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United States District Court,
W.D. Texas,
San Antonio Division.
CITY OF **SAN ANTONIO**, Plaintiff
v.
HOTELS.COM,, et al, Defendants.
Civil No. SA-06-CA-381-OG.

March 20, 2007.

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ORDER

ORLANDO L. GARCIA, United States District Judge.

***1** Pending before the Court is Defendants' Motion to Dismiss for Failure to State a Claim (Dkt.# 26). Plaintiff has filed a response (Dkt.# 35), and Defendants filed a reply (Dkt.# 51). Plaintiff also filed a notice of additional authority in support of its response (Dkt.# 113). After reviewing the allegations in the complaint, the parties' arguments and the applicable law, the Court finds that Defendants' motion should be denied.

Statement of the case

This lawsuit was brought by the City of San Antonio, on behalf of itself and other cities similarly situated, for collection of unpaid hotel occupancy taxes. Plaintiff claims that the Defendants, which are all web-based hotel booking companies, are responsible for paying hotel occupancy taxes on the difference between the retail price of the hotel rooms, which the consumers pay, and the wholesale price that the web-based companies pay the hotels for the contractual right to book the rooms. Plaintiff alleges that the current practice is to simply pay taxes on the wholesale price, rather than the retail price that the consumer pays when he books a room through a web-based company. As a result, a certain amount of taxes are being lost on every hotel room in the City that is booked and paid for through the web-based companies.

Plaintiff seeks a declaration that Defendants have a duty to collect and pay hotel occupancy taxes. Plaintiff also asserts that Defendants are violating state and local laws which govern the assessment, collection, payment and reporting of hotel occupancy taxes. A claim for conversion is also asserted.

Standard of review

In their motion, Defendants contend that they have no duty to collect, remit or report the hotel occupancy tax; that the City has no authority to impose such an obligation on Defendants; and, that the City's conversion claim must fail because Plaintiff

has not alleged that Defendants actually collected any tax owed to the City.

A motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is viewed with disfavor and is rarely granted. *Lowrey v. Texas A & M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir.1997). A district court cannot dismiss a complaint, or any part of it, for failure to state a claim upon which relief can be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957); *Woodard v. Andrus*, 419 F.3d 348, 351 (5th Cir.2005). In reviewing a motion to dismiss, the Court must accept the well-pleaded allegations in the compliant as true, construe those allegations in the light most favorable to the plaintiff, and draw all inferences in its favor. *Woodard*, 419 F.3d at 351; *Truman v. United States*, 26 F.3d 592, 594 (5th Cir.1994). A claim will not be dismissed upon a 12(b)(6) motion unless it appears to a certainty that no relief can be granted under any set of facts provable under the allegations, or that the allegations, accepted as true, do not present a claim upon which relief legally can be obtained. *Adolph v. Federal Emergency Management Agency*, 854 F.2d 732, 735 (5th Cir.1988).

***2** When the motion to dismiss was filed, it was based on the allegations in the original complaint. The complaint was subsequently amended. The Court gave the parties an opportunity to amend and/or supplement their briefs, based on the new pleading. However, the parties determined it was not necessary, and the Court agrees. The parties' arguments apply to the amended complaint with equal relevancy.

Duty to collect and pay tax

Consistent with the authority given to municipalities under the Texas Tax Code, the City of San Antonio has levied "a tax upon the cost or *consideration paid* for a sleeping room or sleeping facility furnished by any hotel ... equal to nine (9) percent of the total price of a sleeping room or sleeping facility." San Antonio Mun.Code Art. IV, § 31-68. (Emphasis added). "*Consideration* " is defined as the price of, or value received for, the right to use a sleeping room, bed or dormitory space or other sleeping facility in a hotel. *Id.* at § 31.66. (Emphasis added). Section 31-69 states that " *[e]very person owning, operating, managing or controlling any hotel* shall collect the tax imposed under this article and pay same to the city tax collector with the report required hereinafter." (Emphasis added). If the person responsible for paying such taxes fails to do so, the City may bring a collection lawsuit and/or a lawsuit to enjoin hotel operations. *See* Tex. Tax Code Ann. § 351.004(a) (Vernon Supp.2006); *see also* San Antonio Mun.Code § 31-74 (suit to enjoin hotel operations is "in addition to the remedy of a collection suit").

Defendants assert that they do not "own, operate, manage or control" a hotel or hotels in San Antonio; therefore, they are not legally obligated to collect, remit or report hotel occupancy taxes. In its amended complaint, however, the City does allege that Defendants have a right to "control" occupancy as a result of their contracts with the hotels, and that they exercise such control on a daily basis. Defendants contend that "controlling" who occupies a certain block of rooms does not equate to "controlling" a hotel.

The City argues that the statutory definition of "consideration" clearly means that hotel occupancy tax must be based on the retail price paid by the guest or occupant, rather than the wholesale price which Defendant pays for the right to re-sell the room. Because Defendants are the persons who collect the money paid by the guest or occupant, they are the persons "in control" and they should be responsible for paying the tax. The City refers to three other recent cases which involve similar issues, and the courts therein denied motions to dismiss the collection claims. *City of Fairview Heights*

v. Orbitz, Inc., Cause No. 05-CV-840-DRH (S.D.Ill. July 12, 2006); *City of Rome, Georgia v. Hotels.com, L.P. et al*, Cause No. 04-CV-249-HLM (N.D.Ga. May 8, 2006); *Leon County v. Hotels.com, L.P., et al*, 2006 WL 3519102 (S.D.Fla.2006).[FN1]

FN1. The City also refers to four Texas Comptroller opinions which state that web-based hotel booking companies *are* required to collect and remit hotel occupancy taxes based on the retail price of the rooms that are rented through them. Specifically, the Texas Comptroller, who has the administrative duty to enforce and collect hotel occupancy taxes on behalf of the State of Texas, has determined:

> Reservation service companies that have a contractual right to control occupancy of hotel rooms prior to making them available to the public ... are responsible for paying taxes to the Comptroller, but only on the difference between the taxes collected and the taxes paid the hotel.
>
> For example, a company contracts for a block of rooms. Rooms are marked up and sold over the Internet. The company requires customers to pay for rooms at the time of booking and has its own cancellation policy. The company controls who occupies the rooms, rents these rooms to the public and, therefore, is required under Texas Tax Code Section 156.053 to collect and remit hotel taxes on the amount paid for the room (i.e., the difference paid hotels and collected from guests).
>
> (*See e.g.*, Dkt. # 26, Appendix, Tab 7). As the Defendants have noted, the Comptroller was interpreting the state tax code, rather than the municipal code. However, Plaintiff contends that the language in the municipal code is identical and should be interpreted in the same manner. The parties disagree, of course, on the weight to be given the Comptroller's opinions.

***3** Because the statute is silent as to the meaning of "control," the Court will need to ascertain the meaning of "control," as used in the statute. Regardless of the Court's interpretation, however, it appears that the question of whether the statute applies to Defendants will ultimately depend, at least in part, on the facts: whether Defendants actually exercise control, the extent of such control, and whether the control exercised in this case is the type of "control" that would trigger a duty under the statute. If there is any ambiguity as to whether Defendants are within the category of persons who are required to collect the tax, "all questions of fact and any ambiguities in the current controlling substantive law must be resolved in the plaintiff's favor." *Lewis v. Fresne*, 252 F.3d 352, 357 (5th Cir.2001). Because Plaintiff has alleged facts relating to the issue of "control," which is required under the statute, the Court cannot conclude, with certainty, that Plaintiff will not be able to recover under any set of facts that may ultimately be proven. Dismissal at this juncture of the proceedings would be inappropriate.

Authority to impose duty

In their second argument, the Defendants argue that the City does not have the authority to impose an obligation on Defendants to collect and remit hotel occupancy taxes. However, the Texas Constitution, article XI, section 5, enables home-rule cities to "levy, assess and collect such taxes as may be authorized by law...." TEX. CONST. ART. XI, § 5. Section 351.002(a) of the Texas Tax Code specifically authorizes municipalities to impose hotel occupancy taxes, and section 302.102 of the Code states that "[a] home-rule municipality may collect taxes that are authorized by the charter of the municipality or by law." Tex. Tax Code Ann. §§ 302.102, 351.002(a) (Vernon 2002). Thus, there is existing

authority to impose and collect such taxes.

Defendants also claim that even if the City has the authority to impose and collect the taxes, the municipal ordinance is void for vagueness because it does not adequately define the person who is required to collect the tax. However, the municipal ordinance uses the same language as the state law on hotel occupancy tax,[FN2] and the statutes are not unconstitutionally vague simply because they do not include definitions for every term used therein. *See Jordan v. De George*, 341 U.S. 223, 231, 71 S.Ct. 703, 708, 95 L.Ed. 886 (1951)("we have several times held that difficulty in determining whether certain marginal offenses are within the meaning of the language under attack as vague does not automatically render a statute unconstitutional for indefiniteness ... [i]mpossible standards of specificity are not required"). The traditional standard for unconstitutional vagueness is: if the terms of an ordinance are so indefinite that men of common intelligence must necessarily guess at its meaning and differ as to its application, the ordinance is unconstitutionally vague. *Medlin v. Palmer*, 874 F.2d 1085, 1090 (5th Cir.1989) (citing *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926)). While the parties may disagree on the meaning and application of the ordinance in question, the Court does not find that the municipal ordinance is unconstitutionally vague as written.

> FN2. Section 156.053 of the Texas Tax Code states: "A person owning, operating, managing, or controlling a hotel shall collect for the state the tax that is imposed by this chapter and that is calculated on the amount paid for a room in the hotel." Tex. Tax Code Ann. 156.053 (Vernon 2002).

Conversion claim

***4** In their last argument, Defendants assert that Plaintiff has failed to state a claim for conversion because the City has alleged that Defendants failed to collect taxes, and if they failed to collect taxes, there is no claim for a failure to remit. Plaintiff disputes this characterization of its pleading, and points to factual allegations in paragraphs 70-72, in which they state that Defendants *possess monies that have been unlawfully withheld* from the City. (Dkt.# 74, pp. 19-20). Likewise, paragraphs 30 and 67 of the amended complaint state that Defendants have *failed to remit* the amounts due and owing to the City. (Dkt.# 74, pp. 9, 19). Paragraph 57 also states that "defendants have engaged and presently engage in a common practice and scheme of selling hotel rooms to occupants at retail but *remitting taxes* based on their lower, negotiated 'wholesale' or 'net' room rates." (Dkt.# 74, p. 14).

Conversion is the wrongful exercise of dominion or control over the property of another in denial of, or inconsistent with, the other's right to the property. *AIG Life Ins. Co. v. Federated Mutual Ins. Co.*, 200 S.W.3d 280, 285 (Tex.App.Dallas 2006, pet. denied). A claim lies for conversion of money when identification of the money is possible and there is an obligation to deliver the money in question. *Id.* The factual allegations in Plaintiff's amended complaint are sufficient to state a claim for conversion.

Defendants also contend that Plaintiff has failed to allege "demand and refusal." A demand for property and refusal to return the property may be necessary when the possession is initially lawful, because the refusal is what makes the possession unlawful, and a cause of action may then accrue. *Hofland v. Elgin-Butler Brick Co.*, 834 S.W.2d 409, 413 (Tex.App.-Corpus Christi 1992, no writ). A demand and refusal is not necessary for every conversion cause of action to accrue. *Id.* at n. 2. In this case, the City is alleging that the possession of any tax money that has been collected from hotel guests and not remitted to the City is unlawful and has been unlawful since its inception.

For these reasons, the Defendants' motion to dismiss for failure to state a claim is DENIED. The City has alleged sufficient facts to state a claim upon which relief may be granted.

W.D.Tex.,2007.
City of San Antonio v. Hotels.com
Not Reported in F.Supp.2d, 2007 WL 1541184 (W.D.Tex.)

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