

IN THE DISTRICT COURT OF CHERRY COUNTY, NEBRASKA

W.F.M., INC.,

Plaintiff,

vs.

CHERRY COUNTY, NEBRASKA,

Defendant.

Case No. CI00-21

SUMMARY JUDGMENT

DATES OF HEARING: (1) August 4, 2000, and,
(2) August 25, 2000.

DATE OF RENDITION: September 27, 2000.

DATE OF ENTRY: Date of filing by court clerk (§ 25-1301(3)).

APPEARANCES:

For plaintiff: (1) No appearance, and,
(2) Michael B. Kratville.

For defendant: (Both) Eric A. Scott, Cherry County Attorney.

SUBJECT OF ORDER: Defendant's motion for summary judgment.

PROCEEDINGS: See previous journal entries.

MEMORANDUM:

1. The decision in *Derr v. Columbus Convention Center, Inc.*, 258 Neb. 537, ___ N.W.2d ___ (2000), restates the oft-repeated principles that control this decision:

a. Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

b. The court views the evidence in a light most favorable to the nonmoving party and gives such party the benefit of all reasonable inferences deducible from the evidence.

c. The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.

d. A movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to a judgment if the evidence were uncontroverted at trial. At that point, the burden of producing evidence shifts to the party opposing the motion.

2. The parties focus their arguments on paragraph 3 of the plaintiff's petition and NEB. REV. STAT. § 77-1738 (Reissue 1996). The defendant argues that the statute authorizes only a county board to strike personal property taxes, that the statute requires the county treasurer to make a particular determination, and that because the treasurer failed to make the required determination, the condition precedent to board action never occurred. The plaintiff urges that the county board acts only ministerially upon the certification of the treasurer.

3. Because the action focuses on the certification of October 1, 1994, the court concludes that the statute as it existed in 1994 controls. NEB. REV. STAT. § 77-1738 (Reissue 1990). However, that statute differs from the 1996 Reissue only as to language deleted in 1995 regarding certain certifications to the state Tax Commissioner. The 1995 amendment has no effect upon the present controversy. Similarly, for the sake of completeness, the court notes a subsequent amendment to the statute. 2000 Neb. Laws, L.B. 968, § 68. Of course, the statute effective at the time of the occurrence controls. This makes it unnecessary and inappropriate to express an opinion whether the 2000 amendment would affect the result in some other case. Consequently, this court cites the 1996 Reissue for convenience.

4. This court concludes that even if § 77-1738 required the county board to act ministerially upon a finding of the existence of the condition precedent, the condition precedent did not occur. However, this is not because of the precise reason urged by the defendant. Section 77-1738 required the county board to examine the return of the county treasurer to determine if it "*appear[s] from the return . . . that . . . it is impossible to collect such taxes . . .*." The statute required the county board to examine the return of the treasurer, rather than to make its own independent determination.

5. NEB. REV. STAT. § 77-1742 (Reissue 1996) (unchanged from the 1990 Reissue) dictates the content of the treasurer's return, requiring the treasurer to "[set] forth in detail the name of each person charged with personal property taxes which [he or she] and [his or her] deputies have been unable to

collect by reason of the removal or insolvency of the person charged with such tax, the *value of the property* and the amount of tax, the *cause of inability to collect* such tax in each separate case, *in a column provided in the list* for that purpose. . . . The truth of the statement contained in such lists shall be *verified by affidavit* of the county treasurer.” NEB. REV. STAT. § 77-1742 (Reissue 1996) (emphasis supplied).

6. For the sake of completeness, the court observes that § 77-1742 was amended in 1998. 1998 Neb. Laws, L.B. 306, § 35. Of course, the statute as it existed in 1994 controls in this case. Because the 1996 Reissue is the same as the 1990 Reissue, this court has cited the 1996 version for convenience.

7. The evidence shows, without dispute or any issue of material fact, that the treasurer’s return fails to (1) state the value of the property, (2) state of the cause of inability to collect, (3) provide a column in the list for either such value or such cause, and (4) include the required verification by affidavit.

