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

Family Fare LLC,
Petitioner,

v

MTT Docket No. 453165

City of Grandville,
Respondent.

Tribunal Judge Presiding
Steven H. Lasher

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

ORDER GRANTING RESPONDENT'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

ORDER GRANTING PETITIONER'S MOTION FOR IMMEDIATE CONSIDERATION

ORDER DENYING PETITIONER'S MOTION TO ADD PREVO'S AS CO-PETITIONER

ORDER DENYING PETITIONER'S MOTION TO AMEND PETITION

FINAL OPINION AND JUDGMENT

INTRODUCTION

On October 28, 2014, Respondent filed a motion requesting that the Tribunal enter summary judgment in its favor in the above-captioned case. More specifically, Respondent contends that Petitioner, Family Fare LLC ("Family Fare"), is not a party in interest, and therefore, the Tribunal's jurisdiction was not properly invoked when Petitioner filed its Petition on May 24, 2013. Petitioner filed a response to the Motion On November 18, 2014, contending that it has a financial interest in the subject property and is, therefore, a party in interest.

On November 13, 2014, Respondent filed a Motion for Leave to File a Supplemental Brief. In support of its Motion, Respondent contends that after filing its Motion for Summary Disposition, the Michigan Court of Appeals issued its decision in *Spartan Stores, Inc v Grand*

Rapids, ___ Mich App ___; ___ NW2d ___ (2014) (Docket No. 314669), which is directly related to Respondent's Motion. Petitioner filed a response to the Motion on November 26, 2014. Petitioner contends that it does not oppose the Motion if Petitioner is also permitted to supplement its brief in opposition to the Motion.

On November 18, 2014, Petitioner filed Motions requesting the Tribunal to add Prevo's Family Markets, Inc. ("Prevo's") as a co-petitioner and immediately consider its request. Petitioner contends that Prevo's and Petitioner are closely related corporations and that the misnomer doctrine supports granting Petitioner's Motion. Respondent filed a response to Petitioner's Motion to Add Prevo's as Co-Petitioner on November 25, 2014. In support of its Response, Respondent contends that the misnomer doctrine does not apply in this case.

The Tribunal has reviewed the Motions, responses, and the evidence submitted and finds that granting Respondent's Motion for Summary Disposition is warranted at this time. In light of the Court of Appeals published decision in *Spartan Stores, Inc*, the Tribunal finds that both parties' requests to file supplemental briefs shall be granted. Finally, Petitioner's Motion to Add Prevo's as a Co-Petitioner and alternate Motion to Amend shall be denied.

RESPONDENT'S CONTENTIONS

In support of its Motion for Summary Disposition, Respondent contends that the title owner of the subject property is Capital Retail, LLC and the lessee is Prevo's Family Markets, Inc. "The Petitioner in this instant case is Family Fare, an entity that has never owned the [s]ubject [p]roperty, never leased the [s]ubject [p]roperty, and does not have an obligation to pay taxes on the [s]ubject [p]roperty." Motion at 2. Respondent contends that these facts are undisputed and conclusively demonstrate that Family Fare is not a party in interest and that the Tribunal's jurisdiction was not properly invoked under MCL 205.735a(6). Respondent cites to

the Tribunal's decision in *Spartan Stores Inc v City of Grand Rapids*, where "the Tribunal decided an almost identical motion and ultimately concluded that the petitioner did not have standing to pursue the property tax appeal." Motion at 4.

In its Motion for Leave to File Supplemental Brief, Respondent contends that only two days after Respondent's Motion for Summary Disposition was filed "the Michigan Court of Appeals decided the case of *Spartan Stores, Inc,* which "directly bears on the issue raised by Respondent's motion in this case." Thus, in its Supplemental Brief, Respondent contends that the Court of Appeals' decision held that a party in interest is a party holding an interest in the property assessed. "The Court further noted that a 'property interest' is 'a legal share in something; all or part of a legal or equitable claim to or right in property." Brief at 3, quoting *Spartan Stores, Inc, supra.* As such, Respondent contends that Petitioner is not a party in interest.

