

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
MICHIGAN TAX TRIBUNAL

Northport Creek Golf Course LLC,
Petitioner,

v

MTT Docket No. 15-002908

Leelanau Township,
Respondent.

Tribunal Judge Presiding
Preeti P. Gadola

ORDER DENYING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

FINAL OPINION AND JUDGMENT

INTRODUCTION

On October 28, 2016, Petitioner filed a motion requesting that the Tribunal enter summary judgment in its favor in the above-captioned case. More specifically, Petitioner contends that the subject property is owned by the Village of Northport and that it should be exempt under MCL 211.7m. In the alternative, Petitioner contends that it is eligible for an exemption as it is a concession available for use by the general public.

On November 18, 2016, Respondent filed a response to the Motion and its own Motion for Summary Disposition. Respondent contends that Petitioner has not shown that it is operating a concession and, furthermore, is not a party in interest in this case as it does not own or lease the property.

Petitioner did not file a response to Respondent's Motion for Summary Disposition.

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

PETITIONER'S CONTENTIONS

In support of its Motion, Petitioner contends the property is owned by the Village of Northport and that it should be exempt under MCL 211.7m. Petitioner contends based upon its operating expenses that it is not run "for profit" and should be exempt under the general rule as the property is owned by a municipality. Specifically, Petitioner contends that the property is not profitable but has significant losses. If, however, the Tribunal finds that the golf course is operated "for profit" under MCL 211.181, Petitioner contends that it is a concession available to the public and should, nevertheless, be exempt.

RESPONDENT'S CONTENTIONS

In support of its response, Respondent contends that Petitioner has not demonstrated that the subject property is operated as a concession and that case law on this issue clearly indicates otherwise. Further, Respondent moves for summary disposition itself contending that Petitioner is not a party in interest as it admits that it does not own the property and has no property interest in the property as required by applicable case law.

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, Petitioner moves for summary disposition under 2.116(C)(10). In the alternative, Respondent moves for Summary Disposition under MCR 2.116(C)(4), (C)(7), (C)(10) and (I)(2).

¹ See TTR 215.

MCR 2.116(C)(4)

Dismissal under MCR 2.116(C)(4) is appropriate when the “court lacks jurisdiction of the subject matter.” When presented with a motion pursuant to MCR 2.116(C)(4), the Tribunal must consider any and all affidavits, pleadings, depositions, admissions, and documentary evidence submitted by the parties.² In addition, the evidence offered in support of or in opposition to a party’s motion will “only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion.”³ A motion under MCR 2.116(C)(4) is appropriate where the plaintiff has failed to exhaust its administrative remedies.⁴

MCR 2.116(C)(7)

Under MCR 2.116(C)(7), the claim is barred because of “release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate or to litigate in a different forum, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of action.”

In *RDM Holdings, LTD v Continental Plastics Co*,⁵ 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) it is a question of law for the court to decide. If a factual dispute exists, however, summary disposition is not appropriate. [Citations omitted.]⁶

² *Id.*

³ MCR 2.116(G)(6).

⁴ See *Citizens for Common Sense in Gov’t v Attorney Gen*, 243 Mich App 43; 620 NW2d 546 (2000).

⁵ *RDM Holdings, LTD v Continental Plastics Co*, 281 Mich App 678; 762 NW2d 529 (2008)

⁶ *Supra* at 687.

MCR 2.116(C)(10)

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 if the documentary evidence demonstrates that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law.⁷ In the event, however, it is determined that an asserted claim can be supported by evidence at trial, a motion under (C)(10) will be denied.⁸

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.⁹ The moving party bears the initial burden of supporting its position by presenting its documentary evidence for the court to consider.¹⁰ The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists.¹¹ 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.¹² If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.¹³

⁷ See *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).

⁸ See *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 436 (1991).

⁹ See *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)).

¹⁰ See *Neubacher v Globe Furniture Rentals, Inc*, 205 Mich App 418, 420; 522 NW2d 335 (1994).

¹¹ *Id.*

¹² See *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991).

¹³ See *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

MCR 2.116(I)(2)

Summary disposition under MCR 2.116(I)(2) is appropriate “[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment . . . ,” and as such, the court may render judgment in favor of the opposing party.¹⁴

CONCLUSIONS OF LAW

The Tribunal has carefully considered each party’s Motion for Summary Disposition and finds that denying Petitioner’s Motion and granting Respondent’s Motion under MCR 2.116(I)(2) is warranted.¹⁵ The Tribunal finds that Petitioner is, admittedly, not the owner of the subject property. The Tribunal further finds that Petitioner is not a party in interest with respect to the subject property and, as such, Petitioner has not properly invoked the Tribunal’s jurisdiction, warranting the granting of Respondent’s Motion. Even if Petitioner is a party in interest, Petitioner has failed to support its Motion as genuine issues of material fact remain.

