STATE OF MICHIGAN

COURT OF APPEALS

SOUTH DAVISON COMMUNITY CENTER, INC.,	UNPUBLISHED October 25, 2002
Petitioner-Appellant,	
v	No. 232346 Michigan Tax Tribunal
TOWNSHIP OF DAVISON,	LC No. 00-266268
Respondent-Appellee.	

Before: Smolenski, P.J., and Talbot and Wilder, JJ.

PER CURIAM.

Petitioner appeals as of right the Michigan Tax Tribunal's judgment affirming respondent's property tax assessment. We reverse and remand.

This appeal arose from the tribunal's decision that petitioner's property was not entitled to a property tax exemption for charitable use under MCL 211.7o. The property at issue is a one-story building in Davison Township, which petitioner used for community purposes. Petitioner initially filed an application for exemption from tax as an exempt educational institution, which the township board denied. Thereafter, petitioner filed a petition with the small claims division of the tax tribunal, seeking exemption as an educational or charitable institution. The tribunal held, based largely on respondent's evidence, that petitioner did not meet the definition of a charitable institution, and, therefore, was subject to property tax.

Absent fraud, we review decisions of the Tax Tribunal to determine if it erred in applying the law or adopted wrong legal principles. *Georgetown Place Co-op v City of Taylor*, 226 Mich App 33, 43; 572 NW2d 232 (1997). The tribunal's factual findings are conclusive unless they are not "supported by competent, material, and substantial evidence." *Id.* Further, we review the tribunal's enforcement of its own rules for an abuse of discretion. *Perry v Vernon Twp*, 158 Mich App 388, 392; 404 NW2d 755 (1987).

Petitioner first argues that it was error to admit respondent's evidence because respondent failed to set forth in its answer the facts upon which it relied in defense of petitioner's petition. 1999 AC, R 205.1332[1] requires, in pertinent part,

> (1) . . . The answer shall set forth the facts upon which the respondent relies in defense of the matter.
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> (3) The respondent shall serve the petitioner with a copy of the answer and supporting documentation filed with the tribunal.

Respondent's answer simply stated, "I feel the assessed values are correct and leave petitioner to its proofs."

We agree with petitioner's contention that respondent's answer was not sufficient under TTR 205.1332 because respondent relied on facts it presented at the hearing in defense of petitioner's petition, which it did not include in its answer. The purpose of an answer is to provide notice to the plaintiff or petitioner to enable the party to adequately prepare its case.[2] Although it is not necessary in every case to plead in detail every possible defense theory or every element of a petitioner's claim that the respondent believes the petitioner will be unable to substantiate, the respondent "must plead something more specific than 'I deny I'm liable.'" *Stanke v State Farm Mut Auto Ins Co,* 200 Mich App 307, 316-318; 503 NW2d 758 (1993). Likewise, "[a] denial that merely states that the pleader 'neither admits nor denies the allegations of paragraph___, but leaves plaintiff to its proof' is insufficient." *Id.* at 316, quoting 1 Martin, Dean & Webster, Michigan Court Rules Practice (1992 Supp), p 43.

Respondent's answer did not specifically deny that petitioner was a charitable or educational organization, explain why the assessment was correct, or address why petitioner's claim was untrue. Had respondent stated in its answer why the assessed values were correct, petitioner would have been able to adequately prepare its case. Yet, respondent did not even generally deny petitioner's claims in its answer, but rather stated that it left petitioner to its proofs, which indicated an intention not to present contradicting evidence.

However, while the tribunal's small claims division's rule mandates that a respondent state the facts on which it relies in defense of the petition in its answer, the rule does not describe

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[1] Hereinafter the tax tribunal rules will be cited as TTR, as authorized by 1999 AC, R 205.111(1).

