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

Talmer Bank & Trust,
Petitioner,

v

MTT Docket No. 461590

City of Manistee,
Respondent.

Tribunal Judge Presiding
Steven H. Lasher

ORDER GRANTING PETITIONER'S MAY 15, 2014 MOTION FOR SUMMARY DISPOSITION

FINAL OPINION AND JUDGMENT

INTRODUCTION

On May 15, 2014, Petitioner filed a renewed Motion for Summary Disposition arguing that the assessments were the result of a mutual mistake of fact. Petitioner contends that it is clear that the subject property is the same property at issue in the Circuit Court action and that the issue under appeal is not regarding the issue of ownership and will not affect the Tribunal's determination.

On August 13, 2014, Respondent filed a response to Petitioner's Motion. In its response, Respondent objects to Petitioner's Motion because it contends that Petitioner did not notify it of the pending Circuit Court action at the time the Stipulation was entered in MTT Docket No. 417624 or the classification issue. Moreover, Respondent contends that only the Assessor may determine whether there is a qualified error and that the proper claim is for unjust enrichment in the Circuit Court.

The Tribunal has reviewed the renewed Motion for Summary Disposition, response, and the evidence submitted and finds that granting Petitioner's Motion for Summary Disposition is

warranted at this time. More specifically, the subject property was not owned by Petitioner at the time of payment of the taxes in 2011, 2012, and 2013. As such, the assessments were established based upon the mutual mistake of fact that Petitioner was the owner.

BACKGROUND

Petitioner previously filed a Motion for Summary Disposition on March 5, 2014, and Respondent filed a response on March 24, 2014, indicating that the Motion should be denied. On April 14, 2014, the Tribunal issued an Order denying Petitioner's Motion concluding that there were outstanding facts remaining as to whether a Circuit Court action was pending with respect to the subject property. Subsequently, on May 15, 2014, Petitioner filed a Renewed Motion for Summary Disposition with additional documentation regarding the Circuit Court action. The Motion for Summary Disposition and case were placed in abeyance following the Tribunal's holding that the Court of Appeal's determination of whether the subject property was a common element was essential to the Tribunal's proceedings.

However, on July 14, 2014, Petitioner filed a Motion for Reconsideration indicating that the issue before the Circuit Court would not affect the Tribunal's determination as the issue does not pertain to the ownership of the subject property. The Tribunal granted Petitioner's Motion on July 24, 2014, and the case was removed from abeyance. The Tribunal's Order also provided Respondent additional time to file a response to Petitioner's May 15, 2014 Renewed Motion for Summary Disposition given the fact that Petitioner failed to properly serve Respondent's counsel with the Motion until July 8, 2014. As a result, Respondent's August 13, 2014 response is considered timely.

PETITIONER'S CONTENTIONS

In support of its renewed Motion for Summary Disposition, Petitioner contends that it is clear that the subject property is the same property at issue in the Circuit Court action and that the subject property became common elements in 2006. "[T]herefore, Petitioner had no right or title or interest in the property when it paid the taxes for years 2011 through 2013." Motion at 6. Petitioner also attached a copy of its original Motion for Summary Disposition and Brief in Support indicating that the arguments made therein are fully incorporated in its current motion. See Motion at 1.

RESPONDENT'S CONTENTIONS

In support of its response, Respondent contends that Petitioner has improperly listed the parcel numbers under appeal. More specifically, Respondent contends that Petitioner erroneously omitted the first 51- of each of the parcel numbers appealed. In addition, Respondent contends that the issues of classification and the Circuit Court case were never disclosed to Respondent, and therefore, cannot constitute a "mutual mistake of fact." Moreover, only the assessor has the authority to determine if a qualified error existed under MCL 211.53a. Response at 6.

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, Petitioner moves for summary disposition under 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. See *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). 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. See *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 436 (1991).