The Tribunal shall first address Respondent’s Motion for Summary Disposition. Respondent properly indicates that the Michigan Court of Appeals held in *Spartan Stores, Inc v Grand Rapids*¹⁶ that a party in interest is a party holding a “property interest.” The Court defined “property interest” as “[a] legal share in something; all or part of a legal or equitable claim to or right in property.”¹⁷ Here, there is no dispute that Petitioner is not the owner of the property as the property was donated to the Village of Northport thorough the Agreement attached to

¹⁴ See also *Washburn v Michailoff*, 240 Mich App 669; 613 NW2d 405 (2000).

¹⁵ Respondent also listed MCR 2.116(C)(4) and (C)(7). The Tribunal finds that subject-matter jurisdiction is defined as “[j]urisdiction over the nature of the case and the type of relief sought” Black’s Law Dictionary (9th ed). The Tribunal would have jurisdiction over the nature of this case and the type of relief sought regardless of whether the petition was properly filed. See *Bonar v Dep’t of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued May 30, 2013 (Docket No. 310707, at 2 fn. 1), wherein the Court of Appeals held that “the MTT has subject matter jurisdiction over tax appeals even when that jurisdiction is not properly invoked in a particular case.” In *Bonar*, the Court held (C)(7) was appropriate, however, that was regarding an untimely appeal. As such, the most appropriate standard is found to be MCR 2.116(I)(2).

¹⁶ *Spartan Stores, Inc v Grand Rapids*, 307 Mich App 565; 861 NW2d 347 (2014).

¹⁷ *Id.* at 577.

Petitioner's Motion as Exhibit A. Petitioner further provided a copy of its Management Agreement with the Village of Northport which specifically states "[t]he Village will remain the owner of the Property and [Petitioner] will no longer have any interest in the Property whatsoever."¹⁸ The Petitioner in *Spartan* was a lessee and was found to hold a property interest based upon the leasehold. Here, there is no lease and only a "Management Agreement" which explicitly states that Petitioner does not hold any interest in the property. The Tribunal is, therefore, unable to find that Petitioner holds an interest in the property. Even though Petitioner's Management Agreement indicates that Petitioner is responsible for the property taxes, Petitioner is not a party in interest. As such, the case at hand does not invoke the Tribunal's jurisdiction and Respondent's Motion under MCR 2.116(I)(2) is properly granted.

Notwithstanding the above, the Tribunal finds that even if Petitioner is a party in interest, Petitioner has failed to establish that summary disposition under MCR 2.116(C)(10) is appropriate. Petitioner contends the property is entitled to the general exemption from property taxes given the municipality's ownership under MCL 211.7m or, in the alternative, the lessee-user exemption under MCL 211.181(2)(b). To support its contentions, Petitioner relies upon *Kalamazoo v Richland Twp*,¹⁹ in which the Court of Appeals held that a golf course owned by the City of Kalamazoo and operated by KMGA was a concession for purposes of the lessee-user statute. The Tribunal finds that the facts of this case are distinguishable from *Kalamazoo*, however. First, in *Kalamazoo*, the petitioner provided affidavits attesting to the operation of KMGA as a nonprofit and the tax exempt bonds utilized to finance the improvements. Here, Petitioner has not submitted any such documentation. Petitioner has merely asserted that it has

¹⁸ Petitioner's Exhibit B at 3.

¹⁹ *Kalamazoo v Richland Twp*, 221 Mich App 531; 562 NW2d 237 (1997).

operated with significant losses stating that “the revenue received by Petitioner for operating the golf course has been woefully insufficient to even break even let alone make a profit.”²⁰ The Tribunal finds this is not sufficient to demonstrate that the subject is not operated by Petitioner “for profit” under MCL 211.181(1). Moreover, KMGA was formed by the City of Kalamazoo as an entity to operate the municipal golf course on its behalf unlike Petitioner which was organized and operating as a business entity managing the golf course prior to its municipal ownership. Thus, Petitioner has failed to establish that no genuine issue of material fact remains regarding the subject property falling into the general rule under 211.7m.

Petitioner alternatively contends that even if it is determined that the golf course is operated “for profit” it is used as a concession available for use by the general public. It does not appear to be disputed that the Management Agreement requires the property to be open to the public. Rather, the dispute is regarding whether the property is a “concession” as required by the statute. The Tribunal has further reviewed the Management agreement and finds, unlike the agreement in the *Kalamazoo* case, Petitioner, rather than the Village has “extensive oversight” with regard to the operation of the subject property. The Tribunal finds that Petitioner’s Management Agreement is more akin to the operation agreements in *Seymour v Dalton Twp*,²¹ and *Golf Concepts v City of Rochester Hills*.²² The rulings in *Seymour* and *Golf Concepts* held that the agreements did not impose appropriate obligations and restrictions upon the lessee. Specifically, the Court in *Seymour* stated:

²⁰ Petitioner’s Brief at 5.

