STATE OF MICHIGAN

COURT OF APPEALS

ECONOMY LAW CENTERS, P.C., and RAYMOND A. MACDONALD,

Plaintiffs/Counter-Defendants-Appellants,

v

CITY OF UTICA,

Defendant/Appellee,

and

TREASURER OF THE COUNTY OF MACOMB,

Defendant/Counter-Plaintiff-Appellee.

UNPUBLISHED
February 15, 2002

No. 227485
Macomb Circuit Court
LC No. 99-004173-CZ

Before: O'Connell, P.J., and White and Cooper, JJ.

PER CURIAM.

Plaintiffs Economy Law Centers, PC and Raymond A. MacDonald[1] appeal as of right from the trial court's February 14, 2000, judgment granting summary disposition in favor of defendants City of Utica and the Macomb County Treasurer. We affirm.

The material facts of this case are not in dispute. Plaintiff filed an amended complaint on October 18, 1999, alleging abuse of process, libel, and seeking injunctive relief and the refund of personal property taxes "illegally and irregularly levied and collected" by defendants. Plaintiff also sought $20,000 in compensatory and punitive damages. The amended complaint further alleged that defendants unlawfully and unconstitutionally assessed personal property taxes against plaintiff in 1998 and preceding years. Specifically, plaintiff maintained that defendants failed to comply with several provisions of the General Property Tax Act, (GPTA), MCL 211.1 *et seq*.

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[1] Raymond A. MacDonald is the president of Economy Law Centers, P.C. For the purposes of clarity in our analysis of the issues, "plaintiff" hereinafter will refer to both MacDonald and Economy Law Centers, P.C.

After defendants answered, defendant Macomb County Treasurer (hereinafter "Treasurer") filed a counterclaim on October 21, 1999. In the counterclaim the Treasurer sought payment of the delinquent taxes. Appended to the counter-complaint was a copy of a delinquent personal property tax statement showing plaintiff $511.23 in arrears.

As relevant to the present appeal, the Macomb Circuit Court clerk found plaintiff in default on December 3, 1999, for "failure to appear, plead, or otherwise defend as provided by law" with regard to the Treasurer's October 21, 1999, counterclaim.[2] See MCR 2.603(B)(2). On December 17, 1999, plaintiff filed a motion to vacate the default judgment, arguing that by initiating the lawsuit, it had already appeared, and was not required to answer or respond to the Treasurer's counterclaim. The Treasurer subsequently moved for entry of default on December 21, 1999. In a default judgment entered January 31, 2000, the trial court ordered plaintiff to pay $524.92[3] owing in delinquent taxes. On January 31, 2000, the trial court also entered an order denying plaintiff's motion to set aside the default judgment.

On December 29, 1999, the Treasurer[4] also moved for summary disposition of plaintiff's claim pursuant to MCR 2.116(C)(4), (8), (9), and (10). In support of its motion, the Treasurer argued in relevant part that the circuit court did not have jurisdiction to adjudicate plaintiff's claims regarding alleged violations of the GPTA and that plaintiff failed to plead in avoidance of governmental immunity in alleging intentional torts.

Following a hearing, the trial court granted summary disposition in favor of defendants in an order entered February 14, 2000. The trial court's written order reflects that summary disposition was granted pursuant to MCR 2.116(C)(4), (7), (8), and (10). During the February 14, 2000, hearing on the motion, the trial court ruled from the bench that summary disposition was proper because it did not have jurisdiction to adjudicate plaintiff's tax claims, and because defendants were immune from tort liability.

After plaintiff again moved to set aside the default judgment and for rehearing of the summary disposition order, the trial court denied plaintiff's motions in a nine-page written opinion and order entered May 4, 2000. Specifically, the trial court found that default judgment was proper because plaintiff failed to answer or defend against the Treasurer's counterclaim. Relying on *Johnston v Livonia*, 177 Mich App 200; 441 NW2d 41 (1989), the trial court also concluded that it lacked subject-matter jurisdiction over plaintiff's claim seeking the refund of personal property taxes.

On appeal, plaintiff first claims that default judgment was improperly entered pursuant to MCR 2.603(A)(1) where plaintiff properly appeared by filing the complaint that initiated these actions. We review for a clear abuse of discretion a trial court's decision on a motion to set aside default judgment. *Zaiter v Riverfront Complex, Ltd*, 463 Mich 544, 552; 620 NW2d 646 (2001). We afford great deference to the trial court's decision, given our courts' recognition of this

[2] A review of the record confirms that the Treasurer properly notified plaintiff of its intention to seek default judgment. MCR 2.603(B)(1)(a).

