

STATE OF MICHIGAN
COURT OF APPEALS

WILLIAM F. ROLINSKI,

Petitioner-Appellee,

V

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellant.

UNPUBLISHED

October 5, 2010

No. 291667

Tax Tribunal

LC No. 00-357830

Before: FORT HOOD, P.J., and BORRELLO and STEPHENS, JJ.

PER CURIAM.

Respondent appeals as of right from the judgment of the Michigan Tax Tribunal, which granted petitioner's motion for summary disposition under MCR 2.116(C)(10). For the reasons set forth in this opinion, we reverse and remand.

Petitioner was the President of Big Buck Brewery & Steakhouse, Inc. (Big Buck) from the 1990s through March 1, 2003. According to respondent, petitioner was a Big Buck corporate officer subject to derivative liability under MCL 205.27a(5) for taxes originally assessed to Big Buck for tax years 1995 through 1997. The original tax assessment against Big Buck was previously discharged via stipulation and release between Big Buck and respondent during Big Buck's bankruptcy proceedings in the federal court in 2007.

In 2009, petitioner filed a motion for summary disposition at the Tribunal under MCR 2.116(C)(7) and (C)(10) on the basis that his liability, if any, was nullified when respondent dismissed Big Buck's claim with prejudice during bankruptcy proceedings. In its order, the Tribunal granted petitioner's motion under MCR 2.116(C)(10) on the alternate ground that there was no genuine issue of material fact because petitioner's duties as president of Big Buck did not qualify him as an individual who could be held liable as a corporate officer under MCL 205.27a(5). The Tribunal found that respondent failed to present evidence to establish a genuine issue of material fact regarding petitioner's status as a corporate officer.

Respondent filed a motion for reconsideration on February 19, 2009, arguing that the Tribunal violated its due process rights by ruling on a ground not raised by petitioner, which denied respondent his opportunity to present evidence on the issue. Respondent included documentary evidence to support its position that petitioner was a liable corporate officer. The Tribunal denied respondent's motion for reconsideration on the grounds that the issue of whether petitioner could be held derivatively liable was already considered by the Tribunal, or

alternatively because respondent's new evidence would not result in a different outcome regarding petitioner's status. The Tribunal found the new evidence insufficient to establish that petitioner qualified as a corporate officer.

Respondent first argues on appeal that the Tribunal erred in granting petitioner's motion for summary disposition based on an issue not raised by the parties.

Our review of a Tax Tribunal decision is limited. *Mount Pleasant v State Tax Comm*, 477 Mich 50, 53; 729 NW2d 833 (2007). "Absent fraud, this Court's review of a Tax Tribunal decision is limited to determining whether the Tribunal made an error of law or adopted a wrong legal principle." *Meijer, Inc v Midland*, 240 Mich App 1, 5; 610 NW2d 242 (2000). The Tax Tribunal's factual findings are final if supported by competent and substantial evidence. *Mount Pleasant*, 477 Mich at 53. "Evidence is competent, material, and substantial if a reasoning mind would accept it as sufficient to support a conclusion." *Galuszka v State Employees Retirement Sys*, 265 Mich App 34, 45; 693 NW2d 403 (2004).

According to Tax Tribunal Rules, the Michigan Court Rules apply where there is no applicable Tribunal rule. 1999 AC, R 205.1111(4); see also *Signature Villas, LLC v Ann Arbor*, 269 Mich App 694, 705-706; 714 NW2d 392 (2006). The Tribunal indicated in its order that it granted petitioner's motion for summary disposition under MCR 2.116(C)(10). However, in denying respondent's motion for reconsideration, the Tribunal pointed to MCR 2.116(D)(1) for its authority to grant summary disposition on an issue not raised by the parties. MCR 2.116(I) mandates that if one of two conditions is met, then the court shall render judgment without delay. The conditions are (1) the pleadings show that a party is entitled to judgment as a matter of law, or (2) the affidavits or other proofs show that there is no genuine issue of material fact. *Boulton v Fenton Twp*, 272 Mich App 456, 463; 726 NW2d 733 (2006). This Court has held that a trial court could grant summary judgment without delay, even without a motion, once the court determined that a suit was barred by operation of law. *Id.* at 462-463.

In a more recent case, this Court found that the trial court's power to *sua sponte* issue a motion for summary disposition is limited, stating that "the trial court may not do so in contravention of a party's due process rights." *Al-Maliki v LaGrant*, 286 Mich App 483, 489; 781 NW2d 853 (2009). The Court reasoned that when a trial court opts to bring up an issue not raised by the parties, then it has the responsibility to provide the nonmoving party with the opportunity to be heard on the issue in order to comply with the parties' due process rights. *Id.*

Here, as in *Al-Maliki*, the Tribunal raised an issue not presented by the parties. Hence, once the Tribunal opted to follow this path, it was then required to give respondent the opportunity to be heard on the issue. Thus, the Tribunal made an error of law by ruling on an issue not presented by petitioner without providing respondent an opportunity to present evidence.

Respondent next argues that the Tribunal erred in denying respondent's motion for reconsideration. To the extent that the Tribunal's ruling found that the new evidence was insufficient and would not change the outcome of its original order, we disagree.

Summary disposition should be granted under MCR 2.116(C)(10) if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v*

Roberson, 212 Mich App 45, 48; 536 NW2d 834 (1995). A genuine issue of material fact exists when, giving the benefit of reasonable doubt to the opposing party, the record leaves open an issue upon which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When deciding such a motion, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Maiden*, 461 Mich at 120.

Under MCL 205.27a(5), where a corporation fails to pay taxes for which it is liable, a corporate officer that has control or supervision over the return or payment of taxes can be held personally liable for the unpaid taxes. For liability to attach, the corporate officer must have significant, tax-specific involvement with the financial affairs of the corporation. *Livingstone v Dep't of Treasury*, 434 Mich 771, 780; 456 NW2d 683 (1990). “The signature of any corporate officers, members, managers, or partners on returns or negotiable instruments submitted in payment of taxes is prima facie evidence of their responsibility for making the returns and payments.” MCL 205.27a(5).

Respondent provided copies of corporate filings listing petitioner as the officer responsible for filing Michigan withholding tax returns for the time period in question. Respondent included tax returns and checks submitted in payment of taxes signed by petitioner and another officer. Respondent also provided a payroll agent notification that was signed by petitioner, which appointed a third party payroll agent for Michigan withholding taxes. At minimum, petitioner’s signature on a corporate check payable to the State of Michigan, which corresponded to the exact amount owed on the corporation’s combined Michigan tax returns, was sufficient to establish respondent’s prima facie case that petitioner was a liable corporate officer with some extent of control or supervisory authority over the corporation’s return or payment of taxes, as required by the statute.

MCL 205.27a(5) does not require that a corporate officer have exclusive authority for all tax affairs of a corporation for derivative liability to apply, as inferred by the Tribunal. Instead, a corporate officer can be held derivatively liable even if he has only supervisory authority over filing and remitting a corporation’s tax returns. Nevertheless, whether petitioner had the requisite “control or supervision of, or responsibility for, making the returns or payments” of the corporation’s taxes that would render him subject to liability is a genuine issue of material fact that precludes summary disposition. Therefore, the Tribunal’s ruling that there was no genuine issue of material fact was not supported by competent and substantial evidence. See *Mount Pleasant*, 477 Mich at 53.

In sum, because neither of the conditions found in *Boulton* apply, the Tribunal was not authorized to render judgment without delay in accordance with MCR 2.116(I) on an issue not raised by the parties. See *Boulton*, 272 Mich App at 463. Furthermore, because there was a genuine issue of material fact regarding petitioners’ status as a liable corporate officer, the Tribunal ruling was inappropriate under MCR 2.116(C)(10). Thus, the Tribunal made an error of law and we reverse.

Moreover, the question presented at the Tribunal—whether the release of a corporation through bankruptcy proceedings eliminates corporate officer liability—is a question worthy of further exploration. It is likely that this question will be presented again to the Tribunal, and it would be both beneficial and instructive to have a Tribunal ruling on this important issue. Thus,

we find that the Tribunal erred in granting petitioner's motion for summary disposition on the grounds of petitioner's corporate officer status under MCL 205.27a(5), and remand for further proceedings consistent with this opinion.

Reverse and remand. We do not retain jurisdiction. No costs are assessed to either party, a public question being involved.

/s/ Karen M. Fort Hood

/s/ Stephen L. Borrello

/s/ Cynthia Diane Stephens