

IN THE SUPREME COURT OF OHIO

14043 BROOKPARK INC.)	Supreme Court Case No: 2013-0105
)	
Appellant,)	On appeal from the Cuyahoga County
)	Court of Appeals
vs.)	Eighth Appellate District
)	
BEREA CITY SCHOOL DISTRICT)	
BOARD OF EDUCATION, CUYAHOGA)	Court of Appeals
COUNTY BOARD OF REVISION,)	Case No. 98286
CUYAHOGA COUNTY FISCAL)	
OFFICER,)	
)	
Appellees.)	

APPELLEE BERE A CITY SCHOOL DISTRICT BOARD OF EDUCATION'S
MEMORANDUM IN RESPONSE TO MEMORANDUM IN SUPPORT
OF JURISDICTION OF APPELLANT 14043 BROOKPARK INC.

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EXPLANATION OF WHY THIS IS NOT A CASE OF PUBLIC OR
GREAT GENERAL INTEREST AND DOES NOT INVOLVE A
SUBSTANTIAL CONSTITUTIONAL QUESTION

This Honorable Court should not accept jurisdiction in this appeal as no issue of public or great general interest, nor any substantial constitution question, is involved. Appellant failed to timely file an appeal of a county board of revision decision and, through, its own negligence failed to protect its right to an appeal. This Court addressed the issue presented in this appeal in the case styled *Sears, Roebuck & Co. v. Franklin Cty. Bd. of Revision* (1991), 62 Ohio St.3d 156, 580 N.E.2d 775.

This case commenced with an appeal from a decision of the Cuyahoga County Board of Revision (hereinafter referred to as "BOR"). The decision was appealed to both the Ohio Board of Tax Appeals (hereinafter referred to as "BTA") and the Cuyahoga County Court of Common Pleas (hereinafter referred to as "Court"). The Appellee in this appeal, the Berea City School District Board of Education (hereinafter referred to as "BOE") perfected its appeal first with the BTA on November 12, 2009. The Appellant was notified that an appeal had been filed with the BTA by letter from the BTA dated November 19, 2009. The Appellant filed its notice of appeal three weeks later, on December 3, 2009, with the Court. When the appeal was filed with the BTA by the BOE, exclusive jurisdiction was established with the BTA pursuant to O.R.C. §5717.05. The Court never obtained jurisdiction over the appeal attempted to be filed with it by the Appellant. The only appeal before the BTA was the appeal filed by the BOE. Subsequently, the BOE withdrew its appeal with the BTA. The Appellant objects to the withdrawal of the appeal.

The issue before this Court is whether a party with an appeal in the BTA can withdraw its appeal when it is the only appeal filed with the Board. This issue has previously been argued

before and settled by this Court. This Court has held that a party can withdraw its appeal prior to the hearing. Nothing in the appellate statutes prevented the BOE from withdrawing its appeal. Furthermore, this Court has held that in order to protect one's right to an appeal, it is necessary for the party to file its own appeal in the jurisdiction which had obtained exclusive jurisdiction.

The Appellant argues that this Court should accept jurisdiction of this appeal because its due process rights were violated when it, allegedly, did not receive notice of an appeal filed with the BTA. The Appellant asserts that the notice the BTA mailed November 19, 2009 acknowledging the filing of the appeal with the BTA is not sufficient notice.

The Appellant further goes on to state that this is an appeal with public or great general interest and involves a substantial Constitutional question because the letter which was sent to the Appellant was merely a notice to inform counsel that the BTA was experiencing severe budget cuts. The Appellant is wrong. The letter clearly states in paragraph one that an appeal had been filed with the BTA, identified the BTA case number, and the attorney examiner to whom the appeal has been assigned. The letter clearly states in the first sentence: "A notice of appeal was filed with the Board of Tax Appeals on 11/12/2009."

This Court decided the issue presented here for review over 20 years ago in the *Sears, supra* case. The holding in *Sears, supra* has been relied upon by numerous courts of appeal during the past two decades. There is no issue presented in this appeal that requires this Court's attention again. What this appeal involves is an Appellant who failed to secure its right to an appeal by filing an appeal with the BTA even after it received notice that an appeal had been filed with that Board and who is attempting to blame the system.

STATEMENT OF THE CASE AND FACTS

This matter is on appeal from a decision of the Cuyahoga County Court of Appeals Eighth Appellate District in which the Court affirmed the withdrawal of a Board of Tax Appeals appeal which had been filed and withdrawn by the Berea City School District Board of Education. The BTA appeal involved the valuation of real property for *ad valorem* taxation purposes of property located at 14043 Brook Park Road, Brook Park (hereinafter referred to as "Property") owned by 14043 Brookpark Inc. (Appellant).

The Property is approximately 2.13 acres of land improved in 1965 with a 120-room, five-story motel operating as an "America's Best Value Inn". For tax year 2008, Appellant filed a complaint with the BOR seeking a reduction from the Auditor's fair market value of \$1,991,200 to a value of \$1,200,000. Pursuant to law, the BOE filed a counter-complaint seeking to maintain the Auditor's value. The BOR conducted a hearing on this matter on September 30, 2009. The BOR issued its decision by letter on November 4, 2009 in which it reduced the fair market value of the subject property to \$1,850,000.

O.R.C. §5717.01 allows for an appeal from a decision of a board of revision to the board of tax appeals by boards of education within thirty days after the notice of the decision of the county board of revision is mailed. On November 12, 2009, the BOE timely filed its appeals of the BOR's decision with the BTA pursuant to O.R.C. §5717.01. The appeals were assigned BTA Case Nos. 2009-V-3433 and 2009-V-3434.

Appellant received a notice from the BTA that an appeal had been filed with the BTA as evidenced by the BTA's letter dated November 19, 2009. O.R.C. §5717.01 does not require notices of appeal be sent to an owner or an owner's counsel by the appellant. Jurisdiction for the appeal was established with the BTA on November 12, 2009.

On December 3, 2009, Appellant filed its notice of appeal of the BOR's decision with the Court pursuant to O.R.C. §5717.05. On January 14, 2010, the BOE filed a motion to dismiss the appeal filed in the Court by Appellant for the reason that jurisdiction had been established in the BTA on November 12, 2009. On January 22, 2010, Appellant filed a brief in opposition to the BOE's motion to dismiss and filed a "Motion to Remove Appeal of Decision of Cuyahoga County Board of Revision to Ohio Board of Tax Appeals". The BOE responded with a brief in opposition to the motion to remove on January 22, 2010. On January 29, 2010, the Court docketed a journal entry stating that the BTA had exclusive jurisdiction.

Two years later, on March 12, 2012, the BOE filed a Notice of Voluntary Dismissal with the BTA of its appeal. On March 13, 2012, Appellant filed an objection to the dismissal of the appeal; the BOE responded on March 15, 2012; and Appellant filed a "surreply" to the BOE's reply with the BTA on March 16, 2012. On March 27, 2012, the BTA issued its Order dismissing the appeal filed by the BOE. On April 26, 2012, Appellant filed its appeal of the BTA's Order dismissing the appeal with this Cuyahoga County Court of Appeals, Eighth Appellate District, which has been assigned Case No. 98286. The Court of Appeals heard oral arguments on the appeal and issued its decision affirming the withdrawal of the appeal on October 4, 2012. The Appellant filed a motion for reconsideration which was denied. The Appellant filed this appeal on January 17, 2013.

APPELLEE'S RESPONSE TO APPELLANT'S ARGUMENT
IN SUPPORT OF PROPOSITIONS OF LAW

Appellee's Response to Appellant's Propositions of Law Nos. 1 and 2: Any notice, whether from the BTA or BOR, received by a party advising the party that an appeal has been filed is sufficient notice to that party to protect its rights and file its own appeal.