[2] The terms of TRR 205.1332 do not specify its purpose. However, as indicated by the terms of its companion rule, TRR 205.1245, which applies in cases before the entire tribunal as opposed to those in the small claims division, the purpose of pleading facts in the answer is to provide notice to the petitioner and the tribunal of the nature of the defense. A similar purpose underlies Michigan's court rules governing responsive pleadings. "[T]he primary function of a pleading in Michigan is to give notice of the nature of the claim or defense sufficient to permit the opposite party to take a responsive position." *Stanke v State Farm Mut Auto Ins Co,* 200 Mich App 307, 317; 503 NW2d 758 (1993).

when, or if, undisclosed evidence should be excluded from the hearing. TTR 205.1332.[3] The tribunal's rules provide that if an applicable tribunal rule does not exist, the Michigan Court Rules shall govern. TTR 205.1111(4). The Michigan Court Rules provide that an error or defect is harmless and not grounds for disturbing a judgment unless it appears to be inconsistent with substantial justice. MCR 2.613(A). Therefore, we will not disturb the tribunal's order in the absence of a showing of prejudice. *Georgetown, supra* at 51; *Kern v Pontiac Twp,* 93 Mich App 612, 623; 287 NW2d 603 (1979).

Respondent's answer would not have been prejudicial to petitioner had the tribunal's decision not been based on the evidence respondent presented in support of its defense. However, it is evident that the tribunal specifically relied on respondent's testimony and evidence, which contained facts that respondent failed to disclose in its answer in violation of TTR 205.1332. In its motion for rehearing, which the tribunal denied, petitioner submitted evidence that directly contradicted a portion of respondent's evidence and the tribunal's conclusion. Had petitioner been aware before the hearing of respondent's evidence in defense of the petition, it could have presented this rebuttal evidence at the hearing. We find that petitioner was prejudiced by respondent's answer because it did not give sufficient notice of the nature of respondent's defense to permit petitioner to take a responsive position.[4]

Petitioner next argues that it was error to admit respondent's documentary evidence because petitioner did not receive it until after the hearing, which violated the time requirement in TRR 205.1342. TRR 205.1342 provides in pertinent part:

> (2) A copy of the valuation disclosure or other written evidence to be offered in support of a party's contentions as to the subject property's value shall be filed with the tribunal and served upon the opposing party not less than 14 days before the date of the scheduled hearing. Failure to comply with this subrule may result in the exclusion of evidence at the time of the hearing because the opposing party may have been denied the opportunity to adequately consider and evaluate the evidence before the date of the scheduled hearing.

The hearing was held on July 19, 2000. Respondent did not serve petitioner with the documentary evidence until July 31, 2000. Thus, respondent failed to provide the evidence in a timely manner in accordance with TRR 205.1342(2).

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[3] In contrast, companion rule TTR 205.1245, which governs answers for cases in front of the entire tribunal, and MCR 2.111(F)(2), which governs answers in Michigan courts, both provide that a defense is waived if not properly pleaded.

[4] Unlike in *Georgetown, supra,* where this Court failed to find prejudice, in this case, there is no indication in the record that petitioner vigorously cross-examined respondent's representative or that the tribunal provided a post-hearing mechanism to allow petitioner to challenge respondent's undisclosed evidence. *Georgetown, supra* at 51. Similarly, in *Kern, supra*, the Court found that the petitioner was not prejudiced where it vigorously cross-examined the respondent, and the petitioner did not allege, nor could the Court discern, prejudice. *Kern, supra* at 623.

This rule gives the tribunal discretion to exclude untimely evidence where "the opposing party may have been denied the opportunity to adequately consider and evaluate the evidence before the date of the scheduled hearing." TRR 205.1342. Clearly, petitioner did not have an opportunity to evaluate the evidence prior to the hearing because it did not receive the evidence until after the hearing; thus, the tribunal improperly admitted the evidence.

However, reversal is not required where the petitioner was not prejudiced by the evidence's admission. *Georgetown, supra* at 51; *Kern, supra* at 623. The tribunal found that petitioner was not a charitable institution because the property had been vacant for two years prior to the tax year at issue, was in a decrepit state and not suitable for use by the community, and had been advertised as a for pay parking lot. At the hearing, respondent presented a copy of petitioner's income and expense statements, a notice of an ordinance violation and the related complaint for operating a parking lot on the property, and a letter from respondent's building inspector.

The admission of petitioner's income and expense statements was not prejudicial because the statements were generated by petitioner, who also presented them to the tribunal, nor was the letter from respondent's building inspector insofar as the inspector discussed the condition of the building because petitioner admitted that the building was in disrepair.

However, we believe that petitioner was prejudiced regarding the admission of the letter to the extent it discussed the building's vacancy, and also by the admission of the notice of ordinance violation. Petitioner had contrary rebuttal evidence, but not having been presented with this documentary evidence before the hearing, petitioner was unable to present it at the hearing. Petitioner obtained affidavits which indicated that the building had not been vacant for two years, nor was the property used as a fee-based parking lot. Because petitioner was prejudiced by the admission of this evidence, reversal of the tribunal's decision is required.[5] *Georgetown, supra* at 51; *Kern, supra* at 623.

Last, petitioner argues that the tribunal erred in failing to award petitioner attorney fees resulting from the adjournment of the first scheduled hearing. The hearing was initially scheduled for April 5, 2000. Due to a medical emergency, respondent's representative was unable to attend the hearing, but petitioner's attorney was present. The tribunal adjourned the hearing until July 19, 2000. As a result, petitioner sought costs pursuant to TRR 205.1145. The tribunal awarded petitioner $181.33, $25.00 for the motion fee and $156.33 in mileage. However, the tribunal did not award attorney fees, concluding that petitioner failed to provide legal support for such an award.

TRR 205.1145 provides:

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[5] Given our resolution of these issues, we need not address petitioner's alternative arguments concerning whether the tribunal's factual findings, determined by considering the undisclosed evidence, were supported by competent, material and substantial evidence, and whether the tribunal erred in applying the law in concluding that petitioner's activities do not meet the definition of a charitable institution.

(1) The tribunal may, upon motion . . . allow a prevailing party in a decision or order to request costs.

This rule does not specifically include recovery of attorney fees and the tax tribunal rules do not define costs. We note that even if we were to consider "costs" to include attorney fees, TRR 205.1145 would not provide a legal basis for such an award because it only applies to a "prevailing party."[6]

We recognize that, therefore, the costs which were awarded to petitioner should not have been given pursuant to this rule. However, MCR 2.503(D)(2) gives a court discretion to award costs when granting an adjournment. Because there are no tribunal rules which address the award of costs before a final judgment, the Michigan Court Rules govern. TRR 205.1111(4). Thus, there was a basis upon which the tribunal could award costs to petitioner.

In regards to attorney fees, MCR 2.503(D)(2) also only authorizes costs. Generally, the express mention of one thing in a statute implies the exclusion of other similar things.[7] *Bradley v Saranac Community Schools Bd of Ed*, 455 Mich 285, 298; 565 NW2d 650 (1997). We believe that had MCR 2.503(D) intended to allow recovery of attorney fees, it would have specifically so stated, as other court rules do. See, e.g., MCR 2.114(E); MCR 2.118(A)(3); MCR 2.119(E)(4); MCR 2.223(B)(1); MCR 2.225(B); MCR 2.313(B)(2), and MCR 2.401(G).

On appeal, petitioner specifically argues that MCR 2.119(E)(4) provides legal support for an award of reasonable attorney fees. However, this court rule allows attorney fees to be awarded if the moving party fails to appear at a contested motion hearing. It is inapplicable to the present case because petitioner was the moving party in regards to the hearing to be held and was present. We conclude that the tribunal was correct in denying petitioner's request for attorney fees because there was no legal basis upon which to award it.

In conclusion, we hold that petitioner was prejudiced by respondent's failure to file a sufficient answer to enable petitioner to adequately respond and by the tribunal's improper admission of certain pieces of documentary evidence offered by respondent. Therefore, we reverse the tribunal's decision and remand for further proceedings consistent with this opinion. On remand, if the tribunal can reissue its opinion and judgment setting forth its reasoning, without considering the inadmissible documentary evidence and without conducting a new

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[6] The United States Supreme Court recently defined a "prevailing party" as one who has received a favorable judgment on the merits of his claim or an enforceable consent judgment; either of which create the necessary "material alternation of the parties' legal relationship." *Buckhannon Bd & Care Home, Inc v West Virginia Dep't of Health & Human Resources*, 532 US 598, 603-604; 149 L Ed 2d 855; 121 S Ct 1835 (2001). In this case, petitioner was not a "prevailing party" because the tribunal merely excused respondent's representative's failure to appear and rescheduled the hearing. There was no change in the parties' legal relationship.

[7] The rules of statutory construction also apply to court rules. *Rafferty v Markovitz*, 461 Mich 265, 270; 602 NW2d 367 (1999).

hearing, it may do so. *Kern, supra* at 625. If it cannot, the tribunal should conduct a new hearing.

Reversed and remanded. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder