, which, if illegal, they would refuse to transport and deliver. The cigarettes were destined for the Ojibwas Trading Post (“OTP”), 1358 Cayuga Road, Irving, New York.³ SA Murnan went to the business premises of both companies and personally inspected the shipments of cigarettes, which were both in excess of 60,000 cigarettes. SA Murnan observed

¹ The following facts are taken from the verified complaint of forfeiture.

² Although not alleged in the complaint, it appears to be undisputed that American Freightways and Overnight Transportation are both located in Tonawanda, New York.

³ Although not alleged in the complaint, it appears undisputed that OTP is located on the Cattaraugus Indian Reservation, Seneca Nation of Indians. Claimants allege that the defendant cigarettes were purchased by Rancho Equities, a Rancho Santa Fe, California company, and that Rancho Equities is the owner of OTP. Claimant Joyce B. Burns claims to be the controlling member of Rancho Equities. Her husband, Richard Burns, is the Chief Executive Officer and manager of Rancho Equities. Mrs. Burns’ daughter, claimant Teresa Dean, claims to be the manager/operator of OTP and the consignee of the defendant cigarettes. Both Mrs. Burns and Teresa Dean claim to be Native Americans and enrolled members of the Lac Courts Band of Lake Superior Chippewa Indians of Wisconsin. Claimant Emery Williams claims to be part owner of OTP. He also claims to be Native American and an enrolled member of the Seneca Nation of Indians.

that neither shipment had applicable New York State tax indicia, *i.e.*, a New York tax stamp, on the cigarettes, and that the shipment received by Overnight Transportation bore Virginia tax indicia on the cigarettes. SA Murnan and New York State Tax Department Investigator Patrick Simet then caused checks of the New York State Tax Department records to be conducted to determine if OTP or other persons or entities associated with OTP, including Richard Burns, Joyce Burns, Teresa Dean, Emery Williams and Rancho Equities, had either applied for or received any licenses from the State of New York that would have allowed them to possess unstamped cigarettes. The checks revealed that none of these persons, or entities associated with them, had either applied for or received any license from the State of New York that would have allowed them to possess unstamped cigarettes. Later that day, the government applied for and was issued a federal seizure warrant by the Hon. H. Kenneth Schroeder, Jr., United States Magistrate Judge, for the seizure of 1,920,000 cigarettes and 720,000 cigarettes.

On April 8, 2002, SA Murnan spoke to the manager of Overnight Transportation, who told Murnan that his company had received another shipment of "illegal" cigarettes and that it was refusing to transport the shipment. SA Murnan visited the premises of Overnight Transportation and observed that none of the 60 cases of cigarettes had applicable New York State tax indicia affixed to them. That same day, the government applied for and was issued a

federal seizure warrant by Magistrate Judge Schroeder for the seizure of an additional 720,000 cigarettes.

The complaint also alleges that the defendant cigarettes were purchased with proceeds traceable to a wire fraud scheme that defrauded various states of cigarette excise tax revenue. More specifically, the government alleges that OTP sold cigarettes over the Internet without paying the applicable state excise taxes and without notifying the appropriate state taxation authorities, as required under the Jenkins Act, 15 U.S.C. § 375 et seq. According to the government, the defendant cigarettes were purchased with money obtained pursuant to this scheme and are therefore forfeitable.

On July 8, 2002, claimants Joyce Burns, on behalf of Rancho Equities, Teresa Dean and Emery Williams each filed a claim to the defendant cigarettes. On July 24, 2002, counsel for claimants filed the instant motion to dismiss and requested an order staying the government's discovery requests pending disposition of the motion to dismiss. Oral argument on the motion was held on September 27, 2002, at which time the Court requested additional briefing. On October 7, 2002, the Court granted the State of New York permission to intervene pursuant to 28 U.S.C. § 2403(b). Additional briefing was completed on November 15, 2002. On January 31, 2003, the Court granted the government's unopposed motion for interlocutory sale of the defendant cigarettes. On February 21, 2003, the Court ordered the parties to submit

additional briefing on the Second Circuit's recent decision in Brown & Williamson Tobacco Corp. v. Pataki, 320 F.3d 200 (2d Cir. 2003). Such briefing was completed on March 14, 2003.

