IN THE SUPREME COURT OF OHIO

Board of Education of the Columbus City Schools,	:	Case No. 06-1429
Appellee,	:	
v.	:	
Franklin County Board of Revision, Franklin County Auditor and Tax Commissioner of the State of Ohio,	:	
Appellees.	:	Appeal from the Ohio Board of Tax Appeals Case No. 2005-A-381
and	:	
2100 Maple Canyon Plaza, LLC,	:	
Appellant.	:	

MOTION OF APPELLEE BOARD OF EDUCATION TO DISMISS APPEAL

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MOTION OF MOTION OF APPELLEE BOARD OF EDUCATION TO DISMISS APPEAL

Now comes Appellee Board of Education of the Columbus City School District and moves this Court to dismiss Appellant's appeal under Section 7 of Rule VI of the Rules of Practice of this Court. The grounds for this motion are two-fold:

(1) Appellant 2100 Maple Canyon Plaza, LLC, had no standing under R.C. 5717.04 to appeal to this Court because it was not a "party" to the BTA appeal below. Maple Canyon was not a party to the BTA proceeding because: (A) it did not file a notice of appeal with the BTA; and (B) it was not permitted by statute to be an appellee before the BTA because it was not the owner of the property; and

(2) Appellant failed to comply with the mandatory and jurisdictional requirements of R.C. 5717.04 in that it failed to join the actual property owner as an appellee in its notice of appeal to this Court and it failed to serve a copy of its appeal on the property owner.

For the reasons set forth herein, this Court is respectfully requested to dismiss this appeal.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Facts

Appellant 2100 Maple Canyon Plaza, LLC (hereafter referred to as Maple Canyon) purchased the property involved in this appeal in an arm's-length sale for $2,900,000 on July 1, 2003 (see conveyance fee form, Appellant's Supp., p. 5). However, a year later, on July 16, 2004, Maple Canyon then sold the property to an unrelated entity, Ted & Maria's Plaza, LLC (see Appellant's Supp. p. 31 and 33). This sale took place before the Franklin County Board of Revision made its decision on a complaint filed against the property by the Appellee Board of Education. Thus, at time of the BOR decision, and at the time of BTA proceeding below, and at the time Maple Canyon filed an appeal with this Court, Appellant Maple Canyon had no legal or equitable interest in the property and no liability or responsibility for the real estate taxes involved in this matter, and was a complete stranger to the property.

On March 30, 2004, the Appellee Board of Education filed a complaint with the Franklin County Board of Revision for tax year 2004, seeking to increase the true value of the property to the sale price of $2,900,000. The complaint set forth the correct tax mailing address of the property owner, which at that time was the address of the tenant, Columbus CVS LLC, at One CVS Drive, Woonsocket, RI. CVS had assumed the existing lease on the property in January, 2001, which was originally executed by Rite-Aid with a prior owner of the property (Appellant's Supp. 8, and 16, which states that "CVS assumed this lease as of 01/13/2002 from Rite Aid"). CVS originally paid rent to Appellant Maple Canyon, but upon sale of the property to Ted & Maria's Plaza, LLC, CVS then paid its rent to Ted & Maria's Plaza, LLC (see Appellant's Supp., p. 16 and 24). The lease required the tenant to pay the real estate taxes on the property.

After Maple Canyon had sold the property to Ted and Maria's Plaza in July, 2004, the Franklin County Board of Revision gave notice of the filing of the board of education's complaint to Ted and Maria's Plaza and gave notice to Ted and Maria's Plaza of the hearing date on the complaint (see Appellant's Supp., p. 6 and 7). No counter-complaint was filed by the property owner. The Board of Revision held a hearing on the complaint on February 17, 2005, and rendered its decision on March 16, 2005. A copy of the BOR's decision was sent to Ted and Maria's Plaza.

In its notice of appeal to the BTA, the Board of Education stated that current owner of the property was Ted & Maria's Plaza, LLC. The Board of Education waived hearing at the BTA and the matter was submitted to the BTA upon the record made at the Board of Revision. Maple Canyon filed a brief with the BTA. On June 30, 2006, the BTA rendered a decision holding that the sale by which Maple Canyon acquired the property in July, 2003, was an arm's-length sale and that the sale price of the property ($2,900,000) had to be taken as its true value in money for tax year 2004.

On July 28, 2006, Maple Canyon filed a notice of appeal with this Court. Maple Canyon did not join the property owner, Ted & Maria's Plaza, LLC, in that appeal and did not serve a copy of its notice of appeal on the property owner.

