Oak Park Crown Pointe LLC,
Petitioner,

v

City of Oak Park,
Respondent.

MICHIGAN TAX TRIBUNAL

MAHS Docket No. 18-003490

Presiding Judge
David B. Marmon

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(7)

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(10)

FINAL OPINION AND JUDGMENT

## INTRODUCTION

On August 22, 2018, Respondent filed a motion requesting that the Tribunal enter summary judgment in its favor in the above-captioned case. More specifically, Respondent contends that, despite Petitioner's assertion to the contrary, Respondent properly provided the Notice of Assessment and that the Petition was filed untimely.

On September 11, 2018, Petitioner filed a response to the Motion. In the response, Petitioner contends that it did not receive notice of the 2018 assessment until it received the summer tax bill in July 2018, and that due process requires that the Tribunal hear the case.

The Tribunal has reviewed the Motion, response, and the evidence submitted and finds that granting Respondent's Motion is warranted at this time.

## RESPONDENT'S CONTENTIONS

In support of its Motion, Respondent contends that Petitioner failed to timely file the petition on or before May 31, 2018 as required by MCL 205.735a(6). Despite Petitioner's assertion, Respondent properly sent the 2018 Notice of Assessment on February 26, 2018. Respondent provides a copy of the Notice, as well as the Affidavit of Joseph V. Wujkowski, the owner of Kent Communications, which states that his company mailed the Notices of Assessment for the City of Oak Park on February 23, 2018. Respondent also provides proof of mailing of the Notices dated February 26, 2018.

## PETITIONER'S CONTENTIONS

In support of its response, Petitioner contends, in pertinent part, that affidavits from three employees of its management company shows that Petitioner did not receive the Notice of Assessment. That statement alone entitles Petitioner to a decision on the merits of the claim. Respondent's documentary evidence does not show that Petitioner's Notice of Assessment was sent, only that 118,658 items were mailed. MCL 205.735a is not a jurisdictional statute, and due process requires that Petitioner receive a hearing.

## STANDARD OF REVIEW

There is no specific Tribunal rule governing motions for summary disposition. Therefore, the Tribunal is bound to follow the Michigan Rules of Court in rendering a decision on such motions.[1] In this case, Respondent moves for summary disposition under MCR 2.116(C)(4) and (C)(10). However, a motion for summary disposition

[1] See TTR 215.

asserting that an appeal has been filed untimely is properly brought under MCR 2.116(C)(7) (statute of limitations) instead of MCR 2.116(C)(4) (lack of subject matter jurisdiction).[2] Summary disposition is therefore inappropriate under MCR 2.116(C)(4) and the Tribunal will construe the Motion as being brought under MCR 2.116(C)(7) and (C)(10). Under MCR 2.116(C)(7), a claim may be barred based on a statute of limitations.

In *RDM Holdings, LTD v Continental Plastics Co*,[3] the Michigan Court of Appeals addressed a motion for summary disposition filed under MCR 2.116(C)(7). In *RDM,* the court stated:

> [T]his Court must consider not only the pleadings, but also any affidavits, depositions, admissions, or other documentary evidence filed or submitted by the parties. The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. This Court must consider the documentary evidence in a light most favorable to the nonmoving party. If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide. If a factual dispute exists, however, summary disposition is not appropriate.[4]

Summary disposition under MCR 2.116(C)(10) tests the factual support for a claim and must identify those issues regarding which the moving party asserts there is no genuine issue of material fact. Under subsection (C)(10), a motion for summary disposition will be granted "when the affidavits or other documentary evidence, viewed in the light most favorable to the nonmoving party, show that there is no genuine issue

[2] See *Bonar v Dep't of Treasury*, unpublished per curiam opinion of the Court of Appeals, issued May 30, 2013 (Docket No. 310707), p 2 n 1.
[3] *RDM Holdings, LTD v Continental Plastics Co*, 281 Mich App 678; 762 NW2d 529 (2008).
[4] *Id.* at 687 (citations omitted).

as to any material fact and the moving party is therefore entitled to judgment as a matter of law."[5]

The Michigan Supreme Court has established that a court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed by the parties in the light most favorable to the non-moving party.[6] The moving party bears the initial burden of supporting its position by presenting its documentary evidence for the court to consider.[7] The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists.[8] Where the burden of proof at trial on a dispositive issue rests on a non-moving party, the non-moving party may not rely on mere allegations or denials in pleadings but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists.[9] If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.[10]

## CONCLUSIONS OF LAW

The Tribunal has carefully considered Respondent's Motion under MCR 2.116 (C)(7) and (C)(10) and finds that granting the Motion under (C)(7) and denying the motion under (C)(10) is warranted.

Although Petitioner argues that MCL 205.735a is not a jurisdictional statute, the Court of Appeals has held that "the time requirements for filing appeal petitions are

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[5] *Lowrey v LMPS & LMPJ, Inc,* 500 Mich. 1, 5; 890 NW2d 344 (2016) (citation omitted).
[6] See *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)).
[7] See *Neubacher v Globe Furniture Rentals, Inc*, 205 Mich App 418, 420; 522 NW2d 335 (1994).
[8] *Id.*
[9] See *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991).
[10] See *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

jurisdictional in nature"[11] to the extent that they provide requirements for properly *invoking* that jurisdiction.[12] In general, if a petitioner fails to adhere to the filing deadlines contained in MCL 205.735a(6), the Tribunal's jurisdiction has not been properly invoked and the case will be dismissed.[13] Under MCL 205.735a(6), the jurisdiction of the Tribunal is invoked by a party in interest filing a written petition before May 31 of the tax year involved where, as here, the appeal concerns commercial property. An untimely filing is excused when a Notice of Assessment is sent in violation of due process.[14] Petitioner asserts that its due process rights were violated because it did not receive the Notice, and that the facts of this case are similar to those in *Mich State Univ v City of Lansing* ("*MSU*").[15] There, the Court of Appeals upheld the Tribunal's "determination that the city failed to provide adequate proof establishing timely mailing of the notice of assessment" because the determination was "supported by competent, material, and substantial evidence."[16] *MSU* is not precedential because it is unpublished.[17] Further, and contrary to Petitioner's position, due process does not

[11] *WA Foote Mem Hosp v City of Jackson*, 262 Mich App 333, 338; 686 NW2d 9 (2004); see also *Electronic Data Sys Corp v Twp of Flint*, 253 Mich App 538, 542-543; 656 NW2d 215 (2002).
[12] See *Parkview Mem Ass'n v City of Livonia*, 183 Mich App 116, 120–121, 454 NW2d 169 (1990).
[13] See *WA Foote Mem Hosp*, 262 Mich App at 340.
[14] *Parkview*, 183 Mich App at 120, citing *W & E Burnside Inc v. Bangor Twp*, 402 Mich 950; 314 NW2d 196 (1978).
[15] *Mich State Univ v City of Lansing*, unpublished per curiam opinion of the Court of Appeals, issued February 5, 2005 (Docket No. 250813).
[16] *Id*. at 3.
[17] MCR 7.215(J)(1). In addition, the Court of Appeals has upheld the Tribunal's dismissal of a case where the "petitioner failed to show that respondent mailed notice to an address not on record in violation of MCL 211.24c." *Summit Dev Group, Inc v City of Battle Creek*, unpublished per curiam opinion of the Court of Appeals, issued October 23, 2012 (Docket No. 307773), p 3. The *Summit Dev Group, Inc* Court further held that the respondent satisfied MCL 211.24c(4) and therefore the Tribunal's conclusion that the petitioner had been provided notice was "adequately supported." *Id*. at 3-4. See also *Primestar*, un pub op at 5. The Tribunal notes that no published decision of the Court of Appeals has analyzed the interplay between due process and MCL 211.24c since *Parkview*, which is not precedential because it was published before November 1, 1990. See MCR 7.215(J)(1).