²¹ *Seymour v Dalton Twp*, 177 Mich App 403; 442 NW2d 655 (1989).

²² *Golf Concepts v City of Rochester Hills*, 217 Mich App 21; 550 NW2d 803 (1996).

The agreement does little to impose obligations and restrictions upon Seymour stated with the requisite degree of specificity. Terms of an agreement characteristic of a concession, e.g., minimum hours, standards of service, or oversight of operations by the city, are conspicuously absent.²³

Similarly, the Court in *Golf Concepts* held that:

The provisions do not include requirements for minimum hours of operation, for petitioner's standards of service, or for respondent's oversight of the golf course operations. While the lease provisions demonstrate that respondent had some control over the operations, the provisions address broader management issues rather than specific obligations.²⁴

Here, the Management Agreement sets forth the following operation requirements:

- A. NCGC shall operate the Golf Course on a play for pay basis in a manner that is available to all members of the general public without discrimination and regardless of residency.
- B. Hours of operation for the Golf Course and related facilities shall be set at the reasonable discretion of NCGC, provided, however they are reasonably consistent with other golf courses in the northern lower peninsula of Michigan that provide open golf, outings, and league play.
- C. The Village shall not be responsible for any memberships or gift certificates issued.
- D. NCGC shall encourage youth golf, including cooperation and encouragement through promotional programs of instruction, tournaments and other activities that focus on youth participation.
- E. For safety and maintenance reasons, the Golf Course shall not be used for non-golf activities during the term of this Agreement without the prior written consent of NCGC and the Village.²⁵

Like the agreements in *Seymour* and *Golf Concepts*, this does not set forth minimum hours of operation and leaves the hours within Petitioner's discretion, there is no oversight of the overall operations by the Village, and there are no true standards of service other than to require the encouragement of youth golf. The Tribunal finds that, based upon the Management Agreement, it is unable to conclude that Petitioner has demonstrated that the subject property qualifies as a concession under MCL 211.181(2)(b).

²³ *Seymour*, 177 Mich App 409.

²⁴ *Golf Concepts*, 217 Mich App at 29.

²⁵ Management Agreement at 6 (attached as Exhibit B to Petitioner's Motion).

Given the above, the Tribunal finds that Respondent's Motion for Summary Disposition under MCR 2.116(I)(2) is appropriately granted as Petitioner is not a party in interest with respect to the subject property. Further, even if the Tribunal's jurisdiction was properly invoked, the Tribunal finds that Petitioner's Motion under MCR 2.116(C)(10) is not supported as Petitioner has failed to establish that no genuine issues of material fact remain regarding its operation "for profit" or that it is a "concession" and its Motion shall be denied.

JUDGMENT

IT IS ORDERED that Petitioner's Motion for Summary Disposition is DENIED.

IT IS ORDERED that Respondent's Motion for Summary Disposition is GRANTED.

IT IS FURTHER ORDERED that the case is DISMISSED.²⁶

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

APPEAL RIGHTS

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.²⁷ 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.²⁸ 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

²⁶In the Petition in this matter, it stated, "In the event this Tribunal does not grant Petitioner its requested exemptions, Petitioner requests in the alternative that the assessed value of the Property be reduced to \$410,000, a level consistent with its most recent appraisal." As such, Petitioner had two contentions in its Petition: the property is exempt from ad valorem property taxation, and if not, the property is overvalued on the tax roll. However, as the Tribunal finds Petitioner is not a party in interest in this matter, both contentions are dismissed.

²⁷ See TTR 261 and 257.

²⁸ See TTR 217 and 267.

demonstrating that service must be submitted with the motion.²⁹ Responses to motions for reconsideration are prohibited and there are no oral arguments unless otherwise ordered by the Tribunal.³⁰

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.”³¹ A copy of the claim must be filed with the Tribunal with the filing fee required for certification of the record on appeal.³² The fee for certification is \$100.00 in both the Entire Tribunal and the Small Claims Division, unless no Small Claims fee is required.³³

By Preeti P. Gadola

Entered: February 22, 2017
krb

²⁹ See TTR 261 and 225.

³⁰ See TTR 261 and 257.

³¹ See MCL 205.753 and MCR 7.204.

³² See TTR 213.

³³ See TTR 217 and 267.