

ORIGINAL

IN THE SUPREME COURT OF OHIO

MASON CITY SCHOOL DISTRICT,
BOARD OF EDUCATION

Case No. 2012-2107

Appellee,

On Appeal from the Ohio
Board of Tax Appeals

vs.

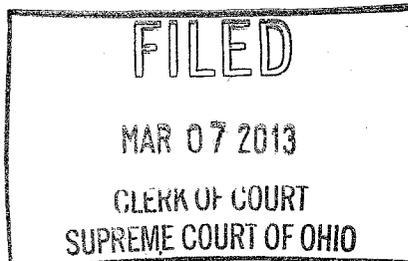
WARREN COUNTY BOARD OF
REVISION, et al.

Appellee,

and

SQUIRE HILL PROPERTIES II, LLC,

Appellant



MOTION TO DISMISS OF APPELLEE MASON CITY SCHOOL DISTRICT,
BOARD OF EDUCATION

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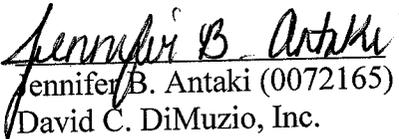
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SQUIRE HILL PROPERTIES II, LLC

MOTION TO DISMISS

Now comes Appellee Mason City School District, Board of Education, and moves this Court to dismiss Squire Hill Properties II, LLC's appeal because Appellant failed to comply with the mandatory and jurisdictional requirements of R.C. 5717.04. The reasons are more fully set forth in the attached Memorandum in Support.

Respectfully submitted,


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MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

I. Procedural History and Factual Background

The former owner, Wasserpach IV, LLC (“Wasserpach”), filed the Original Complaint in this case with the Warren County Board of Revision (“BOR”) requesting a decrease in the subject property’s true value to \$3,031,110 for tax lien date, January 1, 2008.¹ On its Complaint, Wasserpach cited to a “reduction in fair market value of property due to decreased profitability resulting from decreased market rents, large vacancies, lower rental income, and increased property expenses.” (See Complaint.) Wasserpach also disclosed that the *property sold for \$5,350,000 on December 15, 2006.* (emphasis added)

Appellee Mason City School District, Board of Education (“BOE”) filed a Counter Complaint also referencing the sale 12 ½ months prior to the tax lien date, but instead of asking for an increase to the sale price, the BOE requested that auditor’s values (totaling \$5,066,900) be maintained.

At the hearing before the BOR, Wasserpach submitted the written appraisal and testimony of appraiser Gene Minion who opined a value of \$2,942,000 for the leased fee interest in the subject property. The BOR voted to reduce the value of the property to \$3,353,900.

The BOE then appealed the decision of the BOR to the Board of Tax Appeals on or about September 16, 2009. (See BTA Appeal.) Wasserpach’s counsel, Robert A. Bardach, filed a Notice of Appearance with the BTA on October 28, 2009. While the case was pending before the BTA, a transfer of the subject property took place from

¹ The Warren County Auditor valued the one-story strip mall at \$5,066,900 for tax year 2008.

Wasserpach to Viking Partners Deerfield on June 21, 2010 for \$0 consideration. Viking Partners failed to file an appearance with the BTA.

On April 17, 2012, the day prior to the BTA hearing, Bardach contacted the BTA to say that he would not be in attendance since Wasserpach no longer owned the property. Counsel for the county Appellees also waived appearance at the hearing. Counsel for the BOE was the only party present at the BTA hearing.

Again, while the case was still pending before the BTA, another transfer of the subject property took place from Viking Partners Deerfield to Squire Hill Properties II (“Squire Hill”) on July 12, 2012 for \$0 consideration. No entry of appearance was made on behalf of Squire Hill before the BTA.

In its Decision and Order issued on November 16, 2012, the BTA agreed with the BOE that the sale is the best evidence of value. Because of the existence of the sale, there was no need for the alternate opinion of value offered by Wasserpach’s appraiser. The BTA set the value at the December 2006 sale price of \$5,350,000. (See Decision and Order.)

