IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Harvest Niagara Village, Appellant	:	
v.	:	No. 1335 C.D. 2009
Erie County Board of Assessment Appeals and Millcreek Township School District	:	Argued: April 19, 2010

BEFORE: HONORABLE ROBERT SIMPSON, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY[1] FILED: September 24, 2010

Harvest Niagara Village (Taxpayer) challenges an order of the Court of Common Pleas of Erie County (trial court) denying its petition for allowance of appeal *nunc pro tunc*. Taxpayer contends that the Erie County Board of Assessment Appeals' (Board) negligent failure to give its hearing counsel notice of the Board's October 28, 2008, decision increasing the 2009 assessment of Taxpayer's real property constitutes a breakdown in administrative operations justifying a *nunc pro tunc* appeal. We reverse.

Taxpayer, a Delaware limited liability company with an Oregon mailing address, owns and manages commercial real estate (Property) located at

[1] This matter was assigned to the author on May 28, 2010.

2380 Village Common Drive, Erie, PA, 16501.[2] In March 2008, Taxpayer authorized Thompson Property Tax Services (Tax Consultant), located in Seattle, Washington, to receive all documents and notices regarding tax assessments and tax assessment appeals pertaining to the Property for the 2008 tax year.[3] Thereafter, in an April 4, 2008, letter to the Erie County Assessor's Office (Assessor), Tax Consultant notified the Assessor that it had been authorized to receive all tax bills and assessment notices for Taxpayer's Property.[4] Tax

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[2] The address certification on the Property's deed indicates Taxpayer's mailing address as: Harvest Niagara Retirement Residence, LLC, c/o Harvest Facility Holdings, LP, Attn: Bruce Thorn, 2250 McGilchrist Street SE, Salem, OR 97302. See Reproduced Record (R.R.) at 19a.

[3] Specifically, Taxpayer's letter of authorization provided:

> [Taxpayer] under the management of Holiday Retirement does hereby appoint [Tax Consultant] or a representative thereof as Agent to represent our Firm's property in respect to all property tax matters for the 2008 tax year.
>
> As our agent, they have the right to file returns, request change of address, receive assessments and tax bills, examine any records, and discuss or appeal any tax assessment to the appropriate government authority when, in their opinion, the assessment does not constitute fair market value.

R.R. at 36a.

[4] Specifically, the April 4, 2008, letter provided as follows:

> [Tax Consultant] [has] been authorized to receive all tax bills and assessment notices for the below referenced property. Please see attached letter of authorization. Effective immediately, please change the address and forward all related information to:
>
> Harvest Niagara Vlg. Ret. Res. LLC
> c/o [Tax Consultant]
> 600 University Street, Suite 2215
> Seattle, WA 98101
>
> Property Location: 2380 Village Common Dr
>
> Account #: 33-123-418.0-033.00

(Continued....)

Consultant attached a copy of the March 2008 letter of authorization to the April 4, 2008, letter and further requested that the Assessor change the address for the Property and forward all related information to Tax Consultant at its address in Seattle, Washington.

In mid-2008, the Board assessed the Property for the 2009 tax year at $5,214,820. In July 2008, the Millcreek Township School District (School District), seeking an increase in the assessment, intervened and appealed. R.R. at 3a-4a. In September 2008, the Board sent a notice of the appeal hearing to Tax Consultant in Seattle, Washington. Id. at 5a.

On October 8, 2008, the Board held a hearing on the School District's appeal. Attorney William P. Bresnahan (Counsel), of the Pittsburgh firm of Hollinshead, Mendelson, Bresnahan and Nixon, appeared on behalf of Taxpayer and participated in the hearing. On October 28, 2008, the Board issued a decision increasing the Property's assessment for the 2009 tax year to $8,690,010. R.R. at 6a. The same day, the Board mailed notice of its decision to Tax Consultant, but not to Counsel in Pennsylvania. Pursuant to Section 5571(b) of the Judicial Code, 42 Pa. C.S. §5571(b), (appeals from a government unit to a court, generally), Taxpayer had 30 days to appeal the Board's decision to the trial court.

On March, 10, 2009, not having received a decision, Counsel contacted the Board. The Board notified Counsel that it mailed its decision to Tax Consultant on October 28, 2008.

On March 17, 2009, Taxpayer filed a petition for allowance of appeal *nunc pro tunc* with the trial court. R.R. at 8a-12a. The Board promptly filed an answer. Id. at 15a-20a. Following oral argument and submission of briefs, the

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Id. at 35a.

trial court ultimately denied Taxpayer's *nunc pro tunc* petition by order of June 4, 2009. Id. at 21a. The trial court noted the change of address for Taxpayer and concluded that the Board's mailing of the decision to Tax Consultant, but not to Counsel, did not constitute a breakdown in operations. Id. at 32a-34a. Taxpayer now appeals.

Our review of a decision to grant or deny an appeal *nunc pro tunc* is limited to a determination of whether the trial court abused its discretion or erred as a matter of law. Hanoverian, Inc. v. Lehigh County Board of Assessment, 701 A.2d 288 (Pa. Cmwlth. 1997). Abuse of discretion is defined as not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is patently unreasonable, or is the result of partiality, prejudice, bias or ill will, as shown by the evidence or the record, discretion is abused. Kelly v. County of Allegheny, 519 Pa. 213, 546 A.2d 608 (1988).

The 30-day time limit for filing a tax assessment appeal is mandatory and generally, judicial extensions of an appeal period will not be granted. Connor v. Westmoreland County Board of Assessment Appeal, 598 A.2d 610 (Pa. Cmwlth. 1991). An appeal period may not be extended as a matter of grace or mere indulgence. Union Electric Corporation v. Board of Property Assessment Appeals & Review, 560 Pa. 541, 746 A.2d 581 (2000). However, a court may extend an appeal period based upon a showing of extraordinary circumstances involving fraud or its equivalent, duress or coercion. Id. A breakdown in administrative operations or negligence on the part of administrative officials may be deemed the equivalent of fraud. Id.

In support this appeal, Taxpayer contends the trial court erred and abused its discretion in denying its petition for allowance of appeal *nunc pro tunc*

after the Board negligently failed to notify Counsel of its decision to increase the Property's assessment. Generally, Taxpayer acknowledges, the 30-day period for filing a tax assessment appeal to the trial court is mandatory, and extensions will not be granted. Appeal of Cedarbrook Realty, Inc., 395 A.2d 613 (Pa. Cmwlth. 1978). However, Taxpayer contends that the Board's failure to send notice of the hearing decision to counsel of record amounted to negligence and resulted in Taxpayer being deprived of due process and the opportunity to file a timely appeal. As support for this assertion, Taxpayer relies upon our Supreme Court's decision in Union Electric wherein the Supreme Court upheld the granting of an appeal *nunc pro tunc* where the negligence of the assessment board caused the late appeal. The Supreme Court recognized an appeal *nunc pro tunc* may be warranted where the board is negligent, acts improperly or even unintentionally misleads a party. Id. Here, Taxpayer asserts, the Board's negligence in not sending notice of the decision to Counsel constitutes a breakdown in the Board's operations.

Taxpayer further contends the Board acted negligently in not notifying Counsel of the hearing decision because it is common practice in any ongoing litigation and a requirement of the Pennsylvania Rules of Civil Procedure.[5] In particular, Taxpayer asserts the Board does not dispute the fact it failed to send Counsel notice of its decision. Taxpayer points out that the April 4,

[5] See Pa. R.C.P. No. 440 (a)(1) ("Copies of all legal papers other than original process filed in an action or served upon any party to an action shall be served upon every other party to the action. Service shall be made … by … mailing a copy to … each party at the address of the party's attorney of record endorsed on an appearance or prior pleading of the party …."); Pa. R.C.P. No. 236(a)(2) ("The prothonotary shall immediately give written notice of the entry of … (2) any other order, decree or judgment to each party's attorney of record …."). See also Erie L.R. 440 (service of legal papers other than original process must be given to opposing counsel within five business days if by mail); 2 Pa. C.S. §555 ("All adjudications of a local agency shall be in writing … and shall be served upon all parties or their counsel, personally, or by mail.").

2008, letter does not instruct the Assessment Office to forgo sending notice of any decision for an appeal to any attorney retained by Taxpayer. Taxpayer further points out that the April 4, 2008 letter was directed to the Assessor, not the Board, and was sent before counsel of record entered his appearance at the appeal hearing. Therefore, Taxpayers argues that the Board cannot claim that it was relieved of its duty to inform an attorney of record, which is common practice in any active litigation. Accordingly, Taxpayer contends that the Board's negligence in not sending Counsel a notice of its decision constitutes a breakdown in the Board's operations such that Taxpayer's appeal should be permitted *nunc pro tunc*.

In response, the Board and School District argue that, given the circumstances here, the Board's mailing notice of its decision to Tax Consultant, as Taxpayer's authorized agent, rather than to Counsel, who did not enter a written appearance, did not constitute a breakdown in administrative operations warranting the grant of an appeal *nunc pro tunc*. It would stretch the imagination, the Board argues, to believe sending notification to Taxpayer at the address it specified in a written, notarized letter of authorization could in any way be characterized as fraud, duress, coercion or a breakdown in administrative operations.

Here, the Board asserts, Counsel failed to submit a written request to be notified of the Board's decision. At hearing before the Board, Taxpayer proffered no evidence of any written authorization appointing Counsel to receive tax or assessment notices regarding the Property. Therefore, Taxpayer's only written instruction to the Assessment Office requested that all tax bills and assessment notices regarding the property be sent to Tax Consultant as Taxpayer's agent. Based on these facts, the Board asserts the trial court did not abuse its discretion in finding Taxpayer failed to establish extraordinary circumstances justifying an appeal *nunc pro tunc*.

The Board further contends it is a local agency as defined by 2 Pa. C.S. §101 (a government agency other than a Commonwealth agency) and the Pennsylvania Rules of Civil Procedure do not apply to proceedings before the Board.[6] Therefore, the Board maintains the Rules do not require the Board to mail notice to Counsel.[7] Nonetheless, the Board asserts its appeal hearings are governed by its own Assessment Appeal Rules and Regulations. See R.R. at 44a-47a. In particular, Board Rule 5 (Appeal Hearings), requires that written authorization to represent an aggrieved party must be presented to the Board at the time of the scheduled hearing.[8] Id. at 46a. The Board asserts, neither Taxpayer nor Counsel offered evidence of any written authorization either indicating Counsel appeared at the hearing as Taxpayer's counsel of record or advising the Board that future assessment notices were to be directed to Counsel. At most, Counsel appeared at the hearing and orally stated he was there on behalf of Taxpayer. In a yearly appeal period, the Board holds up to 25 hearings a day. There are no stenographers. The Board contends that if all Counsel did was proffer an oral request for notice of the decision, the Board easily could have overlooked it.

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[6] See Appeal of Borough of Churchill, 525 Pa. 80, 575 A.2d 550 (1990) (Rules of Civil Procedure do not apply to statutory appeals in general and tax assessment appeals in particular).

[7] Somewhat inconsistently, the School District contends that Pa. R.C.P. No. 440 creates a duty for Counsel to formally enter his appearance of record. See Pa. R.C.P. No. 440(a)(1)(i) (copies of all legal papers, other than original process, shall be mailed to party's attorney of record endorsed on appearance or prior pleading).

[8] Specifically Board Rule 5 provides in relevant part:

> (B) APPEARANCE AT HEARINGS: The aggrieved party or their authorized attorney must appear at the appeal hearing before the Board. The authorization to represent an aggrieved party must be signed by the aggrieved party prior to the date of the hearing where only the aggrieved party filed the appeal and presented to the Board at the time of the scheduled hearing.

As stated previously herein, Tax Consultant attached a March 2008 letter of authorization to its April 4, 2008, letter notifying the Assessor that it was authorized to receive all tax bills and assessment notices for Taxpayer's Property and further requesting that Assessor change the address for the Property and forward all related information to Tax Consultant at its address in Seattle, Washington. However, the March 2008 letter of authorization from Taxpayer to Assessor appointing Tax Consultant as its agent to represent Taxpayer with respect to all tax matters clearly states that such agency appointment only applies to tax matters for the **2008 tax year**. R.R. at 36a. This restriction is critical in this matter as it reveals that the agency relationship between Taxpayer and Tax Consultant was a limited special agency for the 2008 tax year only. The assessment currently at issue in this case is for the 2009 tax year. There is no letter of authorization in the record appointing Tax Consultant as Taxpayer's agent for the 2009 tax year. Therefore, the action by the Board in sending notice of its October 2008 decision regarding the 2009 tax year to Tax Consultant was negligent.

The Board's negligence is not negated by the fact that the notice of hearing on the School District's appeal for the 2009 tax year was sent to Taxpayer's changed address, which in turn prompted Taxpayer to appear at the hearing with Counsel. R.R. at 5a. Rule 5(C) of the Board's Assessment Appeal Rules and Regulations mandates that if a property subject to an assessment appeal is owned by and in the name of a corporation, then that corporation must have an attorney represent its interests before the Board. Id. at 46a. That is exactly what occurred in this matter. Counsel appeared at the October 8, 2008, hearing and

entered his appearance with the Board.[9] Once Taxpayer appeared before the Board with Counsel, as required by the Board's rules and regulations, it was incumbent upon the Board to ensure that Counsel was provided with a copy of the Board's October 28, 2008, decision disposing of the School District's appeal in a timely manner regardless of whether Taxpayer had previously entered a change of address with the Assessor.

Additionally, the Board's reliance on Rule 5(B) of the Assessment Appeal Rules and Regulations is misplaced. The plain language of Rule(B) pertains to the aggrieved party. The aggrieved party before the Board was the School District as they were the party filing the appeal challenging the Property's assessment for the 2009 tax year. The Rule most pertinent to Taxpayer with respect to the School District's appeal was Rule 5(C), which, as stated above, mandates that if a property subject to an assessment appeal is owned by and in the name of a corporation, then that corporation must have an attorney represent its interests before the Board. R.R. at 46a. We note that neither Rule 5(B) or Rule 5(C) mandate that an attorney representing a corporate taxpayer who is not the aggrieved party file a prior written notice of appearance with the Board. Moreover, the notice of the appeal hearing sent to Taxpayer by the Board did not inform Taxpayer that if it intended to be represented by counsel, that Taxpayer had to authorize such representation in writing to the Board prior to the scheduled hearing. Id. at 5a.

As such, Counsel's appearance before the Board was sufficient to put the Board on notice that he was present at the hearing to represent Taxpayer's

[9] At oral argument before this court, Counsel represented that at the appeal hearing he gave the Board his business card with the intention of receiving all future correspondence and a

(Continued....)

interests. In addition, the Board's excuse that it may have easily overlooked any oral notice of appearance by Counsel is rejected as its own Rules require that Taxpayer be represented by an attorney and the Board does not dispute that Counsel was present during the hearing.

Finally, the fact that Counsel did not contact the Board within 30 days of the hearing to ascertain whether the Board had rendered a decision does not justify the Board's failure to send Counsel a copy of its decision. While Counsel offered no explanation as to why he waited until March 10, 2009, to inquire if the Board had issued a decision, the delay is certainly justifiable since Counsel appeared before the Board as Taxpayer's attorney of record and was therefore reasonably expecting that the Board would provide Counsel with a copy of the October 28, 2008, decision in sufficient time for Counsel to file a timely appeal therefrom. In addition, Counsel promptly filed a petition for allowance of appeal *nunc pro tunc* within seven days of learning of the Board's decision.

decision from the Board.

In summary, we conclude that the trial court abused its discretion in denying Taxpayer's petition for allowance of appeal *nunc pro tunc*. The Board's negligent failure to notify Taxpayer's counsel of record in a timely manner constituted a breakdown in administrative operations such that Taxpayer's appeal should have been permitted *nunc pro tunc*. Accordingly, we reverse.

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JAMES R. KELLEY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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v.	:	No. 1335 C.D. 2009
Erie County Board of Assessment Appeals and Millcreek Township School District	:	

O R D E R

AND NOW, this 24th day of September, 2010, the order of the Court of Common Pleas of Erie County, dated June 4, 2009, at No. 12543 of 2009, is reversed.

JAMES R. KELLEY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Harvest Niagara Village, Appellant	:	
v.	:	No. 1335 C.D. 2009
Erie County Board of Assessment Appeals and Millcreek Township School District	:	Argued: April 19, 2010

BEFORE: HONORABLE ROBERT SIMPSON, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

DISSENTING OPINION BY JUDGE SIMPSON **FILED: September 24, 2010**

I respectfully disagree with the result reached by the majority. Because of our deferential review for abuse of discretion and the existence of several factors supporting the trial court's exercise of discretion, I would affirm.

I do not believe that the failure to notify counsel of the Board's re-assessment decision is the dispositive fact. Instead, I believe the authorized change of the taxpayer's address for purposes of assessments is critical. Harvest Niagara Village (Taxpayer) authorized Thompson Property Tax Services (Tax Consultant), to "request change of address." R.R. at 36a. Consistent with this authority, Tax Consultant wrote the Assessment Office stating, "Effective immediately, please change the address …." Id. at 35a. This occurred during the period of Tax Consultant's authorization and before the assessment process for the 2009 tax year began. From that point forward, Taxpayer's address for assessment purposes was Tax Consultant's address.

A notice of hearing on the school district's appeal for the 2009 tax year was sent to Taxpayer's changed address. Id. at 5a. It was an effective address, since the notice prompted Taxpayer's participation through counsel at the hearing. At this point, there was no reason for the Board to believe there was any problem with Taxpayer's changed address.

The trial court found that the Board sent the notice of its post-hearing re-assessment to Taxpayer's changed address, which appears on the face of the notice. Taxpayer offers no explanation as to what happened to that notice or as to why this address was inadequate. This lack of proof supports the trial court's exercise of discretion not to allow an appeal *nunc pro tunc*.

Additionally, given the timing in this case, I am reluctant to interfere with the trial court's exercise of discretion. Counsel did not contact the Board until more than five months after the hearing and four months after the re-assessment decision was mailed to Taxpayer's changed address. In its petition for allowance of appeal *nunc pro tunc*, Taxpayer averred: "9. Only after [counsel] contacted the assessment office on March 10, 2009 did [Taxpayer] become aware of the disposition." R.R. at 10a. There is nothing else in the record to justify the passage of time. This lack of explanation for the delay also supports the trial court's exercise of discretion.

Nor do I discern an error of law. Several of the cases on which Taxpayer relies involve situations where neither a party nor its counsel received notice which triggers an appeal period. Nixon v. Nixon, 329 Pa. 256, 198 A. 154 (1938); Calcagni v. Pennsylvania Board of Probation and Parole, 582 A.2d 1141 (Pa. Cmwlth. 1990); Moore v. Pennsylvania Board of Probation and Parole, 503 A.2d 1099 (Pa. Cmwlth. 1986). That is not the situation here, where notice of re-assessment was sent to Taxpayer's changed address.

Also, unlike the situation in several cases, nothing in this record established that Board orders are customarily sent to counsel appearing at a hearing. Cf. Estate of Purdy, 447 Pa. 439, 291 A.2d 93 (1972) (parties stipulated neither attorney received any notice of the order and that the court customarily mailed counsel of record copies of opinions and orders); Nixon (discussing custom of Superior Court prothonotary in notifying counsel when orders entered). Because the rules of civil procedure do not apply, Appeal of Borough of Churchill, 525 Pa. 80, 575 A.2d 550 (1990), and the Board's rules do not address its duty to notify attorneys who do not file written appearances, some attempt to establish custom could have been useful here.

For all these reasons, I discern no abuse of discretion in the trial court's decision not to allow an appeal *nunc pro tunc*; accordingly, I would affirm.

ROBERT SIMPSON, Judge