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. See *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)). The moving party bears the initial burden of supporting its position by presenting its documentary evidence for the court to consider. See *Neubacher v Globe Furniture Rentals, Inc*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* 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. See *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. See *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

CONCLUSIONS OF LAW

The Tribunal has carefully considered Petitioner's renewed Motion for Summary Disposition and finds that granting the Motion is warranted. Although Petitioner did not

specifically cite to authority for its motion, the Tribunal finds that summary disposition is appropriate under MCR 2.116(C)(10). More specifically, Petitioner has demonstrated that there are no genuine issues of material fact remaining and summary disposition is appropriate at this time.

The first issue is with respect to Respondent's contention that the Petition improperly lists the parcel numbers at issue as Parcel Nos. 51-259-006-17, 51-259-006-18, 51-259-006-19, 51-259-006-20, 51-259-007-21, 51-259-007-22, 51-259-007-23, 51-259-007-24, 51-259-008-25, 51-259-008-26, 51-259-008-27, 51-259-008-28. While Respondent is correct that the Petition improperly omits the preceding 51- for each parcel number, the Tribunal finds that this error is *de minimis* and did not prejudice Respondent in responding to the Petition or Motions filed in this case. For the record, the proper parcel numbers are Parcel Nos. 51-51-259-006-17, 51-51-259-006-18, 51-51-259-006-19, 51-51-259-006-20, 51-51-259-007-21, 51-51-259-007-22, 51-51-259-007-23, 51-51-259-007-24, 51-51-259-008-25, 51-51-259-008-26, 51-51-259-008-27, 51-51-259-008-28.

The Tribunal finds that in its April 14, 2014 Order it has already addressed Respondent's contentions pertaining to res judicata. More specifically, the Tribunal held that the instant case was not barred by res judicata because the issue of ownership could not have been decided in a prior action. In addition, the Tribunal held that the issue of ownership would, in fact, qualify as a mutual mistake of fact by stating:

> The Tribunal finds that a misconception regarding the ownership of the property would qualify as a mutual mistake of fact. For the 2010 through 2013 tax years, Respondent believed that Petitioner owned the subject property and issued an assessment to Petitioner for the tax years at issue. Petitioner was under the same belief and paid the taxes at issue. Thus, Petitioner has demonstrated that the parties were under the same allegedly erroneous belief that the subject property was owned by Petitioner. In addition, it is clear that both parties shared the belief that the property was not a common element and was taxable separate from the

> condominium units in the project. Thus, the Tribunal finds that if Petitioner did not own the subject property or that the property was a common element, the assessments against Petitioner were the result of a mutual mistake of fact which would provide the Tribunal with jurisdiction over the taxes paid in calendar years 2011 through 2013 under MCL 211.53a. [Tribunal's April 14, 2014 Order at 7-8.]

However, the Tribunal held at that time there was insufficient evidence on record to demonstrate that the property was subject to the Circuit Court ruling in Case No. 13-14909-CZ. Therefore, the Tribunal concluded that the original Motion for Summary Disposition must be denied as there were genuine issues of material fact remaining.

In regard to the renewed Motion for Summary Disposition, Respondent still contends that the Tribunal does not have authority under MCL 211.53a because "[o]nly the assessor has the authority and discretion to determine if an act constitutes a qualified error under MCL 211.53a and whether or not to take that to the December Board of Review." Response at 6. However, the Tribunal finds that this is not the standard for review under MCL 211.53a which states:

> Any taxpayer who is assessed and pays taxes in excess of the correct and lawful amount due because of a clerical error or mutual mistake of fact made by the assessing officer and the taxpayer may recover the excess so paid, without interest, if suit is commenced within 3 years from the date of payment, notwithstanding that the payment was not made under protest.

The "qualified error" referred to by Respondent is governed by MCL 211.53b which does indicate that the local assessor must take qualified errors to the board of review. Thus, if a mutual mistake of fact exists, the Tribunal does have authority under MCL 211.53a over taxes paid within 3 years of the filing of this action on December 30, 2013.

