

STATE OF MICHIGAN
DEPARTMENT OF LABOR & ECONOMIC GROWTH
MICHIGAN TAX TRIBUNAL

Michigan Department of Treasury
and State Treasurer,
Petitioners,

v

MTT Docket No. 333113

City of Warren,
Respondent.

Tribunal Judge Presiding
Patricia L. Halm

ORDER GRANTING PETITIONERS' MOTION FOR IMMEDIATE CONSIDERATION

ORDER DENYING PETITIONERS' MOTION TO STRIKE
RESPONDENT'S OFFER OF JUDGMENT FROM RESPONDENT TO PETITIONERS

On December 13, 2007, Petitioners filed two motions: the first requested that the Tribunal strike Respondent's offer of judgment from Respondent to Petitioners; the second requested that the Tribunal give immediate consideration to their motion to strike. In support of these motions, Petitioners made the following arguments:

1. "Respondent states that it is filing its Offer of Judgment pursuant to TTR 111(4) and Michigan Court Rule (MCR) 2.405...MCR 2.405 is a Court Rule designed to regulate Offers to Stipulate to Entry of Judgments...Specifically, one party may present an Offer to Stipulate to Entry of Judgment to another party and, depending on the outcome of any hearing or trial, the offeree may be exposed to the offeror's 'actual costs' as defined in the Court Rule."
2. "Petitioners contend that this Tribunal already has a TTR that addresses how and when costs may be assessed in favor of a prevailing party. Specifically, TTR 145 addresses 'Costs' and states:
 - (1) The tribunal may, upon motion or upon its own initiative, allow a prevailing party in a decision or order to request costs...."
3. "If the Respondent's Offer of Judgment submitted under MCR 2.405 is valid, the Tribunal will have no choice but to award costs under the Court Rule, depending on the outcome of the hearing. The Petitioners contend that the Respondent's Offer circumvents the circumstances and procedures already in place as prescribed in TTR 145 in which the Tribunal may or may not award costs to a prevailing party. Based on the fact that the Tribunal already has a TTR in place that addresses how and when costs are allowed, the

Court Rule cited by the Respondent does not apply and the Respondent's Offer to Stipulate presented under TTR 111(4) should be stricken."

4. "Under MCR 2.405, if the offeree would like to potentially protect itself from exposure to the possibility of having to pay the offeror's 'actual costs,' the offeree is required to provide a counteroffer within 21 days after service of the offer, which in this case a response would be due by December 20, 2007. The Respondent is allowed 14 days to respond to this Motion and the time for counteroffer will have passed. Consequently, if the Tribunal denies this Motion, the Petitioners request a brief extension in which to file a counteroffer, if so desired."

Respondent filed a response in opposition to Petitioners' Motion. In its response, Respondent argues that:

1. "Petitioner's Motion to Strike Respondent's Offer of Judgment should be denied because the 'Offer of Judgment' Rule, set forth in MCR 2.405, does not conflict with an existing Tribunal Rule."
2. "The purpose of the 'Offer of Judgment' rule is to deter protracted litigation and encourage settlement."
3. "There is simply no 'applicable tribunal rule' regarding 'Offers of Judgment'. Thus, applying TTR 111(4), the Tribunal should be governed by MCR 2.405."
4. "Petitioner attempts to confuse the 'Offer of Judgment' rule with TTR 145, which addresses the taxation or award of costs to the prevailing party. TTR 145, however, is essentially a modification of MCR 2.625, which also provides for the award of costs to a prevailing party. Thus, if neither party made an 'Offer of Judgment,' the Tribunal would follow TTR 111(4) and apply TTR 145 and not MCR 2.625."
5. "The Michigan Court Rules provide for the co-existence of MCR 2.625 (taxation of costs) and MCR 2.405 ('Offer of Judgment'), meaning these are separate rules to be applied under separate circumstances. The 'Offer of Judgment' rule takes into account costs and interest when determining the 'adjusted verdict'. MCR 2.405(A)(5). Thus, a prevailing party would be entitled to the addition of the taxation of costs into the computation of the calculation of the 'adjusted verdict,' which is then used to determine if either the offeror or offeree is the prevailing party. In short, the Supreme Court, the party responsible for establishing the Court Rules, recognizes the co-existence and separation of taxation of costs and MCR 2.405. The Tribunal should do the same and follow the Supreme Court's lead in noting that there is a distinction between the taxation of costs and costs associated with an 'Offer of Judgment'."

