

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

RICHARD KORN,	:	
	:	
Plaintiff,	:	
	:	
v.	:	C.A. No. 6149-VCN
	:	
STATE OF DELAWARE AUDITOR	:	
OF ACCOUNTS R. THOMAS	:	
WAGNER, JR. IN HIS OFFICIAL	:	
CAPACITY AS STATE AUDITOR,	:	
	:	
Defendant.	:	

MEMORANDUM OPINION

Date Submitted: September 1, 2011

Date Decided: September 7, 2011

Ronald G. Poliquin, Esquire, The Law Firm of Ronald G. Poliquin, P.A.,
Dover, Delaware, Attorney for Plaintiff.

Frank N. Broujos, Esquire and Judy Oken Hodas, Esquire, Department of
Justice, Wilmington, Delaware, Attorneys for Defendant.

NOBLE, Vice Chancellor

I. BACKGROUND¹

Plaintiff Richard Korn is a Delaware taxpayer residing in Wilmington, Delaware. Defendant R. Thomas Wagner, Jr., is the State of Delaware Auditor of Accounts. The Plaintiff asserts claims against the Defendant based upon two distinct sets of factual circumstances. The first group of claims relates to the Defendant's alleged noncompliance with 29 *Del. C.* § 2906(f), which states, in part, that the "Auditor of Accounts shall conduct postaudits of local school district tax funds budget and expenditures annually." The Defendant conducted these audits annually from the time of his appointment in 1989 through 2002. The Defendant stopped conducting these audits annually in 2003, and, again according to the Plaintiff, as a result, theft and fraud of approximately \$49,000,000 at several school districts went undetected. Second, the Plaintiff alleges that the Defendant violated Delaware's Freedom of Information Act² ("FOIA") by failing to provide the Plaintiff with copies of Office of the Auditor employee time sheets which he duly requested.

¹ The factual background is based on allegations in the first amended verified complaint (the "Complaint").

² 29 *Del. C.* ch. 100.

II. CONTENTIONS

The Plaintiff seeks, first, a declaratory judgment that Defendant's failure to perform annual local school district compliance audits is a violation of 29 *Del. C.* § 2906(f), and, second, preliminary and permanent injunctions directing the Defendant to perform these audits annually (the "Audit Claims"). Additionally, the Plaintiff requests a declaratory judgment that the Defendant's failure to furnish the requested timesheets is a violation of FOIA, together with an injunction and a writ of mandamus directing the Defendant to disclose the timesheets (the "FOIA Claims"). The Defendant contends that dismissal of the Complaint is appropriate under Court of Chancery Rules 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted.³

III. ANALYSIS

A. *Audit Claims*

The Defendant argues that the Audit Claims must be dismissed because this Court lacks the subject matter jurisdiction necessary to adjudicate them. The Court of Chancery is a court of limited jurisdiction and lacks subject matter jurisdiction where there is an adequate remedy at

³ Before oral argument, the Defendant agreed to waive the previously raised defense that the Plaintiff's claim should be dismissed under Court of Chancery Rule 12(b)(5) for insufficient service of process.

law.⁴ The primary issue at the core of the Audit Claims is one solely of statutory interpretation, simple as this interpretation may be. Such issues “are, beyond question, legal issues capable of resolution by the Superior Court, and declaratory relief is available to the same extent as it is [in the Court of Chancery].”⁵

Since declaratory relief of the type sought here could be obtained, if at all,⁶ in the Superior Court, there is an adequate remedy at law for both the

⁴ 10 *Del. C.* § 342.

⁵ *Reeder v. Wagner*, 2007 WL 3301026, at *1 (Del. Ch. Nov. 1, 2007); *Reed v. Brady*, 2002 WL 1402238, at *3 n. 7 (Del. Ch. June 21, 2002), *aff'd*, 818 A.2d 150 (Del. 2003) (TABLE).

⁶ Beyond the issue of this Court’s jurisdiction is the question of whether the Plaintiff has standing to bring these claims. The Plaintiff asserts both individual and taxpayer standing in the Complaint. A plaintiff suing as a citizen must show that he or she “suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Dover Historical Soc. v. Dover Planning Comm’n*, 838 A.2d 1103, 1110 (Del. 2003) (quoting *Society Hill Towers Owners’ Ass’n v. Rendell*, 210 F.3d 168, 175-76 (3d Cir. 2000)). Generally, a plaintiff must prove that his or her interest in the controversy is different from the interest of the public at large. *See Stuart Kingston, Inc. v. Robinson*, 596 A.2d 1378, 1382 (Del. 1991).

The Plaintiff’s allegations appear to fall short of this standard. For instance, the Plaintiff has not alleged he has suffered any unique harm as result of the alleged misconduct that is distinguishable from the harm suffered by the general public. Furthermore, the alleged harm, theft of school district funds, is remote from the alleged misconduct. There are no allegations that the Defendant participated in any fraud or theft. At best, an audit performed after money has been spent *may* detect or deter theft, or *may* lead to a recovery of misappropriated funds, though the extent to which it will succeed in any of these aims is unknowable. For this same reason, it appears speculative that the alleged injury would be redressed by a decision in the Plaintiff’s favor.

In Delaware, taxpayer standing is “reserved for a narrow set of claims involving challenges either to expenditures of public funds or use of public lands.” *Reeder v.*

Plaintiff's declaratory judgment claim and injunction claims. Clearly the availability of a declaratory judgment from the Superior Court suffices as an adequate legal remedy for the Plaintiff's declaratory relief claim. Furthermore, despite the Plaintiff's protestations to the contrary,⁷ a declaratory judgment is an adequate legal remedy for the Plaintiff's injunction claims.⁸ Declaratory judgments "are self executing and 'have the force and effect of a final judgment or decree.'"⁹ Additionally, aside from a conclusory allegation,¹⁰ nothing in the Complaint alleges or suggests the Defendant, an elected State official, would act in defiance of a Superior Court order.

Since an adequate legal remedy is available for all of the Plaintiff's Audit Claims, this Court lacks subject matter jurisdiction over them. Accordingly, the Audit Claims will be dismissed but may be transferred to the Superior Court in accordance with 10 *Del. C.* §1902.

Wagner, 974 A.2d 858, 2009 WL 1525945, at *2 (Del. 2009) (TABLE) (quoting *O'Neil v. Town of Middletown*, 2006 WL 205071 (Del. Ch. Jan. 18, 2006)). As in *Reeder*, the Plaintiff here seeks not to enjoin the misuse of public funds or land, but to obtain an advisory opinion adopting his interpretation of the law. *See id.* As such, it is unlikely that taxpayer standing is available.

While the Court notes the foregoing, it withholds judgment on the question of standing, as these claims are disposed of on other grounds.

⁷ Pl.'s Answering Br. at 9-11.

⁸ *See Reed*, 2002 WL 1402238 at *3.

⁹ *Id.* (quoting 10 *Del. C.* § 6501).

¹⁰ *See* Pl.'s Answering Br. at 9 ("Auditor Wagner has no intention of changing his conduct").

B. FOIA Claims

The Plaintiff alleges that the Defendant violated 29 *Del. C.* §10003 by refusing to provide the Plaintiff with the requested time sheets. The Defendant argues that the Plaintiff has failed to exhaust available administrative remedies, and the Plaintiff acknowledges that dismissal on this ground is appropriate.

Under 29 *Del. C.* § 10005, a citizen alleging a FOIA violation must seek an administrative review before filing suit in court when the Attorney General is obligated to represent the public body with the sought-after public records pursuant to 29 *Del. C.* § 2504.¹¹ In such a case, the person denied access to public records must present a petition and all supporting documentation to the Chief Deputy Attorney General, who must then render a written determination declaring whether a violation has occurred. Only after Chief Deputy's determination is made, may the petitioner or public body appeal the matter to the Superior Court.¹²

By 29 *Del. C.* § 2504, the Attorney General is obligated to represent the Auditor of Accounts in suits brought against him in his official capacity. The Complaint fails to allege that the Plaintiff first petitioned the Attorney General and received an unfavorable administrative determination. The

¹¹ 29 *Del. C.* §§ 10005(b) & (e).

¹² *Id.*

Plaintiff acknowledges his failure to exhaust administrative remedies requires dismissal.

IV. CONCLUSION

As set forth above, this Court lacks subject matter jurisdiction over the Audit Claims, and the FOIA Claims must be dismissed because of Plaintiff's failure to exhaust administrative remedies. An implementing order will be entered.