[3] The amount of $524.92 in taxes owing included interest and administrative fees.

[4] Defendant City of Utica concurred in the Treasurer's motion for summary disposition.

state's general policy "against setting aside defaults and default judgments that have been properly entered." *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 228-229; 600 NW2d 638 (1999).

As our Supreme Court acknowledged in *Zaiter, supra* at 551, MCR 2.603(D)(1) governs the setting aside of a default judgment. MCR 2.603(D)(1) provides:

> A motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed.

"Good cause sufficient to warrant setting aside a default may be shown by a substantial irregularity or defect in the proceeding that the default is based on, or by a reasonable excuse for failure to comply with the requirements that created the default." *Kowalski v Fiutowski*, 247 Mich App 156, 158-159; 635 NW2d 502 (2001), citing *Alken-Ziegler, supra* at 233.

On appeal, plaintiff maintains that by filing the initial complaint, it pled and defended as required by MCR 2.603(A)(1). Plaintiff has not directed our attention to a reported case that supports this position. To the extent that plaintiff has failed to offer supporting authority, this argument is waived on appeal. *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000). In any event, we are not persuaded that the trial court abused its discretion in declining to set aside the default judgment. The trial court declined to set aside the entry of a default judgment because it found plaintiff, by failing to defend against the Treasurer's counterclaim, acted in contravention of MCR 2.603(A)(1), which provides:

> If a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, and that fact is made to appear by affidavit or otherwise, the clerk *must* enter the default of that party. [Emphasis supplied.]

As defendants note in their brief on appeal, the court rules set forth clear requirements that a party must follow to avoid default from a counterclaim. For instance, MCR 2.110(B)(2) provides that a party must file and serve a responsive pleading to a counterclaim. Likewise, MCR 2.108(A)(4) requires a party served with a pleading stating a counterclaim to serve and file an answer or to take any other action permitted by law or court rule within 21 days after service.

Our independent review of the record reveals that the Treasurer filed the counterclaim, along with proof of service, on October 21, 1999. Although the counterclaim was filed the same day as the Treasurer's answer to the amended complaint, the counterclaim was clearly designated as a counterclaim. See MCR 2.110(C). As the trial court correctly observed, plaintiff failed to timely respond to the counterclaim as required by MCR 2.108(A)(4). On appeal, as in the trial court, plaintiff has failed to articulate a reasonable excuse for its failure to comply with the court rules that caused the default, or show a substantial irregularity or defect in the lower court

proceedings that led to the default. *Kowalski, supra* at 159.[5] Accordingly, we are satisfied that default judgment was properly entered pursuant to MCR 2.603(A)(1).

Similarly, we reject plaintiff's claim that the trial court acted in violation of the court rules when it ordered plaintiff to pay $524.92 in delinquent taxes as part of the default judgment. Plaintiff argues in its brief on appeal that the trial court was required to hold a hearing to determine the amount of damages, and that the trial court impermissibly adopted defendants' "unsworn, unconfirmed" statement regarding the amount of damages. We disagree.

MCR 2.603(B)(3)(b) provides as follows:

> If, in order for the court to enter judgment or to carry it into effect, it is necessary to
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> (i) take an account,
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> (ii) determine the amount of damages,
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> (iii) establish the truth of an allegation by evidence, or
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> (iv) investigate any other matter,
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> the court *may* conduct hearings or order references it deems necessary and proper, and shall accord a right of trial by jury to the parties to the extent required by the constitution. [Emphasis supplied.]

Contrary to plaintiff's assertion on appeal, the trial court was not required to hold a hearing regarding damages. In *Wood v DAIIE*, 413 Mich 573, 585; 321 NW2d 653 (1982), our Supreme Court recognized that the decision whether to hold further proceedings on the question of damages following default "is within the discretion of the trial court."[6] See also *Michigan Bank-Midwest v DJ Reynaert, Inc*, 165 Mich App 630, 649; 419 NW2d 439 (1988). In our opinion, the trial court did not abuse its discretion in concluding that further proceedings on the issue of damages were not warranted where plaintiff failed to present evidence demonstrating that the amount owed in delinquent taxes was in serious dispute.

For instance, the Treasurer's motion for summary disposition included the December 28, 1999, affidavit of Steven Mellen, the assessor for the City of Utica. In the affidavit, Mellen stated that he assessed personal property taxes against plaintiff's business for the tax year 1998, after plaintiff failed to file a statement regarding its personal property as required by MCL 211.18(2). Mellen further stated that on the basis of his assessment, he concluded that plaintiff owed the City of Utica $524.92 in delinquent taxes. Further, the Treasurer also presented an

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[5] Likewise, plaintiff did not file an affidavit of facts showing a meritorious defense. MCR 2.603(D)(1); *Alken-Ziegler, supra* at 229.

