APPENDIX

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APPENDIX A

COURT OF APPEALS OF NEW YORK

SAMUEL EDELMAN et al.,
Appellants,

v.

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE et al.,
Respondents.

2018-1235

Submitted December 31, 2018
Decided March 26, 2019

On the Court's own motion, appeal dismissed, without costs, upon the ground that no substantial constitutional question is directly involved. Motion for leave to appeal denied with one hundred dollars costs and necessary reproduction disbursements.

APPENDIX B

SUPREME COURT,
APPELLATE DIVISION,
FIRST DEPARTMENT, NEW YORK

SAMUEL EDELMAN et al.,
Appellants,

v.

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE et al.,
Respondents.

156415/16, 6970, 6971

June 26, 2018

Orders, Supreme Court, New York County (Manuel J. Mendez, J.), entered June 13, 2017, which granted defendants' motion to dismiss the complaint for failure to state a cause of action, and denied plaintiffs' motion to convert defendants' motion into a motion for summary judgment pursuant to CPLR 3211 (c), unanimously affirmed, without costs.

This appeal turns on whether *Matter of Tamagni v Tax Appeals Trib. of State of N.Y.* (91 NY2d 530 [1998], *cert denied* 525 US 931 [1998]), in which plaintiffs' present

arguments were rejected by the Court of Appeals, was abrogated by the decision of the U.S. Supreme Court in *Comptroller of Treasury of MD. v Wynne* (575 US —, 135 S Ct 1787 [2015]). We conclude that *Tamagni* was not abrogated by *Wynne* and therefore that the instant complaint was correctly dismissed for failure to state a cause of action.

Plaintiffs' argument is that New York's tax scheme violates the dormant Commerce Clause by unfairly permitting double taxation of their intangible income by both New York, where they were "statutory residents," and Connecticut, where they were domiciled (*see* 20 NYCRR 120.4 [d]). Plaintiffs contend that this taxation burdens interstate commerce, particularly by inhibiting their free movement into New York State to work and their ability to buy or lease a home in New York due to the risk of being deemed a resident and subject to double taxation of intangible income. Further, they maintain that New York's tax scheme fails the "internal consistency" test, which requires fair apportionment of income between states and nondiscrimination against interstate commerce (*see generally Complete Auto Transit, Inc. v Brady*, 430 US 274, 279 [1977]; *Matter of Zelinsky v Tax Appeals Trib. of State of N.Y.*, 1 NY3d 85, 90 [2003], *cert denied* 541 US 1009 [2004]).

Contrary to plaintiffs' argument, *Wynne* is distinguishable from *Tamagni*, and from the instant case, in two critical respects. First, it did not involve individuals who faced double taxation on intangible investment income by virtue of being domiciliaries of one state and statutory residents of another. Second, the income subject to tax in *Wynne* was not intangible investment income, but

business income, traceable to an out-of-state source. Notably, New York tax law does not permit double taxation of such out-of-state income, but provides for a credit for taxes paid to the other state.

Plaintiffs contend that, unlike *Tamagni*, *Wynne* makes clear that a tax scheme is not immune from Commerce Clause scrutiny simply because it is "residency-based," i.e., imposed on taxpayers by virtue of their status as New York statutory residents. Indeed, the Supreme Court said that the state's "raw power to tax its residents' *out-of-state income* does not insulate its tax scheme from scrutiny under the dormant Commerce Clause" (*Wynne*, 575 US at —, 135 S Ct at 1799 [emphasis added]). However, the income at issue in *Tamagni* (and in the instant case) was not "out-of-state income" but intangible investment income, which "has no identifiable situs," "cannot be traced to any jurisdiction outside New York," and is "subject to taxation by New York as the State of residence" (*Tamagni*, 91 NY2d at 536). Further, while *Tamagni* referred to the "inapplicability of dormant Commerce Clause analysis to State resident income taxation" (91 NY2d at 544), which is inconsistent with *Wynne*, it did so only after recognizing that the statute "dictate[s] some level of dormant Commerce Clause scrutiny" (*id.* at 538-539) and engaging in a thorough analysis that concluded that the taxation scheme did not violate the dormant Commerce Clause.

Nor does *Wynne*, by establishing that the "internal consistency" test must be applied wherever there is Commerce Clause scrutiny, abrogate *Tamagni's* "core holding" that, even if Commerce Clause scrutiny was necessary, there was no reason to apply the test. Where Commerce Clause scrutiny reveals that the statute at issue

does not affect interstate commerce, there is no need for a test determining whether the statute unduly burdens interstate commerce.

The motion court correctly denied plaintiffs' motion pursuant to CPLR 3211 (c). In the context of defendants' motion pursuant to CPLR 3211 (a) (7), the court's focus was on whether plaintiffs had stated a claim for declaratory relief under the Commerce Clause, not on whether they could prevail on such a claim (*see Law Research Serv. v Honeywell, Inc.*, 31 AD2d 900 [1st Dept 1969]).

We have considered plaintiffs' remaining arguments and find them unavailing. Concur—Renwick, J.P., Gische, Kapnick, Gesmer, Kern, JJ.

APPENDIX C

SUPREME COURT OF THE STATE OF
NEW YORK,
NEW YORK COUNTY

SAMUEL EDELMAN and LOUISE EDELMAN,
Plaintiffs,

v.

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE and JERRY BOONE in his official capacity as Commissioner of New York State Department of Taxation and Finance,
Defendants.

156415/2016

June 9, 2017

Present: Manuel J. Mendez, Justice.

The following papers, numbered 1 to *9* were read on this motion pursuant to CPLR § 3211[a][7] to dismiss:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...	*1 -4*
Answering Affidavits -- Exhibits	*5-8*
Replying Affidavits	*9*

Cross-Motion: ☐ Yes X No

Upon a reading of the foregoing cited papers, it is ordered that defendants' motion pursuant to CPLR § 3211[a][7], to dismiss the complaint for failure to state a cause of action, is granted. Plaintiffs' motion filed under motion sequence 002 seeking an Order pursuant to CPLR § 3211[c] converting defendants' motion to dismiss into summary judgment, allowing the parties to submit evidence for proper consideration, is denied.

Plaintiffs are husband and wife, they allege that their principal residence is Sherman, Connecticut. During the years relevant to this action, 2010 through 2013, plaintiffs also had an apartment in Manhattan, New York and a residence in Florida. Plaintiffs were the founders and shareholders of Edelman Shoe, Inc. (hereinafter referred to as "ESI"), a Delaware C-Corporation with offices in Manhattan, New York. On June 4, 2010, plaintiffs sold their collective 95% of the shares of ESI's outstanding common

stock as part of the sale of ESI to Brown Shoe Company, Inc. (hereinafter referred to as "Brown") an unrelated company with offices in St. Louis, Missouri (Mot. Exh. A).

It is alleged that pursuant to an employment agreement with Brown, effective June 4, 2010, Samuel Edelman served as a division president with Brown, performing duties in the New York offices, subject to business travel. From June 4, 2010 through October of 2011, Louise Edelman served as vice-president of Image and Public Relations for a division of Brown. Effective January of 2012, Mrs. Edelman served as senior vice-president of a division of Brown. Under both titles Mrs. Edelman also worked in the New York offices of Brown. Plaintiffs allege that they commuted daily from New York to Connecticut both before and after the sale of ESI to Brown, and concede they were physically present in New York City, New York for more than 183 full or partial days of the year in 2010 and 2013 (Mot. Exh. A).

Plaintiffs allege that they filed joint Connecticut Resident Income Tax Returns for the 2010 and 2013 tax years, and paid full tax to Connecticut on their income. They also allege that they timely filed joint New York Nonresident Income Tax Returns for the years 2010 and 2013, reporting their status as nonresidents of New York State and New York City (Mot. Exh. A).

On May 6, 2014 defendants began an audit of plaintiffs' nonresident income tax returns for 2010 through 2013. During the audit defendants determined that plaintiffs were statutory residents of New York State and New York City for the years 2010 and 2013, pursuant to the provisions of New York Tax Law § 605[b][1][B], § 612, § 620 and New York City Administrative Code § 11-

1705[b][1][B]. Plaintiffs were issued a Notice of Deficiency on June 15, 2016 that reflected the total amount of unpaid taxes for the 2010 and 2013 tax years as $6,165,329.00. Plaintiffs had paid the full amount prior to the Notice of Deficiency, under protest, to prevent the accumulation of interest (Mot. Exh. A).

Defendants determined plaintiffs were statuory residents pursuant to New York Tax Law § 605[b][1][B], because they maintain a permanent place of abode in New York State and were present in the state for more than the 183 days during a tax year. New York Tax Law § 612 subjects all New York residents to a tax on worldwide income regardless of the source. The intangible income being taxed in this action was also deemed taxable under Tax Law § 620 as not specifically derived from employment or business conducted out of state (Mot. Exh. A).

On August 8, 2016 plaintiffs commenced this declaratory judgment action alleging violation of 42 USC § 1983, and seeking a judgment declaring that: (1) New York's statutory residency scheme violates the dormant Commerce Clause by denying taxpayers, such as plaintiffs, a full resident credit against taxes paid to other states on their tangible income; (2) the statutory residency scheme administered by defendants violates the dormant Commerce Clause and seek to have this Court prohibit defendants from taxes paid by plaintiffs on the alleged improper notices or assessments that fail to provide a credit for taxes plaintiffs paid to other states on investment and intangible income; and (3) plaintiffs are entitled to the recovery of attorneys' fees and other costs and disbursements under 42 USC § 1988 (Mot. Exh. A).

Defendants motion pursuant to CPLR § 3211[a][7] seeks to dismiss this declaratory judgment action for failure to state a cause of action.

Plaintiffs oppose this motion and under Motion Sequence 002 seek to have this Court, pursuant to CPLR § 3211[c], convert defendants' motion to dismiss into summary judgment, allowing the parties to submit evidence for proper consideration and a declaration of the rights of the parties.

Plaintiffs argue that the defendants' motion only raises merit based claims with no issues of fact, only a question of law, and is properly treated as summary judgment. It is plaintiffs' contention that by converting defendants' motion to summary judgment this action can proceed directly on the merits.

CPLR § 3211[c] permits a Court in its discretion to treat a motion to dismiss as a motion for summary judgment where the parties indicate that they are "deliberately charting a summary judgment course," or a "purely legal question" is presented (*Mihlovan v. Grozavu*, 72 N.Y. 2d 506, 531 N.E.2d 288, 534 N.Y.S.2d 656 [1988] and *Cooney v. City of New York Dept of Sanitation*, 127 A.D. 3d 629, 8 N.Y.S.3d 166 [1st Dept. 2015]). CPLR § 3211[c] relief is generally not available prior to joinder of issue. CPLR § 3211[c] notice must come directly from the Court and should fairly apprise the parties as to the issues deemed dispositive to the action. If there are no issues of fact, "but only issues of law fully appreciated and argued by both sides," conversion to summary judgment may be granted (*Four Seasons Hotels Ltd. v. Vinnick*, 127 A.D. 2d 310, 515 N.Y.S. 2d 1 [1st Dept., 1987]).

Defendants' argument in opposition to Motion Sequence 002, that there are potential issues of fact warranting discovery in the event it is determined that the complaint states a cause of action, warrants denial of the CPLR 3211[c] relief. Plaintiffs in seeking to provide evidence in support of the merits of their position are essentially admitting that there are potential issues of fact. Plaintiffs have also conceded in their reply papers that in addressing the issue of "whether the facts as alleged support any cognizable legal theory," there is no need to convert this motion to summary judgment. Motion Sequence 002 seeking, pursuant to CPLR § 3211[c], to convert this motion to dismiss into summary judgment, is denied.

Defendants, pursuant to CPLR § 3211[a][7], argue that the conclusory allegations in the complaint fail to state a cause of action under the Commerce Clause of the United States Constitution.

Dismissal pursuant to CPLR § 3211[a][7] requires a reading of the pleadings to determine whether a legally recognizable cause of action can be identified and is properly pled. A cause of action has to present facts so that it can be identified and establish a potentially meritorious claim (*Leon v. Martinez*, 84 N.Y. 2d 83, 638 N.E. 2d 511, 614 N.Y.S. 2d 972 [1994]). Pleadings are given liberal construction with the facts alleged accepted as true (*Tap Holdings, LLC v. Orix Finance Corp.*, 109 A.D. 3d 167, 970 N.Y.S. 2d 178 [1st Dept., 2013]). Pleadings that consist of bare legal conclusions and factual assertions which are clearly contradicted by evidence will not be presumed to be true and are susceptible to dismissal (*Dragon Head LLC v. Elkman*, 102 A.D. 3d 552, 958 N.Y.S. 2d 134 [1st Dept., 2013]). In a declaratory judgment action the sole consideration is "whether a cause of action for declaratory

relief is set forth," not "whether plaintiff is entitled to a favorable declaration" (*Matter of Tilcon N.Y., Inc. v. Town of Poughkeepsie*, 87 A.D. 3d 1148, 930 N.Y.S. 2d 34 [2nd Dept. 2011]).

Defendants rely on New York State Court of Appeals precedent stated in *Matter of Tamagni v. Tax Appeals Trib. Of State of N.Y.*, 91 N.Y. 2d 530, 695 N.E. 2d 1125, 673 N.Y.S. 2d 44 [1998]. It is defendants' contention that plaintiffs' intangible income is being taxed solely because they are New York residents. Defendants argue that plaintiffs are misapplying the dormant Commerce Clause to their circumstances because the alleged tangible income involved does not affect interstate commerce, but simply taxes the plaintiffs' presence and status as New York residents. Defendants claim the plaintiffs status as commuters are not at issue, only their degree of permanence in New York. Defendants also argue the double taxation issue has no merit because plaintiffs enjoy the privileges is protections of two states and are given tax credits in New York for taxes paid for income derived from the other states.

