

STATE OF MICHIGAN
COURT OF APPEALS

DEPARTMENT OF TREASURY,

Plaintiff-Appellee,

v

LAURENSE GREGORY COLLER, a/k/a LARRY
G. COLLER,

Defendant-Appellant.

UNPUBLISHED

March 9, 2004

No. 244344

Wayne Circuit Court

LC No. 01-131493-CZ

Before: Owens, P.J., and Talbot and Murray, JJ.

PER CURIAM.

In this tax collection case, defendant appeals as of right from the circuit court's decision affirming single business tax assessments, interest and penalties issued against him by the Department of Treasury in his capacity as a liable corporate officer of the defunct National Boatland, Inc. We affirm.

I. Facts and Procedural History

Defendant, the owner and operator of National Boatland, Inc., filed the 1990 and 1991 single business tax returns for the corporation, as well as his own individual income tax returns. The tax returns were erroneous, and the Internal Revenue Service advised the Michigan Department of Treasury that it had notified defendant of his failure to report all income on his individual and the corporation's tax returns, resulting in increased federal income tax and increased state individual income and single business income tax owed. Pursuant to MCL 208.75(2), the corporation was required to file amended returns with the state. It is undisputed in this case that amended returns were not filed. The state issued assessments against defendant for state individual income tax, and single business tax for his failure as the corporate officer of the corporation responsible for filing and paying the single business tax returns. Because defendant did not appeal the assessments, they became final.

On January 3, 2001, defendant filed a petition for Chapter 7 bankruptcy, 11 USC 701, *et seq.*, and a discharge of all his debts was issued. The Department of Treasury then sought judgment against defendant in the circuit court, alleging defendant's liability for a total of \$92,892.88 in taxes, penalties and interest for defendant's unreported individual income and the corporation's unreported single business income for the tax years 1990 and 1991. The parties filed cross motions for summary disposition pursuant to MCR 2.116(C)(10). Defendant

contended that his debts were dischargeable pursuant to 11 USC 523. The circuit court ruled that defendant failed to file the required amended state returns for the corporation's single business taxes and accordingly, defendant's tax liabilities for 1990 and 1991 were not discharged. The court granted the Department of Treasury summary disposition and denied defendant summary disposition.

II. Standard of Review

This Court reviews de novo a trial court's decision to grant summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion based on MCR 2.116(C)(10) tests the factual sufficiency of the complaint and must be supported or opposed by affidavits, depositions, admissions, or other documentary evidence. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). The trial court must consider the submitted evidence in the light most favorable to the nonmoving party. *Spiek, supra*. Where the proffered evidence fails to establish that a disputed material issue of fact remains for trial, summary disposition is properly granted to the party so entitled as a matter of law. MCR 2.116(C)(10), *Maiden, supra*.

III. Analysis

The Federal Bankruptcy Code provides that an individual debtor is not discharged from any debt for a tax duty where he fails to file a required return. 11 USC 523(a)(1)(B). Defendant contends that he is not a "debtor" for purposes of the federal statute and that he was not personally required to file the corporation's amended tax return. We disagree.

Under the Michigan corporate liability statute, MCL 205.27a(5), the tax debt of a corporation becomes the tax debt of the person found to be the responsible person, as follows:

(5) If a corporation liable for taxes administered under this act fails for any reason to file the required returns or to pay the tax due, any of its officers having control or supervision of, or charged with the responsibility for, making the returns or payments is personally liable for the failure. . . . The dissolution of a corporation does not discharge an officer's liability for a prior failure of the corporation to make a return or remit the tax due. [MCL 205.27a(5).]

In this case, the state determined that defendant had the personal responsibility to file the corporation's single business tax returns and to pay its taxes. Therefore, the tax debt of the corporation became the tax debt of defendant.

Michigan law requires the filing of an amended state tax return when an assessment by the Federal Internal Revenue Service identifies a tax liability. MCL 208.75(2) provides that:

(2) A taxpayer shall file an amended return with the department showing any alteration in or modification of his federal income tax return which affects his tax base under this act. The amended return shall be filed within 120 days after the final determination by the internal revenue service. [MCL 208.75(2).]

Thus, MCL 208.75(2) requires amended returns for the single business tax within 120 days after the IRS's final determination of the deficiency. Defendant was personally responsible for filing the corporation's single business tax returns and for paying the taxes owed. Although he filed the corporation's tax returns for the tax years 1990 and 1991, the returns were erroneous because they did not reflect the correct amount of single business taxes owed and, therefore, the owed taxes were never paid. Defendant failed to file amended returns for the two tax years to reflect the correct amount of taxes owed and he failed to pay the taxes due.

In its written order and opinion below, the circuit court relied on the decision of the United States Bankruptcy Court for the Western District of Wisconsin in *Mueller v Wisconsin Dep't of Workforce Dev (In re Mueller)*, 243 BR 346 (WD Wis, 1999). On appeal, defendant contends that the decision in that case did not decide the question of who was the "debtor" for purposes of 11 USC 523 (a)(1)(B). This is incorrect. In that case, the state determined that the defendant corporate officer was personally liable for reporting and paying unemployment insurance taxes under the Wisconsin statute, Wis Stat §108.22(9), which, similar to MCL 205.27a(5), places responsibility for nonpayment of the corporation's taxes upon a responsible party. The debtor in *Mueller* failed to appeal the determination that he was the responsible person and lost his argument that his liability did not arise from the tax return but from the "responsible party" statute. One of the issues in that case was whether a "responsible party" is treated the same as "a principal taxpayer" under subsection (ii) of 11 USC 523 (a)(1)(B). *Id.* at 349. The court held that "[t]here is no language in § 523(a)(1)(B)(ii) that requires that the debt must have originally accrued to the debtor. Rather, the debtor need only be liable for the debt." *Id.* at 350. Thus, the responsible corporate person was liable for the company's tax debt and that tax debt was not dischargeable under 11 USC 523(a)(1)(B)(ii) because the return was filed late. *Id.*

In this case, the circuit court also relied on the decision of the United States Bankruptcy Court for the Southern District of Ohio in *Giacci v United States (In re Giacci)*, 213 BR 517 (SD Ohio, 1997). In *Giacci*, the state-required amended returns for individual income taxes were not filed. The Ohio bankruptcy court noted that bankruptcy courts have disagreed "as to whether a debtor's failure to file an amended state tax return to reflect federal adjustments creates a nondischargeable debt under § 523(a)(1)(B)(i)." *Id.* at 520. The court adopted the reasoning of cases that concluded that "a debtor's failure to file an amended state tax return to reflect federal adjustments creates a nondischargeable debt under § 523(a)(1)(B)(i)." *Id.* The court reasoned that, to hold otherwise, "would be to reward the debtor-taxpayer in bankruptcy court for failing to comply with state tax law requirements." *Id.*

The holdings in *Mueller* and *Giacci* are persuasive. The intent of the Michigan corporate liability statute is to assure that taxes assessed to a corporation are ultimately satisfied. *Livingstone v Dep't of Treasury*, 434 Mich 771, 794; 456 NW2d (1990). To allow defendant, the sole corporate officer responsible for the corporation's taxes, to dodge his responsibility for paying the corporation's taxes promptly in a properly prepared tax return or amended tax return

would defeat the purpose of federal and state tax filing and payment deadlines.

Affirmed.

/s/ Donald S. Owens

/s/ Michael J. Talbot

/s/ Christopher M. Murray