[6] In *Wood, supra*, the Supreme Court considered GCR 1963, 520, the predecessor to MCR 2.603(B)(3)(b). As the Court in *Zaiter, supra* at 554 recognized, the only differences between the present and past version of the rule are "stylistic."

October 1, 1999, delinquent personal property tax statement indicating that as of that date, plaintiff owed the Treasurer $511.23 in delinquent taxes.[7] Under the circumstances, we are not persuaded that the trial court abused its discretion in concluding that a hearing regarding damages was unnecessary.

Finally, plaintiff asserts that summary disposition was improperly granted because genuine factual disputes existed to warrant trial, and because the trial court had subject-matter jurisdiction to adjudicate plaintiff's tax claims. We disagree.

We review de novo a trial court's decision regarding a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). With regard to MCR 2.116(C)(4), the trial court concluded that the Tax Tribunal had exclusive jurisdiction over plaintiff's claim alleging violations of the GPTA. "Jurisdictional questions under MCR 2.116(C)(4) are questions of law that are also reviewed de novo." *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 205; 631 NW2d 733 (2001).

The jurisdiction of the Tax Tribunal is set forth in § 31 of the Tax Tribunal Act, MCL 205.701 *et seq*.[8] MCL 205.731 provides:

> The tribunal's exclusive and original jurisdiction shall be:
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> (a) A proceeding for direct review of a final decision, finding, ruling, determination, or order of an agency relating to an assessment, valuation, rates, special assessments, allocation, or equalization, under property tax laws.
>
> (b) A proceeding for refund or redetermination of a tax under the property tax laws.

As our Supreme Court observed in *Wikman v Novi*, 413 Mich 617, 631; 322 NW2d 103 (1982), "the tribunal's jurisdiction is based either on the subject matter of the proceeding (e.g. a direct review of a final decision of an agency relating to special assessments under property tax laws) or the type of relief requested (i.e., a refund or redetermination of a tax under the property tax laws)." Moreover, it is the "longstanding policy" of this state to allow the Tax Tribunal, with its specific expertise, to decide nonconstitutional issues regarding tax bases and assessments. *Jackson Community College v Dep't of Treasury*, 241 Mich App 673, 682; 621 NW2d 707 (2000). Where a claim implicates whether the taxing authority followed statutory procedures, and requires factual determinations concerning the bases for the assessment, the Tax Tribunal is the appropriate forum. *Meadowbrook Village Associates v Auburn Hills*, 226 Mich App 594, 597; 574 NW2d 924 (1997). "[T]he Tax Tribunal has broad powers to remedy any alleged irregularity in the assessment and valuation process." *Richland Twp v State Tax Comm'n*, 210 Mich App 328, 336; 533 NW2d 369 (1995), citing MCL 205.732, 205.755.

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[7] According to the record, the Treasurer collects delinquent taxes owing to the City of Utica.

[8] The Tax Tribunal Act was enacted by 1973 PA 186 as a "culmination of numerous attempts by the Legislature to secure the prompt and fair resolution of disputes concerning the collection of governmental revenues." *Wikman v Novi*, 413 Mich 617, 626; 322 NW2d 103 (1982).

In *Johnston, supra* at 207-208, this Court held that where the plaintiff alleged that the defendant city failed to follow the appropriate statutory procedure for assessing taxes, the claim clearly fell within the scope of the Tax Tribunal's jurisdiction. Like plaintiff in the instant case, the plaintiff in *Johnston* framed the complaint in a manner that alleged a deprivation of the constitutional right to due process of law, but did not challenge the use of the taxes or the constitutional validity of the authorizing statute. *Id.* at 208. In rejecting the plaintiff's argument that her claims fell within the circuit court's jurisdiction, the *Johnston* Court held:

> [P]laintiff is not challenging the use of her taxes or the constitutional validity of the authorizing statute. Rather, plaintiff challenges the validity of the assessment she receives each year which includes an assessment of property she does not own. This we believe involves a factual determination of the accuracy of the assessment and the method of assessing plaintiff's property. As such, it comes within the jurisdiction of the Tax Tribunal. More simply put, while the circuit court has been recognized to have jurisdiction over purely constitutional claims affecting taxation, the mere fact that a particular issue might be framed in constitutional terms does not grant jurisdiction in the circuit court to the exclusion of the Tax Tribunal. If this were the case, virtually every matter submitted to the Tax Tribunal could find its way to circuit court since any inaccurate or improper assessment of a tax could be said to violate the taxpayer's constitutional rights as a taking without due process. Rather, what must be recognized is that the Tax Tribunal has original and exclusive jurisdiction over those tax issues which involve the accuracy and methodology of the property tax assessment. Such issues are involved in the case at bar. [*Id*.]

A review of the amended complaint reveals that the essence of plaintiff's claims was that defendants, by allegedly failing to adhere to certain provisions of the GPTA, unlawfully assessed taxes against plaintiff. The amended complaint also alleged that plaintiff was entitled to a refund for the unlawful taxes paid. Although plaintiff further claimed that defendant's actions "deprived . . . plaintiff[ ] of [the] right[ ] to be secure in . . . property and possessions, and not to be deprived of property, except in accordance with due process of law . . . ," our courts have been clear in their unwillingness to allow a party to avoid the Tax Tribunal's jurisdiction by couching their claim in terms of a deprivation of the constitutional right to due process. *Wikman, supra* at 647; *Johnston, supra* at 208.

In its brief on appeal, plaintiff argues that the circuit court had jurisdiction over its tax claims where it alleged that defendants engaged in "intentional overassessment" concerning plaintiff's taxes. In support of this argument, plaintiff points to our Supreme Court's decisions in *Woodman v Auditor General*, 52 Mich 28; 17 NW 227 (1883); *Sloman-Polk Co v Detroit*, 261 Mich 689; 247 NW 95 (1933), and *Wyzlic v Ironwood*, 365 Mich 87; 112 NW2d 94 (1961). These cases predate the enactment of the Tax Tribunal Act, and therefore are of limited value in

deciding whether plaintiff's claims are subject to the exclusive jurisdiction of the Tax Tribunal. See MCL 205.741.[9]

In *Woodman, supra* at 29, the plaintiffs alleged that the taxing authorities failed to allow them to view assessment rolls, overassessed the value of the plaintiffs' property, and that the assessor's failure to inform himself regarding the true value of the plaintiffs' land resulted in intentional overassessment. Our Supreme Court agreed with the plaintiffs that the legality of the imposed taxes could not be sustained under the circumstances and reversed the trial court's order dismissing the plaintiffs' claims. *Id.* at 31. Further, in *Sloman-Polk, supra* at 691, the plaintiff argued that the assessor failed to properly value the plaintiff's land in light of decreased property values resulting from an economic depression. The plaintiff further argued that such action was "fraudulent in law." *Id.* Our Supreme Court agreed, noting that the assessor could have used reasonable methods to ascertain property values, and therefore did not use its best judgment in assessing the property values. *Id.* The *Sloman-Polk* Court further observed that "intentional overassessment is fraud. A court of equity has jurisdiction to relieve against fraud." *Id.*

Finally, in *Wyzlic, supra* at 95, the plaintiff taxpayers alleged that the City of Ironwood fraudulently overassessed their property when it hired a company paid by resident mining companies to assess property values, and that the plaintiffs were denied the opportunity to dispute the assessments before the City of Ironwood Board of Review. In concluding that the plaintiff taxpayers may be entitled to injunctive relief, the *Wyzlic* Court opined:

> The point is that equitable relief is always available to relieve against fraudulent actions if the pleadings properly allege fraud. We have recently reiterated the long established rule that fraud is the special province of courts of equity. *Style v Greenslade*, 364 Mich 679; and cases cited therein.
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> The opinion of this Court in *Sunday Lake* [*Iron Co v City of Wakefield*, 323 Mich 497; 35 NW2d 470 (1949)] recognizes equity's jurisdiction in cases of this kind where taxes and assessment are attacked for fraud . . . .[*Wyzlic, supra* at 95-96.]

We are not persuaded that these cases are dispositive of the present appeal. Specifically, a review of the amended complaint reveals that unlike the plaintiffs in *Wyzlic, supra* and *Sloman-Polk Co, supra*, plaintiff has not alleged intentional fraud on the part of defendants. Rather, the thrust of the amended complaint is that defendants failed to properly follow statutory procedure in assessing plaintiff's property and that plaintiff is entitled to seek a refund as a result. Moreover, because these cases were decided before the Tax Tribunal was created, we are not persuaded that they support plaintiff's proposition that where intentional fraud is alleged, the Tax

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[9] MCL 205.741 provides that "[a] person or legal entity which, immediately before the effective date of this act, was entitled to proceed before the . . . circuit court . . . for determination of a matter subject to the tribunal's jurisdiction, as provided in [MCL 205.731] shall proceed only before the tribunal."

Tribunal is divested of jurisdiction. Because plaintiff's claims challenge the accuracy and methodology of the property tax assessments, we share the trial court's view that plaintiff's tax claims fall within the exclusive jurisdiction of the Tax Tribunal.[10] *Johnston, supra*.[11]

Finally, plaintiff challenges the trial court's grant of summary disposition with respect to its claims of libel and trespass. The amended complaint reflects only that plaintiff advanced claims of abuse of process and libel in the lower court. Consequently, we will not entertain on appeal plaintiff's argument as it pertains to a trespass claim.

The trial court granted summary disposition of plaintiff's tort claims pursuant to MCR 2.116(C)(7),[12] concluding that defendants, as governmental agencies, were immune from suit. As our Supreme Court recently explained in *Fane v Detroit Library Comm'n*, 465 Mich 68, 74; 631 NW2d 678 (2001):

> Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by immunity granted by law. To survive such a motion, the plaintiff must allege facts justifying the application of an exception to governmental immunity. *Wade v Dep't of Corrections*, 439 Mich 158, 164; 483 NW2d 26 (1992). We consider all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them. *Sewell* [*v Southfield Pub Schools*, 456 Mich 670, 674; 576 NW2d 153 (1998); MCR 2.116(G)(5).

Pursuant to MCL 691.1407(1), "a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1401(f) defines "governmental function" as "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." See also *Brown v Genesee Co Bd of Comm'rs*, 464 Mich 430, 434; 628 NW2d 471 (2001) (Corrigan, C.J.). The term "governmental function" is broadly construed, and the statutory exceptions

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[10] We recognize that in *Romulus City Treasurer v Wayne Co Drain Comm'r*, 413 Mich 728, 738, 746; 322 NW2d 152 (1982), our Supreme Court held that the proper forum for the plaintiffs' claim alleging constructive fraud on the part of the defendant was the circuit court. In *Romulus*, the plaintiffs alleged that the defendant improperly used funds collected as a special assessment to pay administrative costs. *Id.* at 733. The *Romulus* Court held that "questions as to the lawful expenditure of funds do not arise within the other matters within the tribunal's jurisdiction," *id*. at 738, and further held that because the plaintiffs requested the return of funds held in an escrow account, this was not a claim for a "tax refund" as contemplated by MCL 205.731, and therefore lay within the jurisdiction of the circuit court. In the present appeal, plaintiff does not challenge the use of funds collected through taxes, nor is there any indication that the disputed funds are held in escrow to the extent that the circuit court's equity jurisdiction would control. Thus, we find *Romulus* distinguishable.

[11] On appeal, the parties do not challenge the trial court's assumption of jurisdiction over the Treasurer's counterclaim.

[12] On appeal, plaintiff erroneously states that summary disposition of these claims was granted pursuant to MCR 2.116(C)(8) and (10).

thereto are narrowly construed. *Kerbersky v Northern Michigan Univ*, 458 Mich 525, 529; 582 NW2d 828 (1998).

On appeal, plaintiff fails to articulate which, if any, of the exceptions to the broad grant of governmental immunity are applicable. To the extent that plaintiff has attempted to plead the intentional tort of libel to avoid governmental immunity, our courts have recognized that an intentional tort exception to a government agency's immunity from liability in tort does not exist where the alleged torts were committed during the performance of a governmental function. *Smith v Dep't of Public Health*, 428 Mich 540, 544, 611; 410 NW2d 749 (1987), aff'd sub nom *Will v Michigan Dep't of State Police*, 491 US 58; 109 S Ct 2304; 105 L Ed 2d 45 (1989); *Reardon v Dep't of Mental Health*, 430 Mich 398, 414, n 5; 424 NW2d 248 (1988); *Payton v Detroit*, 211 Mich App 375, 392; 536 NW2d 233 (1995); *Flones v Dalman*, 199 Mich App 396, 407; 502 NW2d 725 (1993).

On appeal, plaintiff does not dispute that defendants, in attempting to collect delinquent taxes owed, were engaged in a governmental function when posting a lien notice at plaintiff's premises. Further, in responding to defendants' motion for summary disposition, "plaintiff failed to allege facts justifying application of an exception to governmental immunity, i.e., facts supporting an inference that defendants[s] w[ere] not engaged in the exercise of a governmental function when the alleged defamatory statement was made." *Wallace v Recorder's Court of Detroit*, 207 Mich App 443, 447; 525 NW2d 481 (1994). Accordingly, we are satisfied that the trial court properly granted summary disposition with regard to plaintiff's intentional tort claims.

Affirmed.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Jessica R. Cooper