In response to Petitioner's Motions, Respondent contends that Family Fare is the entity that instituted this proceeding and is not a party in interest, and as such, "the Tribunal lacks subject matter jurisdiction over this proceeding, and the only permissible action that can be taken is dismissal." Response at 2. Respondent quotes to *Vanco I, LLC v City of Grand Rapids*, unpublished opinion per curiam of the Court of Appeals issued November 18, 2014 (Docket No. 317305), to state that "if a party in interest did not file the petition in this case, the Tribunal lacked subject-matter jurisdiction and was required to dismiss the case." *Id*. Respondent contends that looking to this holding and the holding in *Spartan Stores,* which clearly indicates that Petitioner is not a party in interest, the case should be dismissed for lack of subject matter jurisdiction.

PETITIONER'S CONTENTIONS

In support of its response to the Motion for Summary Disposition, Petitioner contends that MCL 205.735a(6) requires that the appeal be filed by "a party in interest." "The word 'a' is an indefinite article with 'generalizing' and indefinite reference to a group or instance." Brief in Opposition to Summary Disposition at 5. Petitioner also references many cases in which the Tribunal has held that a party in interest can be a litigant who was required to pay the taxes under a lease or other contract. Thus, Petitioner contended that " 'a party in interest' under section 35a (6) refers to any 'interested person' or persons with a direct financial interest or the risk of economic loss as a result of local unit's property tax assessment." *Id*. at 7.Because the lessee, Prevo's, is a subsidiary of and is wholly owned by Petitioner, Petitioner is an interested party with a direct financial interest.

In its Supplemental Brief, Petitioner contends that Family Fare was given authority to file the property tax appeal for the 2013 and future tax years "as a result of the operation by entities under the same direction and control." Supplemental Brief at 4. Petitioner also contends that the Court of Appeals rulings in both *Spartan Stores, Inc,* and *Vanco I*, "clearly support Petitioner's arguments that Prevo's should be added as Petitioner and Respondent's Motion for Summary Disposition should be denied." Supplemental Brief at 4. Petitioner contends that the facts and procedural history in *Spartan Stores Inc,* is identical to the facts at hand. In that case, there was a motion for summary disposition under MCR 2.116(C)(4), like the instant case.

> Family Fare then filed a motion for inclusion in the suit as an additional Party, just as Prevo's has done in the instant case. . . . Although the Court of Appeals ultimately determined that Spartan was not a 'party in interest', the Court of Appeals determined that Family Fare was a party in interest and reversed the Tribunal's order granting summary disposition, allowing Family Fare to continue as a petitioner. [Supplemental Brief at 5.]

Petitioner also contends that *Vanco I,* applies as the misnomer doctrine gives the Tribunal the authority to correct a name on the petition.

In its Motion to Add Prevo's as Co-Petitioner, Petitioner contends that the Tribunal has broad authority to add, join, or substitute parties. Under the Tribunal's rules, leave to amend shall be given freely when justice so requires. Petitioner contends that the misnomer doctrine applies, and that under this rule Petitioner should be allowed to correct its error in naming the Petitioner, given that Respondent has not been denied notice of the action due to the error in name. "Here, there is no question that Respondent was on notice from the date the Petition was filed, that an appeal was initiated with respect to the real property in question" and "Respondent will suffer no prejudice whatsoever . . . as result of the substitution of Prevo's as Petitioner . . . ." Motion at 8-9.

APPLICABLE LAW

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. See TTR 215. In this case, Respondent moves for summary disposition under MCR 2.116(C)(4) and (8).

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. See MCR 2.116(G)(5). 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." MCR 2.116(G)(6). A motion under MCR 2.116(C)(4) is appropriate where the plaintiff

has failed to exhaust its administrative remedies. See *Citizens for Common Sense in Gov't v Attorney Gen*, 243 Mich App 43; 620 NW2d 546 (2000).

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." Dismissal should be granted when the claim, based solely on the pleadings, is so clearly unenforceable that no factual development could possibly justify a right to recovery. See *Transamerica Ins Group v Michigan Catastrophic Claims Ass'n*, 202 Mich App 514, 516; 509 NW2d 540 (1993). In reviewing a motion under this subsection, the court must accept as true all factual allegations in support of a claim, as well as, all inferences which can fairly be drawn from the facts. See *Meyerhoff v Turner Construction Co*, 202 Mich App 499, 502; 509 NW2d 847 (1993).

