IN THE CIRCUIT COURT FOR THE 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

LAUREN MINNITI, individually and on behalf of all others similarly situated,
Plaintiff,

vs.

PIZZA HUT OF AMERICA, INC., a Delaware corporation,
Defendant.
_____/

CASE NO: 14-023335 CACE (07)
JUDGE: JACK TUTER

ORDER ON DEFENDANT PIZZA HUT OF AMERICA, INC.'S MOTION TO DISMISS

THIS CAUSE came before the court on defendant Pizza Hut of America, Inc.'s motion to dismiss. The court, having considered the motion and response, having heard argument of counsel, and being otherwise duly advised in the premises, finds and decides as follows:

On December 9, 2014, plaintiff, Lauren Minniti ("Plaintiff"), filed a three-count class action complaint against defendant, Pizza Hut of America, Inc. ("Defendant" or "Pizza Hut"), alleging causes of action for: (1) violation of the Florida Deceptive and Unfair Trade Practices Act (count I); (2) negligence (count II); and (3) unjust enrichment (count III). According to the complaint, Plaintiff alleges that Pizza Hut improperly charges sales tax on delivery fees to its customers. On March 6, 2015, Defendant filed the instant motion to dismiss. On April 16, 2015, Plaintiff filed her response.[1] Thereafter, on April 30, 2015, Defendant filed its reply. A hearing was held before the court on June 19, 2015.

The law is well settled that "the function of a motion to dismiss a complaint is to raise a question of law as to the sufficiency of the facts alleged to state a cause of action." *Hitt v. N. Broward Hosp. Dist.*, 387 So. 2d 482, 482 (Fla. 4th D CA 1980). "The motion admits as true all

[1] In its response, Plaintiff voluntarily withdrew her cause of action for unjust enrichment (count III).

well pleaded facts as well as all reasonable inferences arising from those facts." *Id.* "The allegations must be construed in the light most favorable to plaintiffs and the trial court must not speculate what the true facts may be or what will be proved ultimately in trial of the cause." *Id.* Thus,

> on a motion to dismiss for failure to state a cause of action, a trial court is restricted to a consideration of the well-pled allegations of the complaint. It must accept those allegations as true and then determine if the complaint states a valid claim for relief. A trial court has no authority to look beyond the complaint by considering the sufficiency of the evidence which either party is likely to produce, or any affirmative defense raised by the defendant.

Holland v. Anheuser Busch, Inc., 643 So. 2d 621, 622 (Fla. 2d DCA 2004) (citing *Varnes v. Dawkins*, 624 So. 2d 349, 350 (Fla. 1st DCA 1993)); *see also, Lewis v. Barnett Bank of S. Fla.*, 604 So. 2d 937, 938 (Fla. 3d DCA 1992) ("The law is well settled that a motion to dismiss a complaint is not a motion for summary judgment in which the court may rely on facts adduced in depositions, affidavits, or other proofs.").

First, Defendant argues that Plaintiff fails to state a cause of action for any relief asserted because Plaintiff is limited to the remedies available under section 213.756, Florida Statutes. Section 213.756, Florida Statutes, provides, in pertinent part:

> (2)(a) In any action by a purchaser against a retailer, dealer, or vendor to obtain a refund of or to otherwise recover taxes, fees, or surcharges collected by the retailer, dealer, or vendor from the purchaser:
>
> 1. The purchaser in the action has the burden of proving all elements of its claim for a refund by clear and convincing evidence;
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> 2. The sole remedy in the action is damages measured by the difference between what the retailer, dealer, or vendor collected as a tax, fee, or surcharge and what the retailer, dealer, or vendor paid to the taxing authority plus any discount or collection allowance authorized by law and taken by the retailer, dealer, or vendor; and

> 3. It is an affirmative defense to the action when the retailer, dealer, or vendor remitted the amount collected from the purchaser to the appropriate taxing authority, less any discount or collection allowance authorized by law.