8. As the statute required the board to make its determination from the treasurer’s return, the treasurer’s failure to state such cause made it impossible for the board to determine, from the appearance of the return, that the treasurer had made any such determination. Thus, even if the board’s duty was purely ministerial, the condition precedent triggering such duty, i.e., the appearance of a treasurer’s return setting forth the required statements, never appeared. Moreover, the return was not verified by affidavit, rendering the return irregular and providing another reason for the county board to decline to act pursuant to § 77-1738.

9. Whatever the state of facts may be regarding the treasurer’s state of mind or performance of duty prior to preparation of the return, there is no issue of fact regarding the content of the return.

10. The plaintiff’s legal theory depends entirely upon the notion that the treasurer made a return triggering the striking of taxes from the tax list. Because the treasurer did not make the return as required by law, such striking could not, and did not, occur. The plaintiff’s cause of action necessarily fails.

11. This court is further persuaded that the petition fails for another, perhaps more important, reason.

12. NEB. REV. STAT. § 77-1735 (Reissue 1996) provides the exclusive remedy to obtain refund of an illegal tax. *Rawson v. Harlan County*, 247 Neb. 944, 530 N.W.2d 923 (1995); *Scudder v. County of Buffalo*, 170 Neb. 293, 102 N.W.2d 447 (1960).

13. Section 77-1735 requires the person paying such tax to, “at any time within thirty days after such payment, make a written claim for refund of the payment from the county treasurer to whom paid.” The plaintiff’s petition alleges that “[o]n or about July 30, 1999, *through the attorneys* for the Cherry County Treasurer, [p]laintiff requested a refund” Exhibit 3 (emphasis supplied). Thus, the plaintiff’s petition conclusively shows that the plaintiff failed to make a written claim with the county treasurer. Compliance with the statutory requirement to make a written demand upon the county treasurer constitutes a condition precedent to bringing suit to recover the tax. *City Nat. Bank of Lincoln v. School Dist. of City of Lincoln*, 121 Neb. 213, 236 N.W. 616 (1931). Because the plaintiff failed to comply with the condition precedent, the petition must be dismissed. Further, the time for making such claim expired 30 days after the payment of the tax, making it now impossible to fulfill the condition and refile the action. The petition must be dismissed with prejudice.

14. The pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. The motion must be granted and the petition dismissed with prejudice for the reasons set forth above.

15. The plaintiff failed to appear through counsel at the first hearing on the motion. The attempt by a corporate officer, not an attorney, to “appear” at that hearing was ineffective. *Anderzhon/Architects, Inc. v. 57 Oxbow II Partnership*, 250 Neb. 768, 553 N.W.2d 157 (1996) (proceedings by person not entitled to practice law are a nullity). At the hearing on plaintiff’s motion to reconsider, the plaintiff’s counsel suggested a defect in the service of the defendant’s affidavits but offered to waive any such defects if allowed to adduce additional evidence. As the court granted the requested relief, the plaintiff’s “waiver” is probably binding. But even if it is not, the grounds for the court’s decision appear on the face of the plaintiff’s petition, which attaches and incorporates the treasurer’s return. Thus, even disregarding all of the evidence offered by the defendant, the same result obtains.

16. As the court records reflect that all taxable costs have been paid by the plaintiff, there is no monetary judgment for costs resulting against the plaintiff.

JUDGMENT: IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The defendant’s motion for summary judgment is granted.

2. SUMMARY JUDGMENT is hereby entered dismissing the plaintiff's petition with prejudice to future action at plaintiff's cost.

Signed in chambers at O'Neill, Nebraska, on September 27, 2000.
DEEMED ENTERED upon filing by court clerk.

If checked, the Court Clerk shall:

- Mail a copy of this order to all counsel of record and to any pro se parties.
Done on _____, 20__ by ____.
- 9 Enter judgment on the judgment record.
Done on _____, 20__ by ____.
- Mail postcard/notice required by § 25-1301.01 within 3 days stating "Petition dismissed with prejudice."
Done on _____, 20__ by ____.
- Note the decision on the trial docket as: [date of filing] Signed "Summary Judgment" entered dismissing plaintiff's petition with prejudice.
Done on _____, 20__ by ____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge