

STATE OF MICHIGAN
COURT OF CLAIMS

BED BATH & BEYOND INC.,

Plaintiff,

v

KEVIN CLINTON, in his capacity as
TREASURER FOR THE STATE OF
MICHIGAN,

Defendant.

OPINION AND ORDER

Case No. 13-000156-MT

Hon. Michael J. Talbot

This case comes before the Court on defendant's motion for summary disposition pursuant to MCR 2.116(C)(8). The motion is DENIED.

FACTUAL ALLEGATIONS AND PROCEDURAL HISTORY

Plaintiff is a national retailer that with its subsidiaries operates a chain of retail stores under the names Bed Bath & Beyond (BB&B), Buy Buy Baby, and others. According to plaintiff's policies, when customers return merchandise to retail store locations and do not have a receipt for the item, the customers are not entitled to a cash or credit card refund. However, in order to generate goodwill, plaintiff issues "Merchandise Certificates" in an amount equal to the retail price of the returned merchandise. Each certificate is redeemable by the customer only for merchandise and is useable only at BB&B and its affiliates.

In the normal course of its operations, plaintiff reports and pays to the government amounts it identifies as unclaimed property pursuant to the unclaimed property laws in effect in all applicable jurisdictions in which it conducts business, including the state of Michigan. The

uniform unclaimed property act (UUPA),¹ MCL 567.221 *et seq.*, governs plaintiff's obligations in that regard.

During the years 2006 through 2011, plaintiff reported and remitted \$540,214.77 to the Department of Treasury. This included uncashed vendor checks, unpaid wages, unused gift certificates, and merchandise certificates issued for returns without receipts. Of the total amount plaintiff remitted, \$441,131.16 represented unredeemed merchandise certificates. During a review of merchandise certificate program, plaintiff concluded that the amounts reported and remitted for unused merchandise certificates were exempt from the UUPA. On August 6, 2013, plaintiff submitted a refund claim to the department for \$441,131.16. The department denied the claim.

Plaintiff filed this action against the state treasurer as the administrator of the UUPA pursuant to MCL 567.247. In Count I, plaintiff seeks a declaratory judgment that pursuant to MCL 567.235(4), merchandise certificates are not subject to the UUPA. Plaintiff asks for a refund of amounts erroneously remitted, costs, and attorney fees. Count II alleges constitutional violations from permitting defendant to retain the erroneously remitted funds and requiring plaintiff to transfer the cash value to the department for the unredeemed certificates when the recipients had no right to receive cash.

Defendant has moved for summary disposition pursuant to MCR 2.116(C)(8). Defendant argues that plaintiff properly reported and remitted the amounts of the unclaimed merchandise

¹ The UUPA is similar to the 1981 version of the Uniform Unclaimed Property Act. An updated version was released in 1995, but Michigan has not incorporated many of the changes.

certificates pursuant to the UUPA and is not entitled to a refund. Defendant disputes plaintiff's contention that MCL 567.235(4) applies to the merchandise certificates. Defendant further argues that plaintiff's constitutional arguments lack merit because plaintiff (1) has no property interest in the merchandise credits; (2) has failed to allege which law or amendment is retroactively applied to alter preexisting contracts; and (3) has received due process by its exercise of challenge to the denial of the refund claim.

STANDARD FOR GRANTING SUMMARY DISPOSITION

In *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999), the Court succinctly stated:

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. [Citation and internal quotation marks omitted.]

When deciding a motion brought under MCR 2.116(C)(8), a court considers only the pleadings. MCR 2.116(G)(5).

COUNT I

With respect to Count I, defendant contends that plaintiff's claim for a refund is unenforceable because it is premised on an erroneous interpretation of the pertinent statutes.

When interpreting a statute, the primary goal "is to give effect to the Legislature's intent, focusing first on the statute's plain language." *Malpass v Dep't of Treasury*, 494 Mich 237, 247-248; 833 NW2d 272 (2013). When the words of a statute are unambiguous, the provisions must be enforced as written, and no further judicial construction is permitted. *Id.* at 249.

The UUPA provides a process for the state to hold unclaimed property in trust for the benefit of its rightful owner. *Flint Cold Storage v Dep't of Treasury*, 285 Mich App 483, 492; 776 NW2d 387 (2009). If specific requirements are satisfied, the property is subject to the custody of the state. MCL 567.224. The property must (1) meet the definitional provision of the act; and (2) meet the conditions that raise a presumption of abandonment. *Id.* The UUPA applies to “tangible” and “intangible property” that is held, issued or owing by a “holder” in the ordinary course of the holder’s business. MCL 567.222(n); MCL 567.223(1). Credit memos, gift cards, and gift certificates are included in the definition of intangible property. MCL 567.222(j)(ii) and (iii). The parties do not dispute that the subject merchandise certificates fall within the UUPA definition of intangible property. The dispute focuses on the provision that governs the presumption of abandonment.

With respect to the abandonment of “unclaimed or unused gift certificates, gift cards, or credit memos,” MCL 567.235 states:

(1) Except as provided in subsection (4), a gift certificate, gift card, or credit memo is presumed abandoned if either of the following apply:

(a) The certificate, card, or memo is not claimed or used for a period of 3 years after becoming payable or distributable.

(b) The certificate, card, or memo was used or claimed 1 or more times without exhausting its full value, but subsequently was not claimed or used for an uninterrupted period of 3 years.

(2) For purposes of subsection (1), a gift certificate or gift card is considered to have been claimed or used if there is any transaction processing activity on the gift certificate or gift card including, but not limited to, redeeming, refunding, or adding value to the certificate or card. Activity initiated by the issuer of the certificate or card, including, but not limited to, assessing inactivity fees or similar service fees, does not constitute transaction processing activity for purposes of this subsection.

(3) In the case of a gift certificate or gift card, the owner is presumed to be a gift recipient of the gift certificate or gift card, and the amount presumed abandoned is the price paid by the purchaser for the gift certificate or gift card, less the total of any purchases or fees assessed against the certificate or card. In the case of a credit memo, the amount presumed abandoned is the amount credited to the recipient of the memo.

(4) *This act does not apply to a gift certificate as defined in section 3e of the Michigan consumer protection act, 1976 PA 331, MCL 445.903e, that is issued for retail goods or services by a person engaged in the retail sale of goods or services. [Emphasis added.]*

Subsections (1) and (4) indicate that the UUPA itself does not apply if the gift card, gift certificate, or credit memo meets the MCPA definition of “gift certificate.” Thus, the premise of plaintiff’s complaint and defendant’s motion is that the applicability of the UUPA to the merchandise certificates depends on whether they meet the MCPA’s definition of gift certificate.

The MCPA’s definition of gift certificate states:

Subject to subsection (3),^[2] “gift certificate” means a written promise or a gift card or other electronic payment device that meets all of the following:

(i) Is usable at a single retailer, is usable at an affiliated group of retailers that share the same name, mark, or logo, or is usable at multiple, unaffiliated retailers or service providers.

(ii) Is issued in a specified amount.

(iii) May or may not be increased in value or reloaded.

(iv) Is purchased or loaded on a prepaid basis for the future purchase or delivery of goods or services.

(v) Is honored upon presentation. [MCL 445.903e(2)(b).]

² Subsection 3, MCL 445.903e(3), sets forth several items that are not “gift certificates” for purposes of the section. The parties do not contend that these are relevant here.

In defendant's motion for summary disposition, defendant asserts that the merchandise certificates do not satisfy Subsections (2)(b)(iii) and (iv). According to defendant,

[u]nless a purchase or payment is required, the words of subsection (2)(b)(iii) are nugatory. It would neither add to nor limit what could be considered a gift certificate. Subsection (2)(b)(iv) explicitly requires that the gift certificate be "purchased or loaded on a prepaid basis." Reading the subsections together, it is clear that a gift certificate requires at some point, a purchase or prepayment.

In response, plaintiff contends the definition does not require a "purchase" inasmuch as Subsection 2(b)(iv) includes "loaded" as an alternative to purchase. Plaintiff contends that when a customer returns merchandise without a receipt, the retail store credits the merchandise certificate with an amount that can be used for future purchases. In other words, the certificates are "loaded" by plaintiff. According to plaintiff, "the requirement to load the certificate on a 'prepaid basis' simply means that value or credit must be associated with the instrument prior to redemption, so that no additional amount must be expended by the customer at the time of purchase (as opposed to, for example, a credit card)."

Plaintiff's interpretation of the statute is consistent with the plain language of the statute. It gives independent meaning to the term "loaded," as opposed to "purchased." "[P]repaid" denotes payment in advance of when due. The value loaded on the certificate must be on a "prepaid basis." A certificate that is loaded on a prepaid basis is one where the value was attached to the certificate in advance of the transaction. The consideration provided by the customer for the loading of the value to the certificate is not necessarily cash. The retailer may load the certificate because the customer provided merchandise to the retailer without a receipt for an earlier transaction, as at issue here. The merchandise certificates may be viewed as representing consideration of a *prior* payment of a *prior* purchase, with those certificates being loaded as a *prepayment* of a *future* purchase as Subsection (2)(b)(iv) requires.

Accepting the premise of plaintiff's complaint and defendant's motion, i.e., that the applicability of the UUPA to the merchandise certificates depends on whether they meet the MCPA's definition of gift certificate, this Court is not persuaded by defendant's argument that plaintiff has failed to state a viable claim for relief in Count I.

COUNT II

Count II raises constitutional challenges to defendant's retention of the amounts that plaintiff remitted for the unredeemed merchandise certificates. Some of the challenges are premised on plaintiff's position that when the UUPA is correctly interpreted, it is inapplicable to the merchandise certificates and that defendant's retention of money erroneously remitted has constitutional implications.³ In addition to plaintiff's allegations that are premised on the validity of plaintiff's interpretation of the UUPA, plaintiff's complaint also raises challenges to the UUPA itself.

Defendant's motion for summary disposition does not address those constitutional claims that are premised on the inapplicability of the UUPA to the merchandise certificates and defendant's refusal to return the erroneously remitted amounts. With respect to plaintiff's challenges to the UUPA itself, defendant correctly argues that as a general principle, a holder has no vested property interest in the unclaimed property of its customers. However, the crux of plaintiff's constitutional challenges to the UUPA concerns the ramifications of requiring plaintiff

³ Thus, plaintiff labels Count II as "PERMITTING [sic] THE DEPARTMENT TO RETAIN FUNDS THAT DO NOT CONSTITUTE UNCLAIMED PROPERTY WOULD VIOLATE THE U.S. AND MICHIGAN CONSTITUTIONS, AND THWART THE INTENT OF THE MICHIGAN CONSUMER PROTECTION ACT AND UNIFORM UNCLAIMED PROPERTY ACT."

to remit the full cash value of unredeemed certificates that the bearers could only redeem in the purchase of other merchandise, the price of which included a profit. Courts and commentators have recognized the significance of the merchandise-only limitation in the analysis of the unclaimed property laws and the issuer's constitutional rights. See *American Express Travel Related Servs Co, Inc v Sidamon-Eristoff*, 755 F Supp 2d 556 (D NJ, 2010), aff'd 669 F3d 359 (CA 3, 2012), and aff'd sub nom *New Jersey Retail Merchants Ass'n Sidamon-Eristoff*, 669 F3d 374 (CA 3, 2012); Comment, *Unwrapping Escheat: Unclaimed Property Laws and Gift Cards*, 60 Emory L J 971, 986 (2011). Here, defendant's motion does not address the significance of the merchandise-only limitation on the constitutional claims advanced by plaintiff. At this juncture, the Court is not persuaded that the claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Maiden*, 461 Mich at 119-120.

Moreover, the policy of judicial restraint with respect to constitutional issues weighs in favor of not deciding the merits of the issues at this time. Courts should avoid deciding constitutional issues where a case can be adequately resolved on non-constitutional grounds. *Lawrence M Clarke, Inc v Richco Constr, Inc*, 489 Mich 265, 275; 803 NW2d 151 (2011); *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 632-633; 684 NW2d 800 (2004), overruled in part on other grounds, *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010). The resolution of plaintiff's constitutional issues may be unnecessary if plaintiff establishes its entitlement to refund of the remitted amounts under the terms of the UUPA.

CONCLUSION

Defendant has not presented a persuasive argument that it is entitled to summary disposition pursuant to MCR 2.116(C)(8) with respect to Count I or II.

IT IS HEREBY ORDERED defendant's motion for summary disposition is DENIED.

Dated: **MAY 15 2014**

A handwritten signature in dark ink, appearing to read "Michael J. Talbot", written over a horizontal line.

Hon. Michael J. Talbot
Court of Claims Judge