DISCUSSION

A. Standard for Dismissal

On a motion to dismiss under Rule 12(b)(6) for failure to state a claim, the Court should dismiss the complaint only if it appears beyond doubt that the plaintiff can prove no set of facts in support of its complaint which would entitle it to relief. See King v. Simpson, 189 F.3d 284, 286 (2d Cir.1999) (citation omitted). The Court must confine its consideration "to facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken." Leonard F. v. Israel Discount Bank of N.Y., 199 F.3d 99, 107 (2d Cir.1999) (internal quotations and citation omitted). The Court must accept all factual allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. See Koppel v. 4987 Corp., 167 F.3d 125, 130 (2d Cir.1999).

The issue to consider is not whether a plaintiff will ultimately prevail, but whether it is entitled to offer evidence to support its claims. See Villager Pond, Inc. v. Town of Darien, 56 F.3d 375, 378 (2d Cir.1995), cert. denied, 519 U.S. 808 (1996). It is not the Court's function to weigh the evidence that might be

presented at trial; instead, the Court must merely determine whether the complaint itself is legally sufficient. *Id.*

Two additional rules address the level of particularity required in forfeiture complaints. Rule C(2)(b) of the Supplemental Rules for Certain Admiralty and Maritime Claims (“Supplemental Rules”) states that the complaint must “describe with reasonable particularity the property that is the subject of the action[.]” Rule E(2)(a) of the Supplemental Rules specifies that the complaint must “state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading.”

These standards are more stringent than the general pleading requirements set forth in the Federal Rules of Civil Procedure, an implicit accommodation to the drastic nature of the civil forfeiture remedy. The particularity-of-pleading requirements in forfeiture cases provide a way of ensuring that the government does not seize and hold, for a substantial period of time, property to which, in reality, it has no legitimate claim.

The complaint does not have to meet the ultimate trial burden of showing probable cause for forfeiture; it simply needs to establish a reasonable belief that the government can show probable cause for forfeiture at trial. In other words, the complaint need not allege facts sufficient to show that specific property is tainted, but facts sufficient to support a reasonable belief that the government can demonstrate probable cause for finding the property tainted.

United States v. Daccarett, 6 F.3d 37, 47 (2d Cir. 1993) (internal quotations and citations omitted).

Applying these standards to the instant case, the Court finds that the complaint should not be dismissed.

B. First Cause of Action

In its first cause of action, the government alleges that the defendant cigarettes are subject to seizure and forfeiture because they are contraband cigarettes as defined under the CCTA. Under the CCTA, the term contraband cigarettes means “a quantity in excess of 60,000 cigarettes, which bear no evidence of the payment of applicable State cigarette taxes in the State where such cigarettes are found, if such State requires a [tax] stamp, impression, or other indication to be placed on packages or other containers of cigarettes to evidence payment of cigarette taxes[.]” See 18 U.S.C. § 2341(2).⁴ The CCTA makes it “unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes.” See 18 U.S.C. § 2342. The CCTA also provides that contraband cigarettes are subject to seizure and forfeiture. See 18 U.S.C. § 2344(c).

Under the New York Tax Law, with limited exceptions not applicable here, all cigarettes possessed by anyone within the State other than a licensed New York State stamping agent or wholesaler, must have a New York tax stamp.

⁴ The CCTA expressly provides for several exceptions to its requirements, none of which is applicable here. 18 U.S.C. § 2341(2)(A)-(D).

See N.Y. Tax Law § 471 et seq. The New York Tax Law further prohibits any person other than a duly licensed agent from possessing or transporting for the purpose of sale, any unstamped cigarette packages. See N.Y. Tax Law § 1814. Moreover, under the New York Public Health Law, it is unlawful for any person engaged in the business of selling cigarettes to ship or cause to be shipped any cigarettes to any person in New York State who is not a licensed cigarette tax agent or wholesaler. See N.Y. Pub. Health Law § 1399-II. In this case, the government alleges that the defendant cigarettes constitute a quantity in excess of 60,000, were located within the State of New York, did not have New York State tax stamps on them, and were not shipped through or in the possession of a licensed New York State stamping agent. Such facts, if proven at trial, would establish a prima facie case that the defendant cigarettes constitute contraband cigarettes under the CCTA and are therefore subject to forfeiture.

The claimants raise several arguments as to why the first cause of action in the complaint should be dismissed. The Court finds these arguments without merit.

First, the claimants, who all claim to be Native Americans, argue that the CCTA is not a statute of general applicability because it does not specifically state that it applies to Native Americans. This argument, however, has been rejected by the Ninth Circuit, the only other circuit to address the issue. See Grey Poplars, Inc. v. One Million Three Hundred Seventy One Thousand One Hundred

(1,371,100) Assorted Brands of Cigarettes, 282 F.3d 1175, 1177 (9th Cir. 2002) (the CCTA is a federal statute of general applicability and applies equally to Native Americans, even on the reservation); United States v. Gord, 77 F.3d 1192, 1193-94 (9th Cir. 1996); United States v. Baker, 63 F.3d 1478, 1484-86 (9th Cir. 1995), cert. denied, 516 U.S. 1097 (1996). The Second Circuit has adopted the Ninth Circuit jurisprudence on the applicability of general federal laws to Native Americans. See Reich v. Mashantucket Sand & Gravel, 95 F.3d 174, 182 (2d Cir. 1996) ("We adopt the Ninth Circuit's method of analysis . . . as the appropriate test to determine whether a statute, silent as to Indians, applies to tribes."). Based on the Ninth Circuit cases and the Second Circuit's directive in Reich, the Court finds claimants' argument that the CCTA is not a statute of general applicability to be without merit.⁵

Next, claimants argue that the government cannot rely on New York Public Health Law § 1399-II in support of its claim that the cigarettes are contraband because that statute is unconstitutional. This argument, however, was recently rejected by the Second Circuit in Brown & Williamson Tobacco Corp. v. Pataki, 320 F.3d at 219. Furthermore, even if § 1399-II were

⁵ The government also argues that claimants' arguments based on their status as Native Americans are without merit because the only entity who has standing in this case is Rancho Equities as it was the purchaser of the defendant cigarettes. According to the government, Rancho Equities is a legal entity separate and apart from its Native American members and shareholders and does not assume the status of a Native American. The government also argues that claimants Teresa Dean and Emery Williams lack standing because they have no possessory interest in the defendant cigarettes. The Court need not address these arguments in the context of the instant motion to dismiss.

unconstitutional, the Court would still not be required to dismiss the CCTA cause of action because the government does not rely exclusively on § 1399-II as an applicable predicate. The government's complaint also alleges that New York Tax Law § 471 is an applicable State cigarette tax law and that the cigarettes were possessed in violation of that statute as well.

Finally, claimants argue that the first cause of action must be dismissed because New York has adopted an official policy of non-enforcement of the cigarette tax statutes against Native American retailers. Thus, according to claimants, in light of New York's so-called "untax" policy, there are no State excise taxes due on the defendant cigarettes and, therefore, they do not constitute contraband cigarettes under the CCTA. This argument, however, goes beyond the scope of a Rule 12(b)(6) motion to dismiss. The argument alleges facts outside those alleged in the complaint, some of which are disputed by the government. For example, the government contends that New York has recently been enforcing its tax laws against Native American retailers. Accordingly, the Court will not consider the merits of this argument at this juncture.

C. Second Cause of Action

In the second cause of action the government alleges that the defendant cigarettes are subject to forfeiture because they represent property that is the proceeds of a wire fraud scheme designed to deprive states of cigarette excise tax revenue, in violation of 18 U.S.C. § 1343.⁶ More specifically, the government alleges that OTP sold cigarettes over the Internet without paying the applicable state excise taxes and without notifying the appropriate state taxation authorities, as required under the Jenkins Act.

Wire fraud requires proof of: (1) a scheme to defraud, and (2) the use of a wire communication in furtherance of that scheme. See United States v. Trapilo, 130 F.3d 547, 551-52 (2d Cir. 1997). The Supreme Court has held that the mail and wire fraud statutes are limited in scope to schemes aimed at causing deprivation of money or property. See McNally v. United States, 483 U.S. 350, 360-61 (1987).

Claimants argue that the second cause of action in the complaint must be dismissed because the State's right to collect cigarette taxes does not

⁶ The wire fraud statute provides, in pertinent part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire . . . communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1343.

constitute "property" under the wire fraud statute. The Court finds this argument unavailing.

The Second Circuit has consistently held that the wire fraud statute is applicable to schemes to defraud governments of excise taxes. See, e.g., Trapilo, 130 F.3d at 552-53; United States v. DeFiore, 720 F.2d 757, 761 (2d Cir. 1983), cert. denied, 467 U.S. 1241 (1984). In DeFiore, the Second Circuit upheld the wire fraud convictions of defendants who used a telephone in interstate commerce to facilitate orders of cigarettes and to assure that cigarettes ordered from a North Carolina distributor were paid for so the cigarettes could be released and shipped to New York State for distribution without New York State tax stamps.

The Second Circuit has also upheld a conviction under the mail fraud statute, which is analogous to the wire fraud statute, where the evidence demonstrated that the defendant intended to defraud the State of New York of tax revenue, but failed to prove that any taxes were actually due. United States v. Helmsley, 941 F.2d 71, 94 (2d Cir.1991) ("Section 1341 punishes the *scheme*, not its success." (emphasis in original)), cert. denied, 502 U.S. 1091 (1992).

Claimants argue that these Second Circuit cases have been called into question by the Supreme Court's decision in Cleveland v. United States, 531 U.S. 12 (2000). In Cleveland, the Court held that a state video poker license did not constitute "property" for purposes of the mail fraud statute. Claimants

contend that under Cleveland, New York State's right to collect taxes is not a property right for purposes of the wire fraud statute. Claimants point to language from Cleveland where the Court explains "[i]t does not suffice, we clarify, that the object of the fraud may become property in the recipient's hands; for purposes of the mail fraud statute, the thing obtained must be property in the hands of the victim." Cleveland, 531 U.S. at 15. This same argument, however, was recently considered and rejected by the Fourth Circuit in United States v. Pasquantino, 305 F.3d 291, 294-95 (4th Cir. 2002). There, the Fourth Circuit held that a government's right to collect taxes is a sufficient property right for wire fraud purposes, unaffected by the Supreme Court's decision in Cleveland. The Court adopts the reasoning and result in Pasquantino, and denies claimants' motion to dismiss the second cause of action. See also United States v. Porcellio, 303 F.3d 452, 456-57 (2d Cir. 2002) (post-Cleveland case holding that New York State's right to collect sales taxes constituted "property" for purposes of the mail fraud statute), cert. denied, 123 S. Ct. 945 (2003) .⁷

CONCLUSION

⁷ Claimants also raise an argument that the Jenkins Act is not a statute of general applicability and therefore the second cause of action should be dismissed. However, the Jenkins Act violations alleged by the government in the complaint are not cited as grounds for forfeiture. They are merely cited as evidence of the wire fraud scheme to defraud states of excise tax revenue. Accordingly, the Court need not address this issue in the context of claimants' motion to dismiss.

For the reasons stated, claimants' motion to dismiss the complaint is denied.⁸

IT IS SO ORDERED.

S/ RICHARD J. ARCARA
HONORABLE RICHARD J. ARCARA
UNITED STATES DISTRICT JUDGE

Dated: March 31 , 2003

⁸ Claimants' motion to stay the government's discovery requests pending disposition of the motion is also denied as moot.