Law and Argument

A. Appellant Had No Standing To File Its Appeal With This Court Because It Was Not A Party To The BTA Proceedings.

Appellant had no standing to file an appeal with this Court under R.C. 5717.04 because it was not a party to the BTA proceeding. It was not a party to the BTA proceeding because it was not the owner of the property, and because it had no interest in the property, and because it had no statutory or legal liability for any of the real property taxes which may arise as a result of this appeal.

The real property taxes which are at issue in this appeal are the sole responsibility and sole liability of the owner of the property, Ted and Maria's Plaza. Only the property owner, Ted and Maria's Plaza, had statutory authority to take an appeal to this Court from the decision of the BTA.

R.C. 5717.04 provides that an appeal to this Court may be taken by any of the "parties to the appeal before the board of tax appeals." R.C. 5717.04 states, in part, as follows:

"Appeals from decisions of the board determining appeals from decisions of county boards of revision may be instituted by any of the persons who were parties to the appeal before the board of tax appeals, by the person in whose name the property involved in the appeal is listed or sought to be listed, if such person was not a party to the appeal before the board of tax appeals, or by the county auditor of the county in which the property involved in the appeal is located."

A. In Order To Be A Party Before The BTA, A Person Must Have Filed A Notice Of Appeal With The BTA Or Be Expressly Made An Appellee By Statute.

The issue to determined is whether Maple Canyon was a "party" to the BTA appeal. The right to be a party before the BTA and to participate in the BTA proceeding, and the corresponding right to appeal from the BTA's decision under R.C. 5717.04, depend solely on whether: (1) the person filed a notice of appeal with the BTA; (2) the person is the "property owner" or (3) the person is expressly made an appellee by statute. The current owner of the property, and not a prior owner of the property, is expressly made a party to a BTA proceeding by R.C. 5715.20 and R.C. 5717.01. Maple Canyon was not the owner of the property and it had no standing to appear before the BTA or to be an appellee in the BTA appeal. This Court's prior decisions also explicitly set forth this principle.

Both the county board of revision and the BTA are creatures of statute and are "limited to the powers conferred upon it by statute." *Cincinnati School Dist. Bd. of Edn. v. Hamilton Cty. Bd. of Revision* (2000), 87 Ohio St.3d 363 and *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St.3d 229, 520 N.E.2d. 188. Appellant Maple Canyon had "no inherent right" to be a party before the BTA, but only a right expressly created by statute. Maple Canyon could not vest itself with the status of a party before the BTA merely by filing a brief with the BTA and it acquired no such status simply because the other parties failed to object to its participation in the BTA appeal.

In *Dinner Bell Meats, Inc. v. Bd. of Revision* (1982), 70 Ohio St. 2d 103, 104, 435 N.E.2d 412, this Court held that a board of education which had actually filed a complaint with the county board of revision was not "entitled to appear before the Board of Tax Appeals" and was not a party to the BTA appeal filed by the property owner if the board of education did not file a notice of appeal itself. According to this Court,"[t]he issue presented herein is whether the school board is entitled to appear before the Board of Tax Appeals in opposition to Dinner Bell's appeal, notwithstanding the fact that it did not appeal from the adverse decision of the board of revision" (p. 104) and "[t]he question raised by this appeal is what, if any, consequences flow from the school board's failure to file a notice of appeal?"(p. 104). This Court's holding was as follows: "The Board of Tax Appeals correctly stated that '[o]ne who files a complaint with a Board of Revision is not automatically a party in an appeal before the Board of Tax Appeals'" (p. 105). Because the board of education did not file a notice of appeal with the BTA and because no statute specifically made the board a party-appellee to a BTA appeal, the board was not "entitled to appear before the Board of Tax Appeals" and was not a party to the BTA appeal.

A board of education that filed a counter-complaint under R.C. 5715.19(B) is expressly made a party to a BTA appeal by statute. In *Dinner Bell Meats, Inc.*, supra, this Court noted in footnote 4 (p. 104) that the recent amendments to R.C. 5715.19(B), which provide for the filing of counter-complaint, made a board of education that filed a counter-complaint a party or an "appellee" to a BTA appeal even when it did not file a notice of appeal. This footnote reads as follows:

"Since the date of the decision of the Board of Tax Appeals herein, the General Assembly has amended R.C. 5715.19(B) to provide that '[u]pon the filing of the complaint under this division, the board of education or the property owner shall be made a party to the action.' (Am. Sub. S.B. No. 6, effective August 27, 1981.) It is clear, therefore, that after the effective date of the amendment, the entity which elects not to file an appeal from the board of revision will, nevertheless, be an appellee before the Board of Tax Appeals."

The property owner is, apparently, always a party to the BTA proceeding whether or not the owner filed a complaint with the board of revision or a notice of appeal to the BTA. While R.C. 5715.19(B) literally requires the property owner to file a counter-complaint in order to become a "party" to the BOR proceeding (the last sentence of division (B) states that "[u]pon the filing of a complaint under this division, the board of education or the property owner shall be made a party to the action"), in *Columbus Apartments Assoc. v. Franklin Cty. Bd. of Revision* (1981), 67 Ohio St. 2d 85, 90, 21 Ohio Op. 3d 54, 423 N.E.2d 147, this Court held that a property owner did not have to file a complaint in order to appeal to the BTA. According to this Court: "The right of a property owner to appeal the determination of a board of revision, where a complaint has been successfully pursued by a third party [a board of education], does not depend upon the owner having filed a complaint pursuant to R. C. 5715.19." While *Columbus Apartments Assoc.* was decided before the

amendments to R.C. 5715.19(B) which require a property owner to file a counter-complaint, it is typically relied on to support the view that a property owner does not have to file a counter-complaint in order to be a party appellee to a BTA appeal filed by a board of education.

R.C. 5717.04 also specifically gives "the person in whose name the property involved in the appeal is listed" the right to appeal if that owner was not a party to the BTA proceeding.

However, there is no statute which makes a prior owner of the property, such as Maple Canyon, an appellee before the BTA. R.C. 5715.20 and R.C. 5717.01 make the current owner of the property a party before the BTA, but not a prior owner of the property. Thus, Maple Canyon was not a party to the BTA appeal and had no right or standing to appeal to this Court under R.C. 5717.04

2. Appellant Maple Canyon Was Not Entitled To Notice Of The BOR Decision And Could Not File An Appeal To The BTA Under R.C. 5715.20.

R.C. 5715.20(A) determines who may appeal to the BTA from a decision of a county board of revision and it provides that only "the person in whose name the property is listed or sought to be listed" and "the complainant" can appeal to the BTA. Division (A) of this Section reads, in part, as follows:

"(A) Whenever a county board of revision renders a decision on a complaint filed under section 5715.19 of the Revised Code, it shall certify its action by certified mail to the person in whose name the property is listed or sought to be listed and to the complainant if the complainant is not the person in whose name the property is listed or sought to be listed. A person's time to file an appeal under section 5717.01 of the Revised Code commences with the mailing of notice of the decision to that person as provided in this section."

The BOR decision was rendered on March 16, 2005, while Maple Canyon had previously sold the property on July 16, 2004. Maple Canyon was not entitled to notice of the BOR decision under R.C. 5715.20 because it was not a "complainant" or a "person" to whom notice was required to be given "as provided in this section," and it was not a "person" whose "time to file an appeal under section 5717.01 of the Revised Code commences with the mailing of notice of the decision to that person as provided in this section." As indicated above, the BOR had, in fact, previously sent the notice of the filing of the complaint by the Board of Education required by R.C. 5715.19(B), and the BOR's hearing letter required by R.C. 5715.19(C), to Ted and Maria's Plaza, LLC (see Appellant's Supp., p. 6 and 7), which was the "the person in whose name the property is listed" at both of those times. The Franklin County BOR also properly mailed notice of its decision to the new owner, Ted and Maria's Plaza, as required by R.C. 5715.20. It just so happens that the BOR also sent a copy of the notice of its decision (addressed to Ted and Maria's Plaza) to the attorney for Maple Canyon who appeared at the BOR hearing, but that notice was legally superfluous and did not vest Maple Canyon with any right to appeal to the BTA under R.C. 5715.20, because Maple Canyon was not "the person in whose name the property is listed or sought to be listed" or a "complainant" before the BOR.

R.C. 5717.01 then specifically refers to R.C. 5715.20 in setting forth who may appeal to the BTA. This section reads, in part, as follows:

"An appeal from a decision of a county board of revision may be taken to the board of tax appeals within thirty days after notice of the decision of the county board of revision is mailed as provided in division (A) of section 5715.20 of the Revised Code. Such an appeal may be taken by the county auditor, the tax commissioner, or any board, legislative authority, public official, or taxpayer

authorized by section 5715.19 of the Revised Code to file complaints against valuations or assessments with the auditor."

This section gives the "the county auditor [and] the tax commissioner" a right to appeal to the BTA, and the property owner always has a right of appeal to the BTA. The persons and entities referred to by the words "any board, legislative authority, public official, or taxpayer authorized by section 5715.19 of the Revised Code to file complaints against valuations or assessments with the auditor" are the actual complainants before the board of revision (and not merely someone who was "authorized" to file a complaint but did not do so). In *N. Olmsted v. Cuyahoga Cty. Bd. of Revision* (1980), 62 Ohio St. 2d 218, 219, 16 Ohio Op. 3d 249, 404 N.E.2d 757, this Court stated that "[t]his court has held that only complainants before the board of revision have standing to appeal a determination by that body to the Board of Tax Appeals."

In summary, Appellant Maple Canyon was not "the person in whose name the property is listed"or "the complainant" under R.C. 5715.20 and it was not a person or entity that filed a complaint against the property as referred to in R.C. 5717.01. Consequently, it could not be a "party" to the BTA proceeding and it was not "entitled to appear before the Board of Tax Appeals" under *Dinner Bell Meats, Inc. v. Bd. of Revision* (1982), 70 Ohio St. 2d 103, 435 N.E.2d 412. As such, Appellant could not file an appeal with this Court from the decision of the BTA under R.C. 5717.04.

3. Appellant Maple Canyon Did Not Join The Property Owner As An Appellee In Its Notice Of Appeal In Violation Of The Mandatory And Jurisdictional Requirements of R.C. 5717.04.

Maple Canyon was required by R.C. 5717.04 to make the property owner, Ted and Maria's Plaza, an appellee in its notice of appeal filed with this Court and to serve a copy of the notice of appeal on the property owner. The relevant part of this section reads as follows:

"In all such appeals the tax commissioner or all persons to whom the decision of the board appealed from is required by such section [R.C. 5717.03] to be certified, other than the appellant, shall be made appellees. Unless waived, notice of the appeal shall be served upon all appellees by certified mail."

R.C. 5717.03(B) required the BTA to mail a copy of its decision to the property owner. This section states in part as follows:

*** [T]he board of tax appeals's decision and the date when it was filed with the secretary for journalization shall be certified by the board by certified mail to all persons who were parties to the appeal before the board, to the person in whose name the property is listed, or sought to be listed, if such person is not a party to the appeal, to the county auditor of the county in which the property involved in the appeal is located, and to the tax commissioner."

The property owner, Ted and Maria's Plaza, was an automatic party to the BTA appeal because it was the property owner or "the person in whose name the property is listed" under R.C. 5715.20 and under the principles set forth in *Columbus Apartments Assoc.*, supra. Furthermore, even if Ted and Maria's Plaza was not a "party" to the BTA appeal, it was "the person in whose name the property is listed" under R.C. 5717.03(B). Therefore, Maple Canyon was specifically required to name Ted and Maria's Plaza as an appellee in its notice of appeal to this Court and to serve a copy

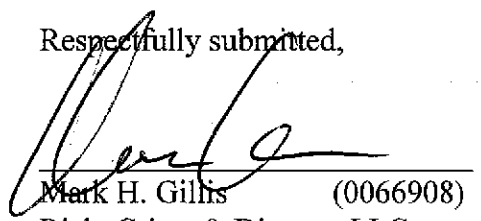
thereof on Ted and Maria's Plaza by certified mail. Maple Canyon did not comply with either of these requirements.

In *Olympic Steel, Inc., Inc. v. Cuyahoga Cty. Bd. of Revision*, 110 Ohio St.3d 1242, 2006-Ohio-4091, 852 N.E.2d 178, this Court held that the requirements of R.C. 5717.04 of "joinder and service is 'mandatory and jurisdictional.'" Where an appellant failed to satisfy these provisions of R.C. 5717.04, the appeal had to be dismissed. Appellant's appeal should, therefore, be dismissed.

CONCLUSION

For these reasons stated herein, this Court is respectfully requested to dismiss the appeal filed by Appellant herein.

Respectfully submitted,



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CERTIFICATION OF SERVICE

I hereby certify that a true and complete copy of the foregoing motion was served upon Todd Sleggs, 820 West Superior Avenue, Suite 400, Cleveland, Ohio, 44113, and upon Paul Stickel, 373 South High Street, 20th Floor, Columbus, Ohio, 43220, upon Marc Dann, Attorney General, 30 East Broad Street, 17th Floor, Columbus, Ohio, 43215, and upon Ted & Maria's Plaza, 13931 Carroll Way, #A-2, Tustin, California, 92780, by regular U.S. Mail, postage prepaid, this 2nd day of March, 2007.

Mark H. Gillis