require actual notice.[18] Instead, the Notice must be sent in a manner "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[19] The Court of Appeals has noted that MCL 211.24c provides a mechanism to give taxpayers notice and an opportunity to be heard.[20] MCL 211.24c states:

> (1) The assessor shall give to each owner or person or persons listed on the assessment roll of the property a notice by first-class mail of an increase in the tentative state equalized valuation or the tentative taxable value for the year. The notice shall specify each parcel of property, the tentative taxable value for the current year, and the taxable value for the immediately preceding year. The notice shall also specify the time and place of the meeting of the board of review. The notice shall also specify the difference between the property's tentative taxable value in the current year and the property's taxable value in the immediately preceding year.
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> (4) The assessment notice shall be addressed to the owner according to the records of the assessor and mailed not less than 14 days before the meeting of the board of review. The failure to send or receive an assessment notice does not invalidate an assessment roll or an assessment on that property.

The Tribunal finds, after weighing the evidence in the light most favorable to Petitioner, that Petitioner has failed to raise a genuine issue of material fact[21] with respect to notice, and therefore its untimely filing is not excused. Respondent provides a Notice of Assessment addressed to Petitioner at 320 Martin St., Suite 200, Birmingham, Michigan 48009.[22] Respondent also submits documentation that Kent

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[18] *In re Treasurer of Wayne Co for Foreclosure*, 478 Mich 1, 9; 732 NW2d 458 (2007).
[19] *Bickler v Dep't of Treasury*, 180 Mich App 205, 211; 446 NW2d 644 (1989), quoting *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 314; 70 S Ct 652; 94 L Ed 865 (1950).
[20] See *Primestar, Inc v Flint Township*, unpublished per curiam opinion of the Court of Appeals, issued October 18, 2002 (Docket Nos. 231293, 231294, 231295, and 231296).
[21] See *Neubacher*, 205 Mich App at 420.
[22] Notice of Assessment, attached as part of exhibit B to Respondent's Motion for Summary Disposition, August 22, 2018.

Communications sent 118,658 pieces of mail on February 26, 2018.[23] Kent Communications owner Joseph V. Wujkowski states in an affidavit that Kent Communications mails the Notices of Assessment for Respondent, and that the Notices were mailed.[24] Petitioner does not assert that 320 Martin St., Suite 200, Birmingham, Michigan 48009 is the incorrect address, and the Affidavits of Kelly Ross, Garrett Middlekauff, and Karen Cubba state that Commercial Financial Management, Inc, the company that manages the office building on the subject parcel, is located at that address.[25] Petitioner, therefore, has not raised and issue of fact whether the Notices were sent to the address in the records of the assessor.[26] In addition, Petitioner failed to raise an issue that (1) Respondent had knowledge that the first mailing was not received and failed to take reasonable steps to notify Petitioners,[27] (2) the notice was undeliverable or untimely mailed,[28] (3) Respondent used an inadequate substitute to provide notice when personal notice by mail was possible,[29] or (4) Respondent failed to use Petitioners' last known address when said address existed in Respondent's records.[30] Accordingly, the Tribunal finds that there is no dispute of fact whether Respondent sent the Notice as prescribed by MCL 211.24c and therefore in a manner "reasonably calculated, under all the circumstances, to apprise [Petitioner] of the

[23] United States Postal Service Proof of Mailing, attached as part of exhibit B to Respondent's Motion for Summary Disposition.
[24] Affidavit of Joseph V. Wujkowski, ¶¶ 2-5, pp 1-2, attached as exhibit C to Respondent's Motion for Summary Disposition.
[25] Affidavit of Kelly Ross, ¶¶ 1-3, pp 1-2; Affidavit of Garrett Middlekauff, ¶¶ 2-3, pp 1-2; Affidavit of Karen Cubba, ¶¶ 2-3, pp 1-2, attached as exhibits B-D to Petitioner's Brief in Opposition to Respondent's Motion for Summary Disposition, September 11, 2018
[26] See MCL 211.24c(4).
[27] See *Sidun v Wayne Co Treasurer*, 481 Mich 503, 511; 751 NW2d 453 (2008).
[28] See *Parkview*, 183 Mich App at 121.
[29] See *Fisher v Muller*, 53 Mich App 110, 122; 218 NW2d 821 (1974).
[30] See *Bickler*, 180 Mich App at 210.

pendency of the action. . . ."[31] Petitioner's petition was therefore filed untimely under MCL 205.735a and summary disposition is appropriate under MCR 2.116(C)(7).

Motions for summary disposition under MCR 2.116(C)(10) concern whether the undisputed facts mandate judgment on the merits of a claim.[32] In *Quinto*, our Supreme Court explained that MCR 2.116(C)(10) is modeled in part on Rule 56(e) of the Federal Rules of Civil Procedure, and that a "moving party may submit affirmative evidence that negates *an essential element of the nonmoving party's claim*."[33] The Tribunal finds that the documentary evidence submitted contains a dispute of material fact whether the valuation method utilized by Respondent was the same as "all other property of that same classification in the assessing jurisdiction."[34] Therefore, summary judgment under MCR 2.116(C)(10) is not warranted.

## JUDGMENT

IT IS ORDERED that Respondent's Motion for Summary Disposition under MCR 2.116(C)(7) is GRANTED.

IT IS FURTHER ORDERED that Respondent's Motion for Summary Disposition under MCR 2.116(C)(10) is DENIED.

IT IS FURTHER ORDERED that the case is DISMISSED.

This Final Opinion and Judgment resolves the last pending claim and closes the case.

## APPEAL RIGHTS

[31] *Id.* at 211, quoting *Mullane*, 339 US at 314.
[32] See *Quinto*, 451 Mich at 362.
[33] *Id*. quoting *Celotex v. Catrett*, 477 US 317; 106 S Ct. 2548; 91 L Ed 2d 265 (1986) (emphasis added).
[34] MCL 211.27(6).

If you disagree with the final decision in this case, you may file a motion for reconsideration with the Tribunal or a claim of appeal with the Michigan Court of Appeals.

A Motion for reconsideration must be filed with the required filing fee within 21 days from the date of entry of the final decision.[35] Because the final decision closes the case, the motion cannot be filed through the Tribunal's web-based e-filing system; it must be filed by mail or personal service. The fee for the filing of such motions is $50.00 in the Entire Tribunal and $25.00 in the Small Claims Division, unless the Small Claims decision relates to the valuation of property and the property had a principal residence exemption of at least 50% at the time the petition was filed or the decision relates to the grant or denial of a poverty exemption and, if so, there is no filing fee.[36] A copy of the motion must be served on the opposing party by mail or personal service or by email if the opposing party agrees to electronic service, and proof demonstrating that service must be submitted with the motion.[37] Responses to motions for reconsideration are prohibited and there are no oral arguments unless otherwise ordered by the Tribunal.[38]

A claim of appeal must be filed with the appropriate filing fee. If the claim is filed within 21 days of the entry of the final decision, it is an "appeal by right." If the claim is filed more than 21 days after the entry of the final decision, it is an "appeal by leave."[39] A copy of the claim must be filed with the Tribunal with the filing fee required for certification of the record on appeal.[40] The fee for certification is $100.00 in both the Entire Tribunal and the Small Claims Division, unless no Small Claims fee is required.[41]

By David B. Marmon

Entered: September 25, 2018
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[35] See TTR 261 and 257.
[36] See TTR 217 and 267.
[37] See TTR 261 and 225.
[38] See TTR 261 and 257.
[39] See MCL 205.753 and MCR 7.204.
[40] See TTR 213.
[41] See TTR 217 and 267.