The BOE will respond to Appellant's Propositions of Law No. 1 and 2 together since they both speak to the certified mail notice.

The Appellant failed to file an appeal with the BTA even after receiving notice that an appeal had been filed with the BTA by the BOE. Appellant blames its neglect to protect its right to an appeal by claiming that the BOR failed to provide it by certified mail with a notice of the appeal within an arbitrary time frame even though no such time frame is set forth in the statute. The statute which governs the filing of appeals with the BTA requires a board of revision to send notice to the parties at a board of revision hearing that an appeal has been filed. It does not provide a time frame for the sending of the notice.

However, Appellant had received notice from the BTA that an appeal had been filed and there was still time for it to file its own appeal with the BTA. The deadline for filing appeals was December 4, 2009. The BTA mailed its notice acknowledging the filing of the appeal by the BOE on November 19, 2009. There is no evidence that the Appellant did not receive this notice. Appellant had time to file an appeal with the BTA. Instead, Appellant waited until the 11th hour and filed an appeal on the last day with the Court. It did this in spite of knowing that the BTA had obtained exclusive jurisdiction on November 12, 2009 when the appeal filed by the BOE had been perfected.

Appellant cites to a United States Supreme Court case, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). It cites:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is **notice reasonably calculated under all the circumstances**, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. [Emphasis added.] Appellant's Memorandum, page 9

The very cite upon which Appellant relies to support its argument is also the very support which shows why its argument should fail. The letter from the BTA [notice, reasonably calculated] had been sent to Appellant. The Appellant [interested parties] was notified [apprised] not only that an appeal had been filed with the BTA but the letter also identified the case number assigned to the appeal by the BTA and the attorney examiner who would be handling the appeal. Although it may not have received notice from the BOR before receiving notice from the BTA [under all the circumstances], the Appellant did receive timely notice and should have protected its right to an appeal by filing its own appeal with the BTA.

Both O.R.C. §§5717.01 and 5717.05 have certified mailing requirements. There is no evidence that certified mailings were not sent. Appellant has not claimed it did not receive the notice of appeal by certified mail. Nor has Appellant produced any evidence that it did not receive the notice by certified mail.

What the evidence does show, however, is that the Appellant was notified of an appeal filed in the BTA by the BOE and that sufficient time remained for the Appellant to file its own appeal in the BTA before the time for the filing an appeal expired.

Appellant states on page 10 of its brief that the letter from the BTA is "not reasonably calculated" to "apprise the interest party of the pendency of the appeal". In fact, that is exactly what the letter does. The very first paragraph of the letter advises the addressee and the parties who were copied on the letter that an appeal had been filed with the BTA, the date the appeal was filed, the case number assigned to the appeal by the BTA, and the attorney examiner

assigned to handle the appeal. This letter was sufficient notice to alert the Appellant to the fact that if it wanted to protect its rights to be heard, it should file an appeal with the BTA.

Appellee's Response to Appellant's Propositions of Law Nos. 3 and 4: A letter from the BTA advising that an appeal has been filed with it and which identifies the BTA case number and attorney examiner assigned to the case is sufficient notice informing the parties that an appeal has been filed.

The BOE will respond to Appellant's Propositions of Law No. 3 and 4 together since they both speak to the letter sent by the BTA.

Appellant expects the BTA to have insight into its legal representation and know that it was represented by counsel and to send notices to counsel instead of sending them to the party affected by the filing of an appeal. Counsel for Appellant was in attendance at the BOR hearing and the BOR sent notice of its decision to counsel as well as to the Appellant itself. However, the BTA did not know that the Appellant was represented by counsel. The BTA received a notice of appeal from the BOE which informed the BTA of the parties to the proceeding at the Board of Revision and sent the appeal by certified mail to the BTA and the BOR, pursuant to statute. The BTA sent notice to the parties to the action before the BOR and not to legal counsel because it was unaware at the time it sent the notice that the Appellant was represented by counsel. This is why the BTA has a requirement that legal counsel must enter an appearance pursuant to O.A.C. §5717-1-03. The BTA had no record from the BOR at that time that the notice was sent. Therefore, it was unaware that Appellant was represented by counsel. Furthermore, Appellant may have chosen different legal counsel to represent it on appeal. The BTA sent notice to the party whose rights were going to be affected by the appeal. The Appellant's due process rights were actually being protected by the BTA with the sending of the notice of appeal directly to the Appellant.

