[Cite as *Machlup v. Cleveland Hts.*, 2010-Ohio-3730.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94120

PETER MACHLUP

PLAINTIFF-APPELLANT

vs.

CITY OF CLEVELAND HTS., OH., ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-634228

BEFORE: Jones, J., Stewart, P.J., and Sweeney, J.

RELEASED AND JOURNALIZED: August 12, 2010

FOR APPELLANT

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LARRY A. JONES, J.:

{¶ 1} Plaintiff-appellant, Peter Machlup ("Machlup"), appeals the trial court's granting of defendant-appellee's, Cleveland Heights' ("Cleveland Heights") motion to dismiss/motion for summary judgment. Having reviewed the arguments of the parties and the pertinent law, we hereby affirm the judgment of the lower court.

STATEMENT OF THE CASE

{¶ 2} This case involves the levying of renewal tax assessments for street lighting and trees in Cleveland Heights. Machlup argues that he did not receive proper notice when the city published service in the local newspaper. Cleveland Heights states it is not required to give personal notice to property owners whose total assessment over a three-year period does not exceed $250.00.[1] Cleveland Heights further claims Machlup had actual notice of the assessment prior to its enactment and participated in the administrative process. On August 29, 2007, Machlup filed an action against the city and a motion for a preliminary injunction restraining the city from filing the assessments with the County Auditor. On September 4, 2007, Cleveland Heights City Council enacted the last ordinances necessary to finalize the assessments. On September 7, 2007, the ordinances were certified to the County Auditor.

{¶ 3} Cleveland Heights was served with notice of the lawsuit on September 12, 2007. Machlup's motion for preliminary injunction was set for hearing. Cleveland Heights filed an opposition to Machlup's preliminary injunction on September 25, 2007. The lower court denied Machlup's motion for preliminary injunction. Cleveland Heights filed its motion to dismiss/motion for summary judgment on December 31, 2007.

STATEMENT OF THE FACTS

{¶ 4} On April 16, 2007, Cleveland Heights City Council passed Resolution

[1] Machlup's assessment, based upon front footage, was $171.48 for the three-year period.

No. 46-2007, declaring the necessity of assessing a portion of the expense of street lighting; and Resolution No. 47-2007, declaring the necessity of assessing a portion of expense of planting, maintaining, and removing shade trees. Cleveland Heights has followed this method of assessment for decades, including the entire fifteen-year period (prior to 2007) that Machlup owned his home in Cleveland Heights.

{¶ 5} Pursuant to R.C. 727.12, estimated assessments for each parcel of land in Cleveland Heights were calculated and placed on file with the Clerk of Council in a 678-page book that was made available to Machlup in July of 2007.[2] Pursuant to R.C. 727.13 and R.C. 727.14, notice of the passage of Resolution Nos. 46-2007 and 47-2007 was given by publishing the Resolutions in their entireties in the Sun Press newspaper for two weeks. Per R.C. 727.14, homeowners whose three-year assessment exceeded $250.00 were also served by certified mail.

{¶ 6} Machlup's three-year assessment totaled only $171.48, so he did not receive personal service. Machlup stated that he found out about the assessment from a neighbor. He subsequently contacted Cleveland Heights City Hall in July 2007 and requested copies of public records relating to the assessments. Machlup reviewed the records at City Hall, along with the

[2]Also on file were detailed budget breakdowns for the continuation of the existing forestry division and street lighting programs for the years 2008, 2009, and 2010. Machlup did not dispute that he had the opportunity to review these documents in July 2007 and that he received copies of most of the documents (with the exception of the 678-page book).

678-page book that listed the proposed assessment amount for every property in Cleveland Heights. Machlup then filed an objection to the assessments and requested a hearing. On August 20, 2007, Council passed Ordinances No. 113-2007 and 114-2007, appointed an Assessment Review Board pursuant to R.C. 727.16, and set a hearing date of August 29, 2007.

{¶ 7} Machlup appeared at the hearing and presented his objections. He argued that the tree lawn trees on his street were on private property, not public property. The Assessment Review Board submitted its report to City Council, and accepted the report on Resolution Nos. 115-2007 and 116-2007; and Ordinance Nos. 117-2007 and 118-2007. The Resolutions and Ordinances were passed on September 4, 2007. Council then directed the Clerk of Council to certify the assessments to the County Auditor. The assessments were sent to the County Auditor on September 7, 2007, and Cleveland Heights was served with the complaint and motion for temporary injunction on September 12, 2007.

ASSIGNMENTS OF ERROR

{¶ 8} Machlup assigns five assignments of error for our review:

{¶ 9} "1. The trial Court's dismissal as a matter of law of Appellant's actions alleging unreasonable notice are [sic] error because Appellee failed to give Appellant notice 'reasonably calculated under the circumstances to inform the affected party.' *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). This violates Appellant's right to due process. Considering the facts and allegations, since this matter was dismissed prior to discovery, in a light most

favorable to the non-moving party, dismissal as a matter of law is error.

{¶ 10} "2. Dismissal of cause of action three is error because Appellee failed to respect the process due by improper declaration of an emergency. Appellant alleges no emergent circumstances existed. Further, at issue is the proper test of the emergency exception – 'substantial deference' or 'not reviewable'.

{¶ 11} "3. Dismissal of cause of action five is error because Appellee knowingly calculates and assesses both taxes in a manner substantially different from the published tax plan. This violates R.C. _727.12 governing tax plans and Appellant's due process rights.

{¶ 12} "4. Dismissal on the basis that jurisdiction is lacking because Appellant is challenging the constitutionality of state statutes but has failed to serve the Ohio Attorney General is error as Appellant is not challenging the constitutionality of any state statutes. Thus, serving the Attorney General is not required.

{¶ 13} "5. "Dismissal on the basis that Appellant failed to join a necessary party, the Cuyahoga County Auditor, is error as the Cuyahoga County Auditor is joined."

LEGAL ANALYSIS

{¶ 14} Due to the disposition of Machlup's fourth assignment of error we shall address it first. Machlup argues in his fourth assignment of error that the lower court's dismissal on jurisdiction was incorrect because he was not challenging the constitutionality of any state statutes. We disagree.

{¶ 15} We find Machlup's claim that he was not arguing the constitutionality of the state statutes to be disingenuous. Contrary to the arguments put forth in Machlup's second brief, filed February 2, 2010, a review of the record provides otherwise.

{¶ 16} Machlup's February 2, 2010 brief was the second brief he filed with this court. His first brief was filed on November 6, 2009 and was stricken by this court on January 13, 2010 for failure to file a conforming brief. Accordingly, the arguments Machlup made in his second brief were provided after Machlup had the benefit of reading and addressing various constitutional arguments made by Cleveland Heights in its appellee's brief. That being said, Machlup still makes his argument, albeit with the later dubious claim that he is not arguing constitutionality, that the notice provisions of the state statutes, followed by Cleveland Heights did not provide him with the due process the constitution requires, i.e., "Appellee has a duty to respect Appellant's right to *due process*. * * *. *U.S. Constitution 5th Amend* [sic.] *applied through 14th.*"[3]

{¶ 17} R.C. 2721.12, Declaratory relief; parties, subsection (A) provides the following:

> **{¶ 18}** "(A) * * *. In any action or proceeding that involves the validity of a municipal ordinance or franchise, the municipal corporation shall be made a party and shall be heard, and, if any statute or the ordinance or franchise is alleged to be unconstitutional, the attorney general also shall be served with a copy of the complaint in the action or proceeding and shall be heard. In any action or proceeding that involves the validity of a township resolution, the township shall be made a party and shall be heard."

[3]See appellant's Feb. 2, 2010 brief, pgs. 4-5.

{¶ 19} A party challenging the constitutionality of a statute "must assert the claim in the complaint or other initial pleading, or an amendment thereto, and must serve the pleading upon the Attorney General in accordance with methods set forth by Rules of Civil Procedure in order to vest a trial court with jurisdiction under former version of declaratory judgment statute, which applied prior to amendment requiring that Attorney General be served with 'complaint' itself. R.C. §2721.12 (1998); Rules Civ.Proc., Rule 4.1." *Cicco v. Stockmaster* (2000), 89 Ohio St.3d 95, 728 N.E.2d 1066.

{¶ 20} We find the lower court's decision to dismiss for lack of jurisdiction due to Machlup's failure to serve and properly join the Attorney General to be proper.

{¶ 21} Accordingly, Machlup's fourth assignment of error is overruled.

{¶ 22} The disposition of Machlup's fourth assignment of error renders his remaining assignments of error moot.

{¶ 23} Assuming for the sake of argument, Machlup's appeal was not dismissed for lack of jurisdiction, it would still lack merit. This is because our review of the evidence demonstrates that Cleveland Heights properly served Machlup; the declarations of emergency in the ordinances in question were in conformance with the law; the tree and street lighting assessments in question were calculated properly; and the joining of the county auditor was proper as the lower court did not award injunctive relief; and there is additional support for the court's decision.

{¶ 24} Further review for the sake of argument only, demonstrates support for the trial court's decision. Specifically, Machlup claims that the city erred when it provided notice via publication instead of certified mail or another R.C. 727.13 accepted form of service. Machlup further argues Cleveland Heights failed to provide him with "notice reasonably calculated under the circumstances to inform."

{¶ 25} R.C. 727.14, Notice in newspaper for street lighting, street cleaning or surface treating, provides the following:

> "In lieu of the procedure provided in section 727.13 of the Revised Code the legislative authority may provide for notice of the passage of a resolution of necessity providing for the *lighting,* sprinkling, sweeping, or cleaning of any street, alley, public road, or place, or parts thereof or for treating the surface of the same with dust-laying or preservative substances, or for *the planting, maintaining, and removing of shade trees*, or for the constructing, maintaining, repairing, cleaning, and enclosing of ditches, and the filing of the estimated assessment under section 727.12 of the Revised Code, *to be given by publication of such notice once a week for two consecutive weeks in a newspaper of general circulation in the municipal corporation. When it appears from the estimated assessment filed* as provided by section 727.12 of the Revised Code, that the assessment against the owner of any lot or parcel of land *will exceed two hundred fifty dollars*, such owner *shall* be notified of the assessment in the manner *provided in section 727.13* of the Revised Code." (Emphasis added.)

{¶ 26} R.C. 727.14 states that *when* the assessment against the owner of any lot or parcel of land *exceeds $250.00*, the owner shall be notified of the assessment in the manner (i.e., same manner as summons in a civil case, certified mail to last known address, address where tax bills are sent, or other

combination of the previous methods in R.C. 727.13) provided in R.C. 727.13.[4]

{¶ 27} However, Machlup's tax assessment did *not* exceed $250.00. Accordingly, Machlup was *not required* to be served in the manner prescribed in R.C. 727.13, (i.e., certified mail, tax bill address, other combination in R.C. 727.13, etc.). Machlup takes issue with the fact that Cleveland Heights served him by publication, but because Machlup's tax assessment did not exceed $250.00, service by publication upon Machlup was proper in this case.

{¶ 28} Machlup's fourth assignment of error is without merit and the trial court was therefore without jurisdiction.

{¶ 29} Accordingly, based on the disposition of Machlup's fourth assignment of error, and accompanying lack of jurisdiction, his remaining assignments of error are moot.

Affirmed.

It is ordered that appellees recover of appellant costs herein taxed.

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[4] R.C. 727.13, Notice, provides the following: "Notice of the passage of a resolution of necessity and the filing of the estimated assessment under section 727.12 of the Revised Code, shall, after the estimated assessment has been made and filed as provided by section 727.12 of the Revised Code, be served by the clerk of the legislative authority, or a person designated by such clerk, upon the owners of the lots or parcels of land to be assessed for the proposed improvement, *in the same manner as service of summons in civil cases, or by certified mail addressed to such owner at his last known address or to the address to which tax bills are sent, or by a combination of the foregoing methods.* If it appears by the return of service or the return of the certified mail notice that one or more of the owners cannot be found, such owners shall be served by publication of the notice once in a newspaper of general circulation within the municipal corporation. The notice shall also set forth the place where such estimated assessments are on file and are open for public inspection. The return of the person serving the notice or a certified copy thereof or a returned receipt for notice forwarded by certified mail accepted by the addressee or anyone purporting to act for him shall be prima-facie evidence of the service of notice under this section." (Emphasis added.)

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, JUDGE

MELODY J. STEWART, P.J., and
JAMES J. SWEENEY, J., CONCUR