CONCLUSIONS OF LAW

The Tribunal has carefully considered Respondent's Motion under MCR 2.116 (C)(4) and (8) and finds that granting the Motion under MCR 2.116(C)(4) is warranted because the Tribunal's jurisdiction was not invoked under MCL 205.735a. Petitioner, Family Fare, is not "a party in interest" with respect to the subject property. Further, granting Petitioner's Motion to Add or Amend would be futile as the Tribunal's jurisdiction was not properly invoked. Notwithstanding the above, the Tribunal finds that the Court of Appeals rulings in *Spartan Stores, Inc*, and *Vanco I*, which were issued after the filing of the original Motion and Response, are relevant to the facts of this case. As such, Respondent's Motion for Leave to File a Supplemental Brief shall be granted and both parties' Supplemental Briefs shall be considered.

Petitioner contends that the Court of Appeals ruling in *Spartan Stores, Inc*, is identical to this case and directs the Tribunal to deny Respondent's Motion for Summary Disposition and allow the substitution of Prevo's for Family Fare. The Tribunal agrees that the two cases *appear*

procedurally similar but are actually dissimilar. In *Spartan Stores, Inc,* the respondent filed a motion for summary disposition under MCR 2.116(C)(4) which was ultimately granted by the Tribunal holding that neither petitioner, Spartan Stores, Inc, or Family Fare, LLC, was "a party in interest" under MCL 205.735a. The Tribunal held that the petitioners were not parties in interest because they were not required to pay 100% of the taxes and there was no provision in the lease indicating that either Petitioner had the right to appeal the valuation of the subject if the owner chose not to do so. The issues in this case are distinguishable from *Spartan Stores, Inc* as they do not include whether the definition of "party in interest" includes a lessee that is not required to pay the full amount of tax due or whether a lease must include language authorizing the lessee to file an appeal. In addition, the Tribunal's Final Opinion and Judgment specifically noted that:

> The inclusion of Family Fare, LLC, as a co-Petitioner after the filing of Respondent's Motion for Summary Disposition does not have any effect on the Tribunal's determination.

Contrary to the Tribunal's finding in that case, the Court of Appeals clearly held that the case could only continue because Family Fare, LLC was included as a co-Petitioner. See *Spartan Stores, Inc, supra*. The Tribunal finds that the issue of whether or not Family Fare, LLC was *properly* added as a co-Petitioner was not specifically addressed by the Court of Appeals. As such, contending that the Court of Appeals decision in *Spartan Stores, Inc,* clearly directs that the Tribunal should add Prevo's as a co-Petitioner, or, permit Petitioner to amend its Petition to reflect Prevo's as petitioner, is erroneous.

Party in Interest

Spartan Stores, Inc does provide the Tribunal with a clear definition of the term "party in interest." More specifically, the Court held that neither MCL 205.735a, nor the Tax Tribunal

Act, provides the definition for this term. As such, the Court looked to dictionary definitions and other case law to define the term and held that a party in interest is "a person or entity with a property interest in the property being assessed." *Spartan Stores, Inc, supra*. The Court held that the lessee is a "party in interest" because its leasehold is a property interest "i.e., 'a legal share in something; all or part of a legal or equitable claim to or right in property.' " *Id*. quoting *Black's Law Dictionary* (10th ed). The Court also held that the same cannot be said for the lessee's corporate parent. While a corporate parent "certainly has a *financial* interest in the tax assessment of the [subject property], it does not have a *property* interest in the assessment of the [subject property]." *Id*. (Emphasis in original.)

In this case, it is clear that Petitioner, Family Fare, is a parent corporation of Prevo's, the lessee. Therefore, it is also clear that Petitioner is not a party in interest as its only interest is financial it does not have a property interest as required by *Spartan Stores, Inc*. On the other hand, the lessee, Prevo's does have a property interest—the leasehold—and is a party in interest.

Motion to Add

Petitioner requests that it be allowed to add Prevo's as a party and that the Tribunal immediately consider its request. Petitioner's Motion for Immediate Consideration properly indicates that Respondent was notified of the Motion and request for immediate consideration. See TTR 225. In addition, Respondent timely filed its response; therefore, the Motion for Immediate Consideration shall be granted. Nevertheless, the Tribunal finds that Petitioner's Motion to Add Prevo's as a Co-Petitioner must be denied because Petitioner is not a party in interest. It would be improper to merely add Prevo's as a party when Petitioner is not a party in interest and, therefore, has no standing to pursue this appeal. In the alternative, Petitioner requests that the Tribunal allow it to amend its original Petition to reflect Prevo's as Petitioner.

Motion to Amend

Petitioner contends that Petitioner's Motion to Amend should be granted because "leave to amend . . . shall be freely given when justice so requires." TTR 221. While Petitioner is correct that motions to amend are generally freely granted, such motions should not be granted if, as here, the amendment would be futile. See *Sandars v Perfecting Church*, 303 Mich App 1, 9; 840 NW2d 401 (2013). Granting the Motion to Amend would be futile because the Tribunal does not have jurisdiction and an amendment would not relate back to the original filing to cure the jurisdictional defect. More specifically, the Tribunal's jurisdiction is strictly limited by statute. MCL 205.735a states:

> The jurisdiction of the tribunal in an assessment dispute as to property classified under section 34c of the general property tax act, 1893 PA 206, MCL 211.34c, as commercial real property, industrial real property, developmental real property, commercial personal property, industrial personal property, or utility personal property is invoked **by a party in interest, as petitioner, filing a written petition on or before May 31 of the tax year involved.** [Emphasis added.]

Thus, the petition is required to be filed in the name of a party in interest. As discussed above, Petitioner, Family Fare, is not a party in interest. As such, the Tribunal's jurisdiction was not properly invoked because the petition was not filed "by a party in interest." *Id.* Petitioner requests to amend its Petition to include Prevo's, a party in interest.

Petitioner contends that Respondent was fully advised of the appeal and would not be prejudiced if the Tribunal granted its Motion to Amend. Although Petitioner may be correct that Respondent had ample notice of the appeal, the issue of subject matter jurisdiction cannot be forfeited or waived for any reason because it involves the Tribunal's authority over the case. See *Vanco I, supra* citing *Arbaugh v Y&H Corp*, 546 US 500, 514; 126 S Ct 1235 (2006). Thus, it is irrelevant whether Respondent had notice of the appeal if the Tribunal lacks the authority to hear the appeal as the Tribunal's jurisdicition was not invoked under MCL 205.735a. Petitioner also

contends that the misnomer doctrine applies, which indicates that the amendment would relate back to the date of the original pleading, and as such, the amendment would not be futile.

Misnomer Doctrine

The Tribunal finds the Court of Appeals ruling in *Vanco I,* is factually distinguishable from the facts in this case. In that case, the Court held that the originally named petitioner AFD, LLC was in no way involved in the suit. More specifically:

> AFD LLC did not retain counsel or direct counsel to do anything. Counsel mistakenly believed that Van Eerden retained his firm on behalf of AFD LLC, but Van Eerden and AFD LLC are not actually related companies. Counsel was at all times counsel for Van Eerden as the owner of Vanco. And Vanco was the party actually prosecuting the suit. There is no indication that AFD LLC was even aware of the suit, much less that AFD LLC prosecuted or participated in the suit. This is a case where the petitioner's counsel simply put the wrong name on the petition.

In the above-captioned case, the original Petitioner and proposed new Petitioner *are* related entities and counsel for Petitioner also represents Prevo's, which is distinguishable from *Vanco I*. Here, Petitioner specifically contends that "Prevo's authorized [Petitioner] to file the instant appeal." Petitioner's Motion to Add at 3. Petitioner's own contentions clearly indicate that there are two separate parties involved in the appeal: the lessee and its parent company. This is clearly distinguishable from a case where the mistakenly named petitioner was not aware of or involved in the suit. The party actually participating in this case is Petitioner, Family Fare, based upon its purported authority granted by Prevo's. As such, the Tribunal finds that the facts in this case are clearly distinguishable from *Vanco I,* and are actually more similar to the facts in *Miller v Chapman Contracting*, 477 Mich 102; 730 NW2d 462 (2007).

In *Miller*, the original plaintiff was erroneously named instead of plaintiff's bankruptcy trustee. "Plaintiff stated that . . . the trustee for his bankruptcy estate, had authorized plaintiff's counsel to file a complaint on behalf of the bankruptcy estate, and that counsel . . . had

misidentified the plaintiff." *Id*. at 105. The Court also stated that "[t]he misnomer doctrine applies only to correct inconsequential deficiencies or technicalities in the naming of parties . . ." and provided examples such as correcting the plaintiff's name to include "partnership" rather than "corporation" and allowing a correction to include plaintiff's full middle name rather than merely a middle initial. *Id*. at 106-107. The Court held that changing the name from the plaintiff to plaintiff's bankruptcy trustee was actually seeking "to substitute or add a wholly new and different party to the proceedings" and that "the misnomer doctrine is inapplicable." *Id*.

Here, the Tribunal finds that Petitioner is seeking to add or substitute a wholly new and different party and not merely make an "inconsequential" correction. Petitioner appears to contend that it is an inconsequential deficiency or technicality because Petitioner and Prevo's share many of the same officers and Petitioner wholly owns Prevo's, the proper party. However, a similar argument was addressed by the Court of Appeals in *Spartan Stores, Inc* where the Court held that:

> Family Fare and Spartan are separate corporate entities. Spartan unconvincingly argues that we should disregard this formal separation because: (1) the businesses share a headquarters address and high-level management staff; and (2) Family Fare is "simply another brand, a 'retail banner' " of Spartan. In other words, Spartan asks us to ignore the corporate form because it is inconvenient for Spartan's current interests to acknowledge that the two businesses are distinct entities. This approach contravenes Michigan law, which states:
>
> > [i]t is a well-recognized principle that separate corporate entities will be respected. Michigan law presumes that, absent some abuse of corporate form, parent and subsidiary corporations are separate and distinct entities. This presumption, often referred to as a 'corporate veil,' may be pierced only where an otherwise separate corporate existence has been used to 'subvert justice or cause a result that is contrary to some other clearly overriding public policy.
>
> Consistent with Michigan law, the separate corporate forms of Spartan and Family Fare must be respected. [*Id*. at fn 13 (internal citations omitted).]

As such, the Tribunal finds that it cannot ignore the corporate form and consider the requested change in party name to be an inconsequential correction under the misnomer doctrine. Like the facts in *Miller*, Petitioner's counsel erroneously listed the wrong party on the Petition based upon the proper party's purported authorization and is now seeking to add a wholly new party. As such, the Tribunal finds that the misnomer doctrine does not apply as the facts are distinguishable from *Vanco I*, and are very similar to *Miller*.

Relation-Back Doctrine

The *Miller* Court also held that if the misnomer doctrine applies, the correction of a named party relates back to the original filing; however, the relation-back doctrine does not apply to the addition of new parties. *Id.* at 105. As such, the relation-back doctrine does not apply to Petitioner's Motion to Amend because it is a motion to add a wholly new party and the Motion shall be denied as futile. More specifically, even if the Tribunal granted the Motion to Amend, the change would only be effective as of the date of the Tribunal's Order. Thus, it would not change the fact that, at the time of filing, the named party was not a party in interest as required by MCL 205.735a. Given that amending the petition at this point would not correct this jurisdictional deficiency, the Tribunal finds that the Motion to Amend shall be denied as futile.

Motion for Summary Disposition

Given the above, the Tribunal finds that the case was not filed by a party in interest, and as such, the Tribunal's jurisdiction was not properly invoked. Therefore, Respondent's Motion for Summary Disposition shall be granted under MCR 2.116(C)(4) for lack of subject matter

jurisdiction. In addition, Petitioner, Family Fare, LLC, lacks standing to pursue this appeal and summary disposition is also appropriate under MCR 2.116(C)(7).[1]

JUDGMENT

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

IT IS FURTHER ORDERED that Respondent's Motion for Leave to File Supplemental Brief is GRANTED.

IT IS FURTHER ORDERED that Petitioner's Motion for Immediate Consideration is GRANTED.

IT IS FURTHER ORDERED that Petitioner's Motion to Add Prevo's as Co-Petitioner is DENIED.

IT IS FURTHER ORDERED that Petitioner's Motion to Amend Petition shall be DENIED.

IT IS FURTHER ORDERED that the case is DISMISSED.

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

Entered: Dec 11, 2014 By: Steven H. Lasher
krb

[1] The Tribunal has also considered Respondent's Motion under MCR 2.116(C)(8) and finds that it is not the appropriate standard.