The letter from the BTA which included a paragraph warning the parties that due to a dramatic increase in newly filed appeals the length of time until the BTA can address the appeal may be lengthy and encouraging the parties to engage in settlement discussions does not negate the fact that the purpose of the letter was to alert the parties that an appeal had been filed.

Appellee's Response to Appellant's Proposition of Law No. 5: The BTA's jurisdiction is statutorily limited to only appeals which were filed with it; therefore, an appeal filed with a common pleas court is not within the jurisdiction of the BTA and the BTA does not have authority to preside over an appeal filed with a common pleas court.

Appellant claims that the BTA should have assumed jurisdiction over its appeal which had been filed in the Common Pleas Court. Appellant argues that its appeal to the Court was perfected; and just because it was not the first appeal filed, that does not mean it does not have an appeal. The BOE submits that the appeal was never perfected since the Court never acquired jurisdiction over the appeal. An appeal had already been filed in the BTA by the BOE on November 12, 2009, three weeks prior to Appellant's appeal in the Court.

The BOR decision was issued November 4, 2009 making the deadline for filing an appeal December 4, 2009. The BOE perfected its appeal November 12, 2009 with the BTA. On November 19, 2009, the BTA sent notice to Appellant that an appeal was filed with the BTA. Even allowing several days for mailing, it can be assumed that Appellant would have received notice from the BTA within enough time for Appellant to file an appeal with the BTA. (An appeal is considered "filed" with the BTA the day it is mailed. O.R.C. §5717.01.)

The BTA is a creature of statute. It is capable of exercising only that authority which is granted to it by statute. *American Restaurant & Lunch Co. v. Glander* (1946), 147 Ohio St. 147. In determining whether a BTA has jurisdiction in an appeal, it must consider O.R. C. §5703.02 which specifically sets forth the powers and duties of the BTA. It provides, in pertinent part:

“(A) Exercise the authority provided by law to hear and determine all appeals of questions of land and fact arising ... in appeals from decision, orders, determination, or actions of any tax administrative agency ... including but not limited to appeals from:

(2) Decision of county board of revision;...”

The BTA never had an appeal from a decision of the BOR filed by Appellant because Appellant never perfected an appeal with the BTA. Therefore, the only appeal over which the BTA had exclusive jurisdiction is the appeal filed by the BOE. Nowhere in 5703.02 is there a provision for the BTA to exercise jurisdiction over an appeal which had been originally filed with a court of common pleas.

One of the case upon which the Court of Appeals relied is the case styled *Trebmal Construction, Inc. v. Cuyahoga county Board of Revision*, 94 Ohio App.3d 246 (Ohio App. 8 Dist., 1994), 640 N.E.2d 601. The BOE submits that *Trebmal* is clearly on point with the facts of this case. In *Trebmal*, which was a consolidated case, both the Cleveland and Warrensville Heights Boards of Education were able to successfully dismiss the appeals filed by the owners (Trebmal Construction, Inc. in Cleveland and Fuchs in Warrensville Heights) because the appeals filed by the Boards of Education were first filed with the Board of Tax Appeals. The appeals by the property owners which were filed with the Cuyahoga County Court of Common Pleas were filed after the appeals by the boards of education were filed with the BTA. Therefore, the BTA had jurisdiction over the appeals.

The two boards of education filed for dismissal of the appeals in the Common Pleas Court. These dismissals were granted. The Boards of Education then filed dismissals of their appeals in the BTA. The BTA granted the dismissals.