6. “Further, TTR 145 does not have the same purpose as the ‘Offer of Judgment’ rule set forth in MCR 2.405. TTR 145 is essentially passive in allowing for costs and does not take into consideration the deterrence of protracted litigation or encouraging settlement.”
7. “Thus, there is no applicable Tribunal Rule regarding Offers of Judgment, as set forth in MCR 2.405.”

Before addressing Petitioners’ Motions, a review of the applicable Tax Tribunal and court rules is required. Tax Tribunal Rule (TTR) 111(4) states that “[i]f an applicable entire tribunal rule does not exist, the 1995 Michigan Rules of Court, as amended, and the provisions of chapter 4 of Act No. 306 of the Public Acts of 1969, as amended, being §§24.271 to 24.287 of the Michigan Compiled Laws, shall govern.” While the Tribunal’s Rules contain a rule governing costs, TTR 145, there is not an applicable Tribunal Rule governing an offer of judgment. Therefore, MCR 2.405, the offer of judgment rule, governs.

For the reasons contained herein, the Tribunal finds the definitions contained within MCR 2.405 to be of particular importance. Specifically, an “offer” is defined as:

...a written notification to an adverse party of the offeror’s willingness to stipulate to the entry of a judgment in a sum certain, which is deemed to include all costs and interest then accrued. If a party has made more than one offer, the most recent offer controls for the purposes of this rule. (Emphasis added.) (MCR 2.405(A)(1)).

In *Hessel v Hessel*, 168 Mich App 390; 424 NW2d 59 (1988), the court addressed the issue of costs. While this case dealt with the division of marital property, the Tribunal finds the court’s analysis applicable to Tribunal cases that deal with property valuation issues. In *Hessel*, the court held that:

The definition of an “offer” at MCR 2.405(A)(1)...refers to the offer of a sum certain. A proposed property settlement does not offer a sum certain; it offers a division of marital property. This case is illustrative: defendant “offered” plaintiff real estate, a car, household furnishings, and certificates of deposit which would presumably vary in worth depending on when they were withdrawn. In no sense of the phrase can these items be equated with a “sum certain.”¹ Even if the worth of the property were considered a “sum” for purposes of MCR 2.405, such worth is by no means “certain,” as this case also demonstrates. Defendant valued the property he offered plaintiff at \$143,200, while the trial court’s valuation of

¹ See also Longhofer, *Michigan Court Rules Practice* (2007 ed), §2405.2, p754 (“The rule does not require that the offer be in any particular form, other than that it be in writing and contain an unconditional offer to stipulate to the entry of a judgment in a sum certain.”) (Emphasis added.)

that same property was approximately \$108,000. (Emphasis added.) *Id.* at 395.

In *Central Cartage Co v Fewless*, 232 Mich App 517; 591 NW2d 422 (1999), the court was asked to determine whether a proposed judgment, to be paid in installments, was a “sum certain.” The court found that “...defendants’ offer, which was for a specific amount (\$250,000), and had a specific interest amount to be applied (six percent), constitutes a ‘sum certain’ for purposes of MCR 2.405.” *Id.* at 532.

In *Knue v Smith*, 478 Mich 88; 731 NW2d 686 (2007), the Michigan Supreme Court addressed the issue of

...whether the requirement of the offer of judgment rule, MCR 2.405, to stipulate “to the entry of a judgment in a sum certain” such as to trigger the operation of the rule, and its sanction provisions, is met if the putative offer would culminate in a judgment, not for a sum certain but in a dismissal with prejudice and without costs only. *Id.* at 89-90.

The Court began its analysis by looking “...to the language of the court rule and in particular to that section which defines what an offer must be to qualify as an ‘offer of judgment.’” *Id.* at 92. The Court stated that “...to be an ‘offer’ the offer must propose to stipulate the entry of a *judgment in a sum certain*. There is no latitude given in this rule for offers of judgment that culminate in something other than a ‘judgment for a sum certain.’” (Emphasis included in original.) *Id.* at 93. The Court concluded “...that the offer of judgment rule does not apply to lawsuits where the putative offer would not result in judgment for a *sum certain*.” (Emphasis added.) *Id.* at 93.

Following this line of reasoning, the Tribunal finds that MCR 2.405 does not apply in cases in which a property’s value is under appeal because the offer of judgment culminates in something other than a “judgment for a sum certain.” In a property valuation appeal, the offer to stipulate to an entry of judgment is not an offer to stipulate to a sum certain; instead, the offer to stipulate is, at a minimum, a stipulation as to the property’s taxable value. Most property valuation appeals also concern the property’s true cash value and assessed value and, as such, would also require a stipulation as to these values. As in *Hessel*, the Tribunal finds that in no sense of the phrase can a stipulation as to a property’s value be equated with a “sum certain.” Because “[t]here is no latitude in MCR 2.405 for offers of judgment that culminate in something other than a judgment for a ‘sum certain,’” MCR 2.405 does not apply in property valuation appeals.

Even if an offer to stipulate to a property’s value were deemed to be a judgment for a sum certain, a decision rendered by the Tribunal is not an “adjusted verdict.”² According to

² MCR 2.405(A)(5) defines “adjusted verdict” as “...the verdict plus interest and costs from the filing of the complaint through the date of the offer.”

Longhofer, *Michigan Court Rules Practice* (2007 ed), §2405.4:

MCR 2.405(A)(4) defines a “verdict” as a jury verdict, a judgment rendered after a bench trial, or a judgment entered as a result of a motion *decided* (but not necessarily filed) after rejection of an offer of judgment. The verdict is adjusted by adding interest and costs from the date of filing the complaint through the date of the offer. The resulting “adjusted verdict” is then utilized as the starting point in determining whether costs may be assessed in the action. The adjustment is necessary to equate the monetary value of an offer (or average offer) with the verdict rendered. As an offer is deemed to include all costs and interest through the date of the offer, these amounts must be added to any verdict rendered before the two figures may be compared. *Id.* at 756.

Under MCR 2.405(A)(4), interest is calculated pursuant to MCL 600.6013. On the other hand, interest in a Tribunal judgment is calculated pursuant to MCL 205.737(4).

A sum determined by the tribunal to have been unlawfully paid or underpaid shall bear interest from the date of payment to the date of judgment and the judgment shall bear interest to the date of payment. However, a sum determined by the tribunal to have been underpaid shall not bear interest for any time period prior to 28 days after the tribunal’s decision. Interest required by this subsection shall accrue for periods before April 1, 1982 at a rate of 6% per year, shall accrue for periods after March 31, 1982 but before April 1, 1985 at a rate of 12% per year, and shall accrue for periods after March 31, 1985 but before April 1, 1994 at a rate of 9% per year. After March 31, 1994 but before January 1, 1996, interest shall accrue at an interest rate set monthly at a per annum rate based on the auction rate of the 91-day discount treasury bill rate for the first Monday in each month, plus 1%. After December 31, 1995, interest shall accrue at an interest rate set each year based on the average auction rate of 91-day discount treasury bills in the immediately preceding state fiscal year as certified by the department of treasury, plus 1%. The department of treasury shall certify the interest rate within 60 days after the end of the immediately preceding fiscal year. The tribunal shall order the refund of all or part of a property tax administration fee paid in connection with taxes that the tribunal determines were unlawfully paid.

Not only do the interest rates differ, the time periods differ. For example, MCR 2.405(5) requires that interest be calculated from the date the complaint was filed to entry of judgment. On the other hand, in a judgment rendered by the Tribunal, interest is paid from the date the petitioner pays the tax to the date the refund is made. Therefore, in all Tribunal cases, the calculation of interest pursuant to MCR 2.405(5) is a meaningless calculation as it would never be utilized.

For these reasons, the Tribunal finds that offers of judgment pursuant to MCR 2.405 are not applicable in Tribunal appeals. If a request for costs is made pursuant to MCR 2.405(D)(5), the Tribunal will deny the request.

However, even though the Tribunal has reached this conclusion, Petitioners' motion must be denied. When an offer is made pursuant to MCR 2.405, the offer is not filed with the court unless the offer is accepted, or until there is an "...entry of the judgment or an order denying a timely motion for a new trial or to set aside the judgment." MCR 2.405(D)(5). In the instant case, the Tribunal has nothing to "strike" since the offer has not been filed with the Tribunal and, therefore, a judgment has not been entered. Therefore,

IT IS ORDERED that Petitioners' Motion for Immediate Consideration is GRANTED.

IT IS FURTHER ORDERED that Petitioners' Motion to Strike the Respondent's Offer of Judgment from Respondent to Petitioner is DENIED.

MICHIGAN TAX TRIBUNAL

Entered: January 29, 2008

By: Patricia L. Halm