In opposition, Plaintiff argues that Defendant's reliance on section 213.756, Florida Statutes as a basis for dismissal is misplaced. Rather, Plaintiff argues that section 213.756, Florida Statutes, is more properly asserted as an affirmative defense. After a careful review, the court agrees. Under Florida law, " '[a]n affirmative defense is a defense which admits the cause of action, but avoids liability, in whole or in part, by alleging an excuse, justification, or other matter negating or limiting liability.' " *State Farm Mut. Auto. Ins. Co. v. Curran*, 135 So. 3d 1071, 1079 (Fla. 2014) (*quoting St. Paul Mercury Ins. Co. v. Coucher,* 837 So. 2d 483, 487 (Fla. 5th DCA 2002)). Additionally, "[a]ffirmative defenses 'cannot ordinarily be raised by motion to dismiss' unless 'the face of the complaint is sufficient to demonstrate the existence of the defense.' " *Wallisville Corp. v. McGuinness*, 154 So. 3d 501, 504 (Fla. 4th DCA 2015) (*quoting Ramos v. Mast*, 789 So. 2d 1226, 1227 (Fla. 4th DCA 2001)); *see also, Fla. R. Civ. P.* 1.110 (d) ("Affirmative defenses appearing on the face of a prior pleading may be asserted as grounds for a motion or defense under rule 1.140(b)."). A review of Plaintiff's complaint does not reveal the existence of this affirmative defense on the face of the pleading. Therefore, Defendant's motion to dismiss on this basis is denied. *See Schojan v. Papa John's Int'l, Inc.*, 34 F. Supp. 3d 1206, 1210 (M.D. Fla. July 23, 2014).

Next, Defendant argues that Plaintiff fails to state a cause of action under FDUTPA because Plaintiff does not allege an unfair or deceptive act. Under Florida law, "a claim for damages under FDUTPA has three elements: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages." *City First Mortg. Corp. v. Barton*, 988 So. 2d 82, 86 (Fla. 4th DCA 2008) (citation and internal quotation omitted). "A deceptive practice is one that is 'likely to mislead' consumers. An

unfair practice is one that offends established public policy and one that is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Rollins, Inc. v. Butland*, 951 So. 2d 860, 869 (Fla. 2d DCA 2006) (citations omitted). After a careful review, the court determines that Plaintiff has adequately pled a cause of action under FDUTPA. (Compl. ¶¶ 1-39, 40-49). The determination of whether a complained of act or practice is unfair or deceptive under FDUTPA requires a factual determination, which is outside the scope of this Court's review when presented on a motion to dismiss. *See Will v. La Gorce Country Club, Inc.*, 35 So. 3d 1033, 1040 (Fla. 3d DCA 2010) ("Whether conduct constitutes an unfair or deceptive trade practice is . . . a question for the fact finder." (*citing Suris v. Gilmore Liquidating, Inc.*, 651 So. 2d 1282 (Fla. 3d DCA 1995). Therefore, Defendant's motion to dismiss count I for failure to state a cause of action is denied.

Defendant also argues that Plaintiff fails to state a cause of action for negligence because Plaintiff has failed to allege the existence of a duty. Under Florida law, "[t]he elements of a negligence action are the existence of a duty, a breach of the duty, a causal connection between the conduct and the resulting injury, and actual damages." *Whritenour v. Thompson*, 145 So. 3d 870, 873 (Fla. 4th DCA 2014) (citations omitted). After a careful review of the complaint, the court determines that Plaintiff has adequately pled a cause of action for negligence. (Compl. ¶¶ 1-39, 50-56). Therefore, Defendant's motion to dismiss count II is denied.

Lastly, Defendant argues that Plaintiff has failed to exhaust her administrative remedies, which requires dismissal. Specifically, Defendant argues that Plaintiff is seeking a refund of erroneously charged taxes that have been paid to the State of Florida, and therefore, must first seek a refund pursuant to section 215.26, Florida Statutes. Section 215.26, Florida Statutes, provides, in pertinent part:

> (1) The Chief Financial Officer may refund to the person who paid same, or his or her heirs, personal representatives, or assigns, any moneys paid into the State Treasury which constitute:
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> . . .
>
> (b) A payment where no tax, license, or account is due. . . .

§ 215.26 (1) (b), Fla. Stat. In opposition, Plaintiff relies upon Florida Administrative Code Rule 12A-1.014 (4), which provides that "[a] taxpayer . . . who has paid a tax to a dealer when no tax is due, *must secure a refund of the tax from the dealer and not from the Department of Revenue*." *Fla. Admin. Code R.* 12A-1.014 (4) (emphasis added). After a careful review, the court determines that Defendant has failed to meet its burden of showing that dismissal of Plaintiff's complaint is required on this basis. Therefore, Defendant's motion to dismiss on the ground that Plaintiff failed to exhaust her administrative remedies is denied.

Accordingly, it is hereby:

ORDERED that Defendant Pizza Hut of America, Inc.'s Motion to Dismiss is **DENIED.** It should be noted the court is not passing on the merits of this class action in denying the motion to dismiss. Whether this class action can be certified in the future is a matter the court may have to resolve on dispositive motions. Defendant Pizza Hut of America, Inc. shall file an answer to Plaintiff's complaint within twenty (20) days of the date of this Order.

DONE AND ORDERED in Chambers, Fort Lauderdale, Florida, this 26th day of August, 2015.

JACK TUTER
CIRCUIT COURT JUDGE

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