Respondent also indicates that the mistake cannot be mutual because Petitioner did not previously inform the assessor of the potential issues with regard to ownership and classification.[1] This was also addressed in the Tribunal's April 14, 2014 Order which states:

> However, the Tribunal finds that the mistake of fact that Petitioner contends is not relating to the existence of the Circuit Court case but rather to the ownership and taxable nature of the subject property as of the relevant tax days. More specifically, Petitioner contends that it was not the owner because the property was a common element in 2006 and DSLT, Inc. had no authority to convey the property to Petitioner in the July 2009 Deed. [*Id*. at 7.]

As such, if the Circuit Court ruling did find that the subject property became a common element in 2006, the parties shared an erroneous belief with respect to the ownership and proper assessment of the subject property. Attached to the renewed Motion for Summary Disposition, Petitioner submitted copies of the Complaint in the Circuit Court Case No. 13-14909-CZ and the underlying deeds. As such, in its June 26, 2014 Order the Tribunal held that:

> These documents indicate that Unit 13 (Parcel No. 51-264-013-00), Unit 14 (Parcel No. 51-264-014-00), Unit 15 (Parcel No. 51-264-015-00), and Unit 16 (Parcel No. 51-264-016-00) were at issue in Case No. 13-14909. Therefore, the Tribunal finds that the Manistee Circuit Court ruling is regarding the subject property and that the ruling has a direct impact on the issues before the Tribunal. [*Id*. at 2.]

Nevertheless, the Tribunal placed the renewed Motion for Summary Disposition in abeyance pending the Court of Appeals action regarding Circuit Court Case No. 13-14909-CZ. In addition, the Tribunal finds that the Complaint references the deed which includes each of the "units" or parcels, specifically listed above, that are pending in this case. In its July 24, 2014 Order the Tribunal found:

> that it erroneously held that the outcome of the Court of Appeals case in Docket No. 321168 directly impacts the Tribunal's ruling. The Tribunal was under the

[1] The Tribunal finds that Respondent improperly characterizes the issue of whether the subject property was a common element as a classification issue. The issue is not with respect to the classification (i.e., residential) but rather how the property shall be assessed (i.e., independently owned or to condominium owners as a common element). The issue of proper assessment is discussed more fully below.

> mistaken belief that the issue on appeal was the lower court's finding that the subject property was a common element and, therefore, that Petitioner was not the owner of the subject property. As such, the Tribunal finds that the case shall be removed from abeyance.

The Tribunal also provided Respondent an additional opportunity to file its response to the renewed Motion for Summary Disposition.

Given the above, the Tribunal finds that the subject parcels were, in fact, common elements beginning in 2006. Thus, the subsequent assessments in each following tax year were the result of a mutual mistake of fact. More specifically, common elements cannot be taxed independently and the assessed values assigned to the subject parcels were in error. As previously indicated, the term common element is defined in MCL 559.103(7) as "the portions of the condominium project other than the condominium units." Further, MCL 559.161 specifically states that:

> Upon the establishment of a condominium project each condominium unit, **together with and inseparable from its appurtenant share of the common elements**, shall be a sole property subject to ownership, mortgaging, taxation, possession, sale, and all types of juridicial acts, inter vivos or causa mortis independent of the other condominium units. [Emphasis added.]

Since the subject property was in fact a common element for the tax years at issue, the ownership and taxation of such was inseparable from the individual condominium units. See MCL 559.161. Thus, the parties were under the shared erroneous belief that Petitioner was an owner when, in fact, the condominium unit owners were the proper owners. In addition, the parties shared the erroneous belief that the subject property was independently owned and was not a common element. As such, it is clear that the independent assessments on the subject parcels were based upon a mutual mistake of fact and were contrary to law.

