



GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
LANSING

ORLENE HAWKS
DIRECTOR

Petersen Financial LLC,
Petitioner,

MICHIGAN TAX TRIBUNAL

v

MAHS Docket No. 18-001651

City of Kentwood,
Respondent.

Presiding Judge
Victoria L. Enyart

ORDER GRANTING RESPONDENT SUMMARY DISPOSITION UNDER MCR
2.116(I)(1) and (C)(4)

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION
UNDER MCR 2.116(C)(4), (C)(8), AND (C)(10) AS MOOT

FINAL OPINION AND JUDGMENT

INTRODUCTION

On November 29, 2019, Respondent filed a motion requesting that the Tribunal enter summary judgment in its favor in the above-captioned case. More specifically, Respondent contends that the Tribunal lacks jurisdiction because Petitioner failed to protest the special assessment. In addition, the future installments of the special assessment survived the foreclosure process by operation of law.

On December 19, 2018, Petitioner filed a response to the Motion. In its response, Petitioner contends that the Tribunal should defer from addressing this issue until it is known whether a recent Court of Appeals decision concerning the dispute is final. The core dispute is a contractual claim whether an agreement was valid. Respondent is attempting to get a decision inconsistent with the Court of Appeals.

The Tribunal has reviewed the Motion, response and the evidence submitted and finds that denying Respondent's Motion for Summary Disposition under MCR 2.116(C)(4), (C)(8) and (C)(10), but granting Respondent summary disposition under MCR 2.116(I)(1) and (C)(4) is warranted at this time.

RESPONDENT'S CONTENTIONS

In support of its Motion, Respondent contends that the Tribunal lacks jurisdiction because the special assessment was confirmed in 2004 and extending in 2014, but Petitioner did not protest at either hearing and thus the Petition is untimely under MCL 205.735(2). Even if the special assessment was timely challenged, MCL 211.78k provides that various liens are extinguished at a foreclosure sale, except "future installments of special assessments" under MCL 211.78k.

PETITIONER'S CONTENTIONS

In support of its response, Petitioner contends that the Michigan Court of Appeals issued a decision involving this dispute and whether the Circuit Court had jurisdiction, and if Respondent does not file leave to appeal that decision to the Michigan Supreme Court, Petitioner acknowledges the issue is resolved as moot and it can withdraw its petition. This case centers on whether a contractual right to a lien was extinguished by a tax foreclosure sale. Because it was not a special assessment, the lien was extinguished by the sale. Respondent's Motion relative to jurisdiction is based on the theory that a special assessment is at issue but Respondent acknowledges that Petitioner does not challenge the special assessment, so the jurisdictional rules for special assessments do not apply.

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), (C)(8), and (C)(10).

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

Motions under MCR 2.116(C)(8) are appropriate when “[t]he opposing party has failed to state a claim on which relief can be granted.” The Court of Appeals has held that:

A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a complaint. Under this subrule “[a]ll well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant.” When reviewing such a motion, a court must base its decision on the pleadings alone. In a contract-based action, however, the contract attached to the pleading is considered part of the

¹ See TTR 215.

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).

pleading. Summary disposition is appropriate under MCR 2.116(C)(8) “if no factual development could possibly justify recovery.”⁵

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 as to any material fact and the moving party is therefore entitled to judgment as a matter of law.”⁶

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.⁷ The moving party bears the initial burden of supporting its position by presenting its documentary evidence for the court to consider.⁸ The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists.⁹ 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.¹⁰ If the opposing party fails to

⁵ *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 133; 676 NW2d 633 (2003) (citations omitted).

⁶ *Lowrey v LMPS & LMPJ, Inc*, 500 Mich. 1, 5; 890 NW2d 344 (2016) (citation omitted).

⁷ See *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)).

⁸ See *Neubacher v Globe Furniture Rentals, Inc*, 205 Mich App 418, 420; 522 NW2d 335 (1994).

⁹ *Id.*

¹⁰ See *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991).

present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.¹¹

MCR 2.116(l)(1) provides that “[i]f the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay.”

CONCLUSIONS OF LAW

The Tribunal has carefully considered Respondent’s Motion under MCR 2.116 (C)(4), (C)(8), and (C)(10) and finds that denying the Motion is warranted, but granting Respondent summary disposition under MCR 2.116(l)(1) and (C)(4) is warranted.

A court has an “independent obligation to take notice” when it lacks subject matter jurisdiction.¹² The Court of Appeals recently decided an issue involving the parties in *Petersen Fin LLC v City of Kentwood*.¹³ The dispute there centered around the same special assessment agreements and the same parcel.¹⁴ As the Court set forth, Petitioner initiated an action in circuit court

alleging that under the General Property Tax Act (GPTA), MCL 211.1 *et seq.*, its “purchase was free and clear from all liens except any future installments of special assessments.” Plaintiff asserted that despite the fact that title by fee simple absolute was conveyed to plaintiff in the tax foreclosure sale, the city continued to cloud the property’s title “by improperly attempting to revive past installments for special assessments as well as contractual obligations that were extinguished upon the final Judgment of Foreclosure.” Plaintiff complained that defendants “wrongfully attempted to recoup past due special assessment installments and continue[d] to charge Plaintiff for the same.” Plaintiff insisted that under the GPTA, all previously owed special assessment installments were extinguished by the judgment of foreclosure and that the county treasurer lacked the authority to deviate from the GPTA mandates.^[15]

¹¹ See *McCormic v Auto Club Ins Ass’n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

¹² *Teddy 23, LLC v Mich Film Office*, 313 Mich App 557, 564–565; 884 NW2d 799 (2015).

¹³ *Petersen Fin LLC v City of Kentwood*, ___ Mich App ___; ___ NW2d ___ (2018) (Docket No. 339399)

¹⁴ See *id.*, slip op at 2; Amended Petition, August 3, 2018, ¶ 5-10, pp 1-2.

¹⁵ *Id.*

Petitioner's complaint contained four counts concerning a particular special assessment agreement.¹⁶ Counts I, II, and III concerned a deferred assessment agreement, a voluntary special assessment/development agreement ("VSADA"), and landscape/irrigation agreement, respectively, that all were scheduled to be paid prior to the judgment of foreclosure, and Petitioner alleged the judgment extinguished the debts owed.¹⁷ Count IV alleged that an amended VSADA entered into by the county treasurer and city was done without authority "in an attempt to restore an assessment that had been voided by the GPTA."¹⁸ The circuit court granted Respondent summary disposition, reasoning that the Tribunal had jurisdiction over Counts I-IV because Petitioner challenged "the nature and imposition of the special assessments."¹⁹

The Court of Appeals reversed the circuit court's determination for Counts I-III, explaining that where no factual issues exist, i.e. the "factual underpinnings of taxes," but instead the question is purely an issue of statutory construction, the circuit court has jurisdiction.²⁰ In Counts I-III, reasoned the Court, Petitioner challenged whether the assessments were enforceable after the foreclosure.²¹ Resolution of the dispute involved "construction of the GPTA and the law of tax foreclosure, having nothing to do with the factual underpinnings of the special assessments."²² The Court also held that the circuit court had subject matter jurisdiction over Count IV because Petitioner alleged

¹⁶ *Id.* Although the complaint consisted of five counts, Count V concerned slander of title, not a special assessment, and thus is not relevant to the issues before the Tribunal. *Id.* at 3.

¹⁷ *Id.* at 2-3.

¹⁸ *Id.* at 3.

¹⁹ *Id.*

²⁰ *Id.* at 6-7, quoting *Romulus City Treasurer v Wayne Co Drain Comm'r*, 413 Mich 728, 737-738; 322 NW2d 152 (1982).

²¹ *Id.* at 7.

²² *Id.*

that the amended VSADA was invalid and resulted in a special assessment.²³ It reasoned “Count IV presented a question of contract law, as shaped by the construction of provisions in the GPTA. Count IV does not require any findings of fact nor entail the factual underpinnings of taxes; rather, it concerns the construction of law—contract law and the GPTA. Therefore, the circuit court and not the MTT has jurisdiction over Count IV.”²⁴

Petitioner’s Amended Petition alleges that under MCL 211.78(k) and MCL 211.78(m) its purchase was “free and clear from all liens except any future installments of special assessments.”²⁵ Petitioner requests an order “declaring that Respondent is and was precluded from levying upon or creating an attachable lien as to the Subject Property on or after September 7, 2014 and further that an order be issued declaring any amounts assessed, invoiced, levied or claimed due after September 7, 2014 under the guises or auspices of the Voluntary Special Assessment/Development Agreement and Resolution to Confirm the Special Assessment Roll be declared void and a refund with interest be issued for any payments made after September 7, 2014.”²⁶ These are the same claims raised by Petitioner in *Petersen Financial*, as they entail whether the GPTA’s foreclosure provisions extinguished any obligation to pay the special assessment, and whether the subsequent resolution was effective to extend the repayment period. The Court of Appeals expressly stated that these questions are outside of the Tribunal’s jurisdiction in a published, binding decision.²⁷ The Tribunal

²³ *Id.* at 9.

²⁴ *Id.*

²⁵ Amended Petition, ¶ 11, p 2.

²⁶ Amended Petition, ¶ 16, p 2.

²⁷ See MCR 7.215(C)(2).

therefore concludes that it lacks subject matter jurisdiction to hear this case. Further, if Respondent wished to appeal the *Petersen Financial* decision to the Michigan Supreme Court, it was required to file leave to appeal within 42 days of the Court's decision.²⁸ That deadline has passed and Respondent has not filed leave,²⁹ and as such the Tribunal declines to place this case in abeyance.

Because the Tribunal has determined that it lacks subject matter jurisdiction, "any action it takes, other than to dismiss the action, is void."³⁰ It therefore may not address the substance of Respondent's Motion and the Motion is denied as moot.

JUDGMENT

IT IS ORDERED that summary disposition is GRANTED for Respondent under MCR 2.116(l)(1) and (C)(4).

IT IS FURTHER ORDERED that Respondent's Motion for Summary Disposition under MCR 2.116 (C)(4), (C)(8) and (C)(10) is DENIED AS MOOT.

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

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.³¹ Because the final decision closes the case, the motion cannot be filed through the Tribunal's web-based e-filing system; it

²⁸ MCR 7.305(2)(a).

²⁹ See Michigan Courts Case Search by Docket Number, https://courts.michigan.gov/opinions_orders/case_search/pages/default.aspx?SearchType=1&CaseNumber=339399&CourtType_CaseNumber=2 , for COA Docket No. 339399, accessed January 16, 2019.

³⁰ *Bowie v Arder*, 441 Mich 23, 56; 490 NW2d 568 (1992).

³¹ See TTR 261 and 257.

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.³² 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.³³ Responses to motions for reconsideration are prohibited and there are no oral arguments unless otherwise ordered by the Tribunal.³⁴

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.”³⁵ A copy of the claim must be filed with the Tribunal with the filing fee required for certification of the record on appeal.³⁶ The fee for certification is \$100.00 in both the Entire Tribunal and the Small Claims Division, unless no Small Claims fee is required.³⁷

By Victoria L. Enyart

Entered: January 17, 2019
wmm

³² See TTR 217 and 267.

³³ See TTR 261 and 225.

³⁴ See TTR 261 and 257.

³⁵ See MCL 205.753 and MCR 7.204.

³⁶ See TTR 213.

³⁷ See TTR 217 and 267.