On December 17, 2012, Squire Hill filed the subject appeal with this Court, but failed to serve all the parties to the BTA case.

II. ARGUMENT

A. Appellant Squire Hill failed to invoke the Jurisdiction of this Court Because It Failed to Comply with R.C. 5717.04.

In Columbus City School Dist. Bd. of Educ. v. Franklin Cty. Bd. of Revision (2007), 114 Ohio St.3d 1224, 871 N.E.2d 602, the Court held that the service requirement set forth in the sixth paragraph of R.C. 5717.04 is mandatory and jurisdictional and that failure to comply requires dismissal of the appeal. Id. at 603 (citing Olympic Steel, Inc.

v. Cuyahoga Cty. Bd. of Revision (2006), 110, Ohio St.3d 1242, 852 N.E.2d 178)). R.C. 5717.04 specifies who must be made Appellees, and that section requires that an appellant serve a copy of its notice of appeal on those persons by certified mail. Id. Among those persons are “all persons to whom the decision of the board...is required to be certified.” Id. R.C. 5717.03(B) requires that the BTA certify its decision to the county auditor, the tax commissioner, and “*all persons who were parties to the appeal before the board...*” Id. (emphasis added).

Appellant Squire Hill did not serve all the parties to the BTA case. More specifically, Squire Hill failed to join Wasserpach as a party and to serve Wasserpach as an Appellee. Squire Hill’s Certificate of Service shows that Notice of Appeal went to counsel for the BOE, counsel for Warren County Appellees and Counsel for the Tax Commissioner. Wasserpach, a party to the BTA case, the person whom the record showed to be the owner of the property and the entity responsible for paying the 2008 taxes, was never served with Appellant’s Notice of Appeal. See also Cincinnati School Dist. Bd. of Educ. v. Hamilton Cty. Bd. of Revision (2007), 116 Ohio St.3d 1220, 879 N.E.2d 774) (Court recognized that application of Columbus case would result in dismissal of appeal because appellant failed to serve its notice of appeal on the party the record showed to be the owner of the property)).

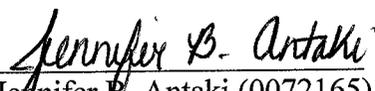
Squire Hill’s assertion that it did not have to serve Wasserpach because it was legally dissolved is without merit. It is well-established law that a limited liability company continues to exist for the purpose of winding up its affairs even after it has filed a certificate of dissolution. R.C. 1705.44, 1705.45. In fact, Ohio law specifically provides that the dissolution of a limited liability company does not prevent

commencement of a proceeding by or against the company in its name, or abate or suspend a proceeding pending by or against the company on the date of dissolution. Id. Squire Hill could have served Wasserpach's statutory agent, Robert A. Bardach, who was also counsel for Wasserpach before the BOR and BTA, since the authority of the statutory agent did not terminate when the limited liability company dissolved. See R.C. 1705.45(B)(4). Wasserpach, Viking Partners Deerfield and Squire Hill, as owners of the subject property, were responsible for the taxes due on the property during the relevant time period and were in the best position to negotiate and/or assign that right between them. It is unfair and unjust that the Courts and school districts should spend resources trying to ascertain who is responsible for the property's tax liabilities.

III. CONCLUSION

Failure to comply with R.C. 5717.04 requires dismissal of the appeal. We respectfully request that the Court dismiss Appellant Squire Hill's Notice of Appeal for lack of jurisdiction because it failed to join and serve a Notice of Appeal on all parties before the BTA.

Respectfully submitted,


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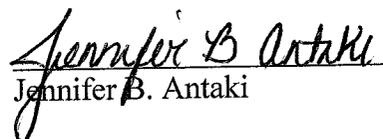
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Dismiss of Appellee
Mason City School District Board of Education has been served by ordinary U.S. Mail
this 6th day of March, 2013 upon the following counsel of record:

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