

NOT DESIGNATED FOR PUBLICATION

CITY OF NEW ORLEANS' * NO. 2004-CA-0836
DEPARTMENT OF FINANCE * COURT OF APPEAL
IN ITS CAPACITY AS THE * FOURTH CIRCUIT
ORLEANS PARISH TAX * STATE OF LOUISIANA
COLLECTOR

VERSUS

NEW ORLEANS *
PADDLEWHEELS, INC. AND *
WARREN L. REUTHER, JR., *
NANCY M. REUTHER, DUANE * * * * *
P. SMITH, JAMES E. SMITH,
JR., JAMES E. SMITH, SR.,
CRAIG W. SMITH, AND
ANTHONY G. MOORE
INDIVIDUALLY, ET AL.
CONSOLIDATED WITH:

CONSOLIDATED WITH:

NEW ORLEANS NO. 2004-CA-0837
PADDLEWHEEL, INC.

VERSUS

THE CITY OF NEW ORLEANS
AND THE CITY OF NEW
ORLEANS' DEPARTMENT OF
FINANCE IN ITS CAPACITY
AS THE ORLEANS PARISH
TAX COLLECTOR

CONSOLIDATED WITH:
CITY OF NEW ORLEANS'
DEPARTMENT OF FINANCE
IN ITS CAPACITY AS THE
ORLEANS PARISH TAX
COLLECTOR

CONSOLIDATED WITH:
NO. 2004-CA-0838

VERSUS

NEW ORLEANS
PADDLEWHEELS, INC. AND
JAMES E. SMITH, JR.,
INDIVIDUALLY AND IN HIS
CAPACITY AS AN OFFICER
OF NEW ORLEANS
PADDLEWHEELS, INC.

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NOS. 2003-5903 C/W 2003-7324 C/W 2003-8315 DIVISION "G-11"
Honorable Robin M. Giarrusso, Judge

* * * * *

Judge Edwin A. Lombard

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(Court composed of Chief Judge Joan Bernard Armstrong, Judge Dennis R. Bagneris, Sr., Judge David S. Gorbaty, Judge Edwin A. Lombard, Judge Roland L. Belsome)

**BAGNERIS, J., CONCURS IN PART AND DISSENTS IN PART FOR
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REVERSED; REMANDED

This appeal is from the trial court's judgment granting Motions for Summary Judgment filed by defendant New Orleans Paddlewheels, Inc. ("Paddlewheels") in these consolidated cases. After review of the record,

the arguments of the parties and the applicable law, we reverse the judgment of the trial court and remand this matter to the trial court for further proceedings.

RELEVANT FACTS AND PROCEDURAL HISTORY

Three consolidated cases comprise this matter for appeal. Two of the cases are summary tax collection proceedings initiated by the City of New Orleans (“the City”) against Paddlewheels’ officers and directors seeking to impose personal liability for previously determined, assessed, and collectible corporate tax debts. The third case was initiated by Paddlewheels against the City in response to its filing of the first collection proceeding. The District Court granted Paddlewheel’s Motion for Summary Judgment in their action, and granted Paddlewheels’ exceptions in the two City filed actions, causing both cases to be dismissed with prejudice. The original suit, 2003-5903, City of New Orleans v. New Orleans Paddlewheels, et al. (“Paddlewheels I”), is a collection proceeding filed April 15, 2003 on behalf of the City seeking to impute personal liability of a sales/use and amusement tax debt pertaining to Paddlewheels’ operation of the M/V CAJUN QUEEN and M/V CREOLE QUEEN for the years 1996-1999.

The second suit, 2003-7324, (Paddlewheels II) is an action filed on May 12, 2003 on behalf of Paddlewheels against the City claiming that the

filing of Paddlewheels I breached a 1998 compromise agreement that resolved case number 1997-16630 (“Flamingo Casino Case”) and its related tax litigations. The referenced agreement, signed September 15, 1998, released a Joint Venture Partnership between the Hilton Hotel and Paddlewheels from all claims of tax indebtedness made by the City pertaining to the Partnership’s operation of the M/V QUEEN OF NEW ORLEANS, d/b/a Flamingo Casino, and its related tax litigations, Case No. 1997-16629, 1997-16630, and 1997-17222, through the signing date of the Agreement. In its petition, Paddlewheels alleged damages for the City’s taxation of two vessels: the M/V CAJUN QUEEN and the M/V CREOLE QUEEN.

The third suit, 2003-8315 City of New Orleans v. New Orleans Paddlewheels, et al. (“Paddlewheels III”), is a collection proceeding filed May 30, 2003, on behalf of the City against Paddlewheels and its officers and directors seeking to impute personal liability of a sales/use and amusement tax debt pertaining to Paddlewheels’ operation of the M/V CAJUN QUEEN and M/V CREOLE QUEEN for the years 2001-March, 2003.

The City and Paddlewheels both filed Motions for Summary Judgment to determine whether or not the 1998 compromise agreement in

any way affected the ongoing litigation in “Paddlewheels I” for sales/use and amusement tax. During a hearing on March 5, 2004, the District Court granted Paddlewheels’ Motion for Summary Judgment and exceptions of no cause of action and/or right of action, but did not address the City’s Motion. The City appeals this judgment.

STANDARD OF REVIEW

Appellate courts review motions for summary judgment *de novo*. *Hutchinson v. Knights of Columbus*, 866 So.2d 228 (La. 2/20/2004).

LAW AND DISCUSSION

First, the City argues that the District Court erred by allowing Paddlewheels to raise assessment related defenses and exceptions to the City’s tax collection proceedings in Paddlewheels I and Paddlewheels III. In order to recover a contested tax, an aggrieved taxpayer must pay the tax under protest and timely file suit to recover. New Orleans Code, Section 150-192; *See also*, La. Rev. Stat. 47:1576. Failure to pay under protest precludes the taxpayer’s request for judicial review of the tax. *Church Point Wholesale Beverage Co., Inc. et al. v. Leon R. Tarver, Secretary, Department of Revenue and Taxation, State of Louisiana, et al.*, 614 So.2d 697 (La. 1993). Thus, according to the law and jurisprudence, upon completion of the administrative appeal, Paddlewheels was required to pay

the contested tax liability under protest and file a suit for recovery in order to be availed of assessment related judicial review. Because payment under protest was the last available recourse to contest the tax, and it was not exercised, the District Court erred in allowing any assessment related defenses to the City's assessed tax debts. Therefore, we reverse any and all District Court review of assessment related defenses including, but not limited to: 1) the conversion from summary to ordinary process; 2) the determination of no assessment finality and granting of Paddlewheels' Motion for Partial Summary Judgment; 3) the granting of Paddlewheels' exception of no amusement tax liability in Paddlewheels I; and, 4) the judicial restraint by injunctive orders preventing collection of corporate tax debts.

Next, the City argues that the District Court erred when it granted Paddlewheels' Motion for Summary Judgment in Paddlewheels II alleging that the City breached a 1998 compromise agreement, relating to the 1997 Flamingo Casino Case, by its filing of the Paddlewheels I litigation. The City argues that the agreement was specific to indemnification of taxes relating to the joint venture operation of the M/V QUEEN OF NEW ORLEANS and not intended to provide tax indemnification for any other Hilton Hotel or Paddlewheels' vessels and operations during that time. In

response, Paddlewheels argues that the City is precluded from any taxation of any Paddlewheels vessels, including those not the subject of the 1998 Compromise Agreement.

In the absence of substantiating evidence of mistaken intent, a compromise is subject to the normal rules of contract analysis and enforced precisely as written. *Dumas v. Angus Chemical Co.*, 742 So.2d 655 (La. App. 2 Cir. 8/20/99). The compromise agreement at issue in this case provides that the tax claims being resolved were in relation to a Hilton Hotel/Paddlewheels partnership that owned the M/V QUEEN OF NEW ORLEANS (d/b/a Flamingo Casino). Two prior decisions of this Court have established that both Paddlewheels I and III in this litigation have nothing to do with the Flamingo Casino Case and its Compromise Agreement. The plain language of the agreement dictates that the compromise specifically pertained to taxation of the Joint Venture between the Hilton Hotel and Paddlewheels and their operation of the “M/V QUEEN OF NEW ORLEANS and any other vessel or vessels which are, or might be involved” in that joint venture. Accordingly, we reverse the District Court’s decision granting Paddlewheels’ Motion for Summary Judgment, and grant the City’s Motion for Summary Judgment on the same issue dismissing Paddlewheels’ claim against the City in its entirety in Paddlewheels II, Case No. 2003-

7324.

As no evidence was presented and no hearing held on the issue of officer and director personal liability of the previously assessed corporate tax debts, this matter is remanded to the District Court for further proceedings.

REVERSED;

REMANDED