Plaintiffs arguments relying on *Comptroller of the Treasury of Maryland v. Wynne*, 135 S. Ct. 1787 191 L.E. 2d 813, 83 ULSW 4309 [2015], do not support the causes of action asserted in their complaint.

"The Commerce Clause grants Congress the power to "regulate Commerce...among the several States." Art. I § 8, cl. 3. Although the Commerce Clause is phrased positively, it has been interpreted as having a negative command, "known as the dormant Commerce Clause, prohibiting certain state taxation even when Congress has failed to legislate on the subject." The dormant Commerce

Clause is applied to preclude States from relying on an interstate element to discriminate between transactions, which is interpreted to mean, "a transaction may not be more heavily taxed when it crosses state lines than when it occurs entirely within the State." The dormant Commerce Clause is also applied to prohibit state taxes that provide "a direct commercial advantage to local businesses" or subject "interstate commerce to the burden of 'multiple taxation' " (*Comptroller of the Treasury of Maryland v. Wynne*, 135 S. Ct. 1787, supra at page 1794).

Comptroller of the Treasury of Maryland v. Wynne, 135 S. Ct. 1787, supra, found the dormant Commerce Clause was violated, after Maryland taxed residents for out of state income and only gave a partial credit for the taxes that were paid in the state where the income was earned. It was determined that by not giving full credit to the taxes paid out of state for income earned there, Maryland taxed its residents twice, creating an inappropriate taxation of interstate commerce in violation of the dormant Commerce Clause.

The facts in this action are distinguishable in that plaintiffs have conceded they are New York residents. They own an apartment in New York, work in New York, and have a presence for more than 183 days. They are being taxed as New York statutory residents. Plaintiffs describe themselves as domiciled in Connecticut and paying taxes in that state, but the intangible income being taxed in this action is not specifically derived from employment or business conducted out of state. The taxation in New York does not involve income earned in Connecticut.

Plaintiffs circumstances are much more aligned with the facts in the *Matter of Tamagni v. Tax Appeals Trib.*

of State of N.Y., 91 N.Y. 2d 530, supra, wherein the plaintiffs alleged they were domiciliaries of New Jersey, with ownership of an apartment in New York City and a residence in New Hampshire. Mr. Tamagni was employed as an investment banker in New York City. The plaintiffs were also deemed statutory residents, taxed on intangible income, and brought an action under the dormant Commerce Clause.

The Court of Appeals determined that the dormant Commerce Clause was not violated under the "internal consistency test" because the incidences of the tax fell, "on a separate local occurrence as opposed to instate activity." The plaintiffs residency was determined based on the amount of time spent in the state together with the permanent abode, all of which occur entirely within the state. The plaintiffs having obtained the protections and service of New York State were subject to taxation (*Matter of Tamagni v. Tax Appeals Trib. of State of N.Y.*, 91 N.Y. 2d 530, supra at page 543).

The facts in this action are clearly distinguishable from those of *Comptroller of the Treasury of Maryland v. Wynne*, 135 S. Ct. 1787, supra, and pursuant to Court of Appeals precedent as stated in *Matter of Tamagni v. Tax Appeals Trib. of State of N.Y.*, 91 N.Y. 2d 530, supra, the plaintiffs conclusory assertions fail to state a cause of action, warranting dismissal pursuant to CPLR § 3211[a][7]. To the extent the merits of this declaratory action are addressed, the complaint does not state a cause of action because there is no violation of the dormant Commerce Clause. The alleged double taxation alleged does not apply to an identifiable interstate market, or favor intrastate commerce.

Accordingly, it is ORDERED that defendants' motion pursuant to CPLR § 3211[a][7], to dismiss the complaint for failure to state a cause of action is granted, and it is further,

ORDERED that this declaratory judgment action is dismissed, and it is further,

ORDERED that the plaintiffs' motion filed under motion sequence 002 seeking an Order pursuant to CPLR § 3211[c] converting defendants' motion to dismiss into summary judgment, allowing the parties to submit evidence for proper consideration, is denied, and it is further,

ORDERED that the Clerk of the Court enter judgment accordingly.

Dated: June 9, 2017

ENTER:

/s/ Manuel J. Mendez
MANUEL J. MENDEZ
J.S.C.