In holding that the BTA did not err in permitting the school boards to voluntarily dismiss their appeals, the Court of Appeals relies upon this Court’s decision in the case of *Sears*,

Roebuck & Co. v. Franklin Cty. Bd. of Revision (1991), 62 Ohio St.3d 156, 580 N.E.2d 775 in which the owner objected to the dismissal because it would operate to prejudice a party. The *Trebmal* Court, citing *Sears*, stated:

“Mayfield had the opportunity to indicate its disagreement with the valuation determined by the board of revision in at least two ways: ... (2) it could have filed a notice of appeal with the BTA contesting the reduction in valuation of the subject property. ...”

This Court went on further to state:

“In other words, the BTA has no jurisdiction to consider errors raised by a party that failed to file its appeal with the BTA.” (emphasis added) *Id.*, p. 253.

In *Trebmal*, the Court further stated:

“Under the particular facts before us now, it was obvious to both *Trebmal* and *Fuchs*, within thirty days after the BOR gave notice of its decision, that their respective opponents (the school boards) had succeeded in filing the first notices of appeal with the BTA.”

To preserve the litigation of taxable values, it was necessary for both *Trebmal* and *Fuchs* to file their own appeals with the BTA, where its jurisdiction became exclusive.

By appealing the decisions of the BOR to the common pleas court rather than the BTA, where the appeals were filed first, *Trebmal* and *Fuchs* cut off their right to litigate the taxable values. The right to determine the values was denied them not by the law, but by themselves. This court will not create a remedy where the law already provides a comprehensive procedure.” (emphasis added)

Appellant received notice from the BTA that on November 12, 2009 an appeal from the BOR’s decision had filed with it. By not filing an appeal with the BTA upon receipt of that notice, Appellant “cut off” its right to litigate the taxable valuation of the Property. Such an appeal by Appellant to the BTA would have protected it against the unilateral withdrawal of an appeal by “locking in the jurisdiction of the BTA to determine valuation.”

Appellant had ample notice of the filing of the appeal by the BOE in the BTA. Notice of the BOE’s appeal was sent November 19, 2009. The deadline for appealing the BOR’s decision

was December 4, 2009. Having failed to perfect an appeal with the BTA, Appellant failed to preserve its right to an appeal of the BOR's decision in the BTA.

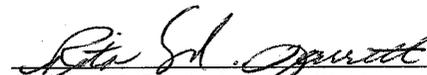
Appellant discusses the "jurisdictional priority rule" in its Memorandum in Support of Jurisdiction. The rule is applicable to state courts of concurrent jurisdiction. The rule is inapplicable in the case at bar. The jurisdictional priority rule contemplates its applicability in cases pending in two different courts of concurrent jurisdiction. This instant appeal involves a court and an administrative agency. The administrative agency is a creature of statute and only has powers granted to it by statute. O.R.C. §5703.02.

The BTA does not have the authority to hold a merit hearing where no appeal has been filed with it. Appellant failed to protect itself against a unilateral withdrawal of the appeal filed by the BOE; and therefore, is not entitled to a valuation hearing.

CONCLUSION

For the reasons set forth above, the Appellee Berea City School District Board of Education respectfully requests that this Honorable to decline jurisdiction and dismiss Appellant's appeal.

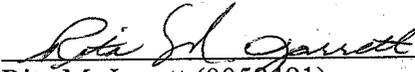
Respectfully submitted,


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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Appellee Berea City School District Board of Education's Memorandum in Response to Memorandum in Support of Jurisdiction of Appellant 14043 Brook Park Inc. was sent to Counsel for Appellant, Charles Gruenspan, Esq., Charles Gruenspan Co., L.P.A., 605 Commerce Park Square Three, 23230 Chagrin Boulevard, Cleveland, OH 44122; and Counsel for the County Appellees, Sandra Curtis-Patrick, Esq., Cuyahoga County Prosecutor's Office, 1200 Ontario Street, Eighth Floor, Cleveland, Ohio 44113 by regular U.S. mail this 11th day of February, 2013.



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