Petitioner properly relies upon the Court of Appeals ruling in *Eltel Associates, LLC v City of Pontiac*, 278 Mich App 588; 752 NW2d 492 (2008), to contend that the issue of ownership is

a factual issue which, in this case, constitutes a mutual mistake of fact. In *Eltel, supra*, the issue was whether title to the property transferred on December 12, 2001, or on January 24, 2002. See *id*. at 591. The Court held that:

> the assessor mistook the date on the deeds as the date of the parcels' transfer of ownership, and petitioner was misdirected by this mistake and plenarily adopted it as its own when it paid the taxes as though it had owned the property since the December closing. Petitioner's misunderstanding of the taxable nature of the property, generally, and its initial failure to consider other facts that might alert it to its mistake, such as the time the deeds spent in escrow, were factual oversights similar to the ones described in *Ford Motor Co., supra* at 443[]. The fact is that the state, not petitioner, owned the land until January, so it was exempt. [*Eltel, supra* at 592.]

Similarly, the assessor mistook the July 17, 2009 Deed in Lieu of Foreclosure as transferring an interest in the property to Petitioner. However, no interest was ever transferred to Petitioner because the property remained common elements owned, by definition, by the condominium owners and not DSLT, Inc. who lacked the authority to transfer the property to Petitioner in 2009. Thus, this is a factual issue, similar to *Eltel, supra*, in that the fact is that the condominium unit owners, not Petitioner, owned the subject property at the time of the assessments to Petitioner. Like *Eltel, supra*, the taxable status of the property was incorrect given the shared erroneous belief with respect to ownership. In *Eltel, supra*, the incorrect assessment related to an exemption remaining on the subject property given that the property did not transfer prior to tax day. Here, the incorrect assessment is that the subject property cannot be assessed as separate parcels but was required to be assessed to the condominium owners as common. See MCL 559.161.

Given the above, the Tribunal finds that if the subject property was a common element in 2006 and has remained a common element. The assessments at issue were the result of a mutual mistake of fact because no ownership interest ever transferred to Petitioner. As common

elements cannot be taxed independently from the condominium units, the Tribunal finds that all subsequent assessments were invalid. However, the Tribunal's jurisdiction is limited by MCL 211.53a to the taxes paid within 3 years of the filing of the action on December 30, 2013. Therefore, all taxes paid by Petitioner on Parcel Nos. 51-51-259-006-17, 51-51-259-006-18, 51-51-259-006-19, 51-51-259-006-20, 51-51-259-007-21, 51-51-259-007-22, 51-51-259-007-23, 51-51-259-007-24, 51-51-259-008-25, 51-51-259-008-26, 51-51-259-008-27, 51-51-259-008-28, on or after December 30, 2010, shall be refunded.

JUDGMENT

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

IT IS FURTHER ORDERED that the officer charged with collecting or refunding the affected taxes shall collect taxes and any applicable interest or issue a refund within 28 days of entry of this Final Opinion and Judgment. The refund shall include **all taxes paid by Petitioner on or after December 30, 2010**, as well as a proportionate share of any property tax administration fees paid and penalty and interest paid on delinquent taxes. The refund shall also separately indicate the amount of the taxes, fees, penalties, and interest being refunded. A sum determined by the Tribunal to have been unlawfully paid shall bear interest from the date of payment to the date of judgment, and the judgment shall bear interest to the date of its payment. A sum determined by the Tribunal to have been underpaid shall not bear interest for any time period prior to 28 days after the issuance of this Final Opinion and Judgment. Pursuant to MCL 205.737, interest shall accrue (i) after December 31, 2009, at the rate of 1.23% for calendar year 2010, (ii) after December 31, 2010, at the rate of 1.12% for calendar year 2011, (iii) after

December 31, 2011, and prior to July 1, 2012, at the rate of 1.09%, and (iv) after June 30, 2012, through December 31, 2014, at the rate of 4.25%.

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

By: Steven H. Lasher

Entered: 8/28/2014
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