UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF KENTUCKY,
NORTHERN DIVISION AT COVINGTON
CIVIL ACTION NO. 2:12-cv-00035

GARTH KUHNHEIN, ON BEHALF
OF HIMSELF AND OTHERS
SIMILARLY SITUATED — PLAINTIFF

v.

KENTON COUNTY PUBLIC LIBRARY
BOARD OF TRUSTEES — DEFENDANT

DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S COMPLAINT

The Defendant, Kenton County Library Board of Trustees, by and through counsel, for its Memorandum in Support of its Motion to Dismiss, states as follows:

I. FACTUAL BACKGROUND

On January 20, 2012, Garth Kuhnhein ("Plaintiff") filed a Class Action Complaint with Jury Trial Demand and Declaration of Rights ("Complaint") against the Kenton County Public Library Board of Trustees (the "Library") in Kenton Circuit Court. In relevant part, Plaintiff alleges he is a resident and property owner in the County of Kenton, Kentucky, and has paid taxes to the Library as set forth on his yearly county tax bill. Complaint, ¶ 2. According to Plaintiff, KRS 173.790 governs the increase or decrease of the tax levy for the Library and states that the ad valorem tax rate "shall not be increased or decreased unless a duly certified petition requesting an increase or decrease in the tax rate of a specifically stated amount is signed by fifty one (51% of the number of duly qualified voters voting in the last general election . . . ." *Id.* at ¶

7. At the time of the formation of the Library, the ad valorem tax rate was set as the equivalent of $0.60 per one thousand dollars of value on a home. *Id.* at ¶ 8.

Plaintiff alleges that from 2007-2011 the Library has incrementally increased its ad valorem tax rate from $0.82 to $0.113. *Id.* at ¶ 9. In enacting these increases, Plaintiff asserts that the Library has disregarded KRS 173.790 (*Id.* at ¶¶ 17-18), which has resulted in many years with the rates being over the authorized $.060 per one thousand dollars rate. *Id.* at ¶ 10. Further, Plaintiff alleges that, as a result of the purported improper tax increases, he and the proposed class members are owed not only a refund of $5,125,466.97 for the year 2011, but also for all other years where the tax has been increased above $.060 per one thousand dollars tax rate (*a.k.a* 2007-2011). *Id.* The putative class consists of "All property owners/or taxpayers, who have paid Kenton County Library taxes in excess of the last lawfully set rate set by certified petition." *Id.* at ¶ 19.

Plaintiff asserts four causes of action in his Complaint: declaratory judgment against the Library concerning the assessment and collection of ad valorem taxes in excess of the rate established by KRS Chapter 173 (Count I); Conversion (Count II); unlawful taking per 42 U.S.C. § 1983 (Count III); and unjust enrichment (Count IV). *Id.* at ¶¶ 28-46. In terms of relief, Plaintiff seeks injunctive relief requiring the Library to issue refunds for taxes billed and collected in excess of the statutorily approved rate of $0.60 per one thousand dollars; injunctive relief preventing the Library from increasing its tax rate unless KRS 173.790 is complied with; compensatory damages in the form of refunds, with interest; a declaratory judgment that KRS 173.790 governs the tax rate and the ability to increase or decrease the rate; prejudgment interest, court costs and attorneys fee, per 42 U.S.C. § 1983; and certification of a class.

On February 2, 2012, the Library removed the action to this Court because of the federal claims asserted in the Complaint and it now seeks to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(6) because Plaintiff has failed to state a claim upon which relief can be granted.

II. ARGUMENT

Plaintiff's Complaint should be dismissed because he fails to state a claim upon which relief can be granted. First, Plaintiff has not alleged that he exhausted his administrative remedies prior to filing this lawsuit, as mandated by KRS 134.590. Second, even if Plaintiff had exhausted his administrative remedies, he is precluded from asserting a class action for tax refunds under KRS 134.590. Third, Plaintiff's claim for tax refunds for the years prior to 2010 should be dismissed because the two-year statute of limitations in KRS 134.590 has run on those refunds. Finally, Plaintiff's conversion claim should be dismissed because the Library has sovereign immunity from all tort claims.

A. Because Plaintiff does not allege that he filed a claim requesting a tax refund prior to filing this lawsuit, he has failed to exhaust his administrative remedies.

Plaintiff's Complaint should be dismissed because he does not allege that he filed a claim requesting a tax refund under KRS 134.590 prior to filing suit. Before filing a lawsuit seeking a refund for excess payment of ad valorem taxes, a taxpayer must first exhaust administrative remedies, as mandated by KRS 134.590. *Cromwell Louisville Assoc. v. Kentucky*, 323 S.W.3d 1, 7 (Ky. 2010) (citing Ky. Rev. Stat. §134.590 and holding that "a taxpayer must exhaust the administrative remedy procedures before seeking a refund"); *Bischoff v. City of Newport*, 733 S.W.2d 762 (Ky. App. 1987). If a plaintiff fails to exhaust administrative remedies prior to filing a lawsuit for a tax refund, the complaint should be dismissed. *Bischoff*, 733 S.W.2d at 764. *Accord: Department of Revenue v. Curtsinger*, No. 2006-CA-001379 and 2006-CA-001462,

2007 Ky. App. Unpub. LEXIS 699, at *16-17 (Ky. App. Oct. 26, 2007) (acknowledging that when a taxpayer alleges that an ad valorem tax was paid where the taxes were not owed, the taxpayer is required to exhaust the administrative remedies of KRS 134.590 prior to filing suit).

KRS 134.590(6) states, in relevant part:

> No refund for ad valorem taxes, except those held unconstitutional, shall be made unless the taxpayer has properly followed the administrative remedy procedures established through the protest provisions of KRS 131.110, the appeal provisions of KRS 133.120, the correction provisions of KRS 133.110 and 133.130, or other administrative remedy procedures.

In *Bischoff*, the City of Newport enacted ordinances establishing the city's ad valorem tax rates for the years 1980 to 1985. 733 S.W.2d at 763. The plaintiff filed suit challenging the ordinances as violating KRS 132.027, which limited the tax rate a city could set. *Id.* The complaint requested the circuit court to declare the ordinances invalid and require the refund of the excess taxes paid for those years. *Id.* The city moved to dismiss, arguing that the plaintiff failed to exhaust his administrative remedies as required by KRS 134.590 prior to filing a lawsuit. *Id.* The circuit court granted the city's dismissal. On appeal, the appellate court upheld the circuit court's dismissal. *Id.* The court rejected the plaintiff's contention that the circuit court should have declared whether the tax rates were valid merely because it was a proper subject for a declaration of rights; instead holding that a declaration of rights is appropriate only where an "actual controversy" exists. *Id.* The court found that, where the taxpayer has paid a tax which he or she later concludes was based upon an illegal rate and seeks a refund, "the tax payer must exhaust that remedy [in KRS 134.590] before seeking a refund judicially . . . ." *Id.* at 764. The *Bischoff* court found that since "the timely administrative application for a refund is a condition precedent to entitlement to recover a tax already paid, it must follow that such application is also necessary to create an actual controversy with respect to the rate upon which that tax is based."

Id. Accord: Light v. City of Louisville, 93 S.W.3d 696, 697 (Ky. App. 2002); *City of Somerset v. Bell*, 156 S.W.3d 321, 330 (Ky. App. 2005).

Like the plaintiffs in *Bischoff*, *Light* and *Bell*, Plaintiff is asking this court to declare that the Library increased its ad valorem tax rate in violation of a Kentucky statute and he seeks a refund.[1] Specifically, Plaintiff asserts that "KRS 173.790 governs any increases or decreases to said [ad valorem tax] rate" and that the Library has increased the rate "in violation of KRS 173.790." Complaint, ¶¶ 30-31. As a result, Plaintiff seeks a refund of taxes collected in excess of the proposed statutorily approved rate of $0.60 per one thousand dollars of property value.

Nowhere in his Complaint, however, does Plaintiff allege he has "followed the administrative remedy procedures established through the protest provisions of KRS 131.110, the appeal provisions of KRS 133.120, the correction provisions of KRS 133.110 and 133.130, or other administrative remedy procedures [such as filing a claim for a refund]," prior to filing this lawsuit, as is required under KRS § 134.590. *See* Complaint, ¶¶ 1-46. Therefore, Plaintiff's Complaint must be dismissed for failure to exhaust administrative remedies.

B. Because Plaintiff cannot maintain a class action for a refund of the alleged excess taxes paid, his request for compensatory damages on behalf of the class should be dismissed.

Plaintiff seeks to represent a class of "All property owners/or taxpayers, who have paid Kenton County Library taxes in excess of the last lawfully set rate set by certified petition." Complaint, ¶ 19. As part of the class wide relief sought, Plaintiff requests "judgment and award

[1] Because Plaintiff's lawsuit seeks to recover money paid as excess taxes by an allegedly illegal assessment, this Court is not divested of jurisdiction by the Tax Injunction Act, 28 USC § 1341. *See Central Steel & Wire Co. v. Detroit*, 99 F. Supp. 639, 640-641 (D. Mich. 1951) ("It is not apparent to this Court that a statute which in plain language prohibits a District Court from enjoining, suspending or restraining the assessment, levy or collection of any tax under state law had any conceivable application to this cause of action. A suit to recover money paid as taxes by an allegedly illegal assessment is far removed from an action to enjoin, suspend or restrain the assessment, levy or collection of a tax, and to hold that Section 1341, Title 28 U.S.C. controls such an action at law would require this Court to ignore well established principles of statutory construction.").

of compensatory damages, in the form of refunds, with interest, against the Defendant Library in the amount to be determined by the finder." Complaint, p. 8.

Class relief is not available to obtain a refund of ad valorem taxes because in Kentucky each taxpayer is required to apply for a refund of taxes individually before seeking judicial redress. KRS 134.590(6) provides:

> "(6) No refund shall be made unless each *taxpayer individually* applies within two (2) years from the date payment was made. If the amount of taxes due is in litigation, *the taxpayer shall individually apply for refund* within two (2) years from the date the amount due is finally determined. Each claim or application for a refund shall be in writing and state the specific grounds upon which it is based. No refund for ad valorem taxes, except those held unconstitutional, shall be made unless the taxpayer has properly followed the administrative remedy procedures established through the protest provisions [ ], the appeal provisions [ ], the correction provisions [ ] and, or other administrative remedy procedures." (emphasis added).

The current language of the statute could not be any clearer. "[T]he taxpayer shall *individually* apply for a refund . . ." (emphasis added). KRS 134.590(6) provides a mandatory administrative procedure for seeking refunds from the Department of Revenue and other taxing agencies. Indeed, in *Board of Education of Fayette County v. Taulbee,* 706 S.W.2d. 827, 828-29 (Ky. 1986), the Kentucky Supreme Court, addressing this very issue and statute, held that since KRS 134.590(6) provided a specific, mandatory procedure to seek refunds, class action relief was unavailable for the refund of taxes. The *Taulbee* holding was re-affirmed in the later Kentucky Supreme Court decision, *Griggs v. Dolan,* 759 S.W.2d. 593, 597 (Ky. 1988).

In 2005, the Kentucky Court of Appeals, in *City of Somerset v. Bell,* 156 S.W.3d. 321 (Ky. App. 2005) appeared to reverse direction from the Kentucky Supreme Court precedent set forth in *Taulbee* and *Griggs*. In *Bell,* a group of taxpayers, living in an area annexed by the City of Somerset, brought a class action lawsuit alleging that the City of Somerset had improperly collected ad valorem property taxes from them. The trial court, relying upon *Taulbee*, *supra.*,

concluded that although the taxpayers were entitled to a refund, they were precluded from recovering funds in a class-action lawsuit. The Kentucky Court of Appeals however, held that class action relief *was* available because in 1996, and after the Supreme Court decision in *Taulbee,* the Kentucky Legislature had amended KRS 134.590(6) and removed the phrase "in each case." Thus, the Kentucky Court of Appeals in *Bell* concluded that the Kentucky Legislature had in effect repealed the *Taulbee* holding.

Significantly, after the Court of Appeal's decision in *Bell,* the Kentucky Legislature again re-visited KRS 134.590(6). In 2006, the Kentucky Legislature amended the statute to add in the words "each taxpayer individually applies for a [refund]." KRS 134.590.[2] Moreover, in the Preamble to this amendment, the General Assembly stated that it:

> **"wishe[d] to make it clear that each taxpayer must file an individual refund claim and that the filing of a class action lawsuit does not constitute a timely filing for each member or the class . . . ."** (emphasis added)

It is clear that the *Bell* decision was an aberration; and that the current version of KRS 134.590, much like the language in the statute prior to the Kentucky Court of Appeal's decision in *Bell*, prohibits taxpayers from maintaining class action lawsuits to recover tax refunds.

Plaintiff's class action complaint must be dismissed as a matter of law, because KRS 134.590 precludes recovery of ad valorem tax refunds on a class action basis. Even in those cases where courts have determined that a local government charged an improper, excessive or invalid ad valorem tax, the relief sought – namely class action refund -- has been denied because each taxpayer is required to apply for a refund individually under Kentucky's statutory scheme. KRS 134.590(6); *Griggs v. Dolan*, 759 S.W.2d 593, 597 (Ky. 1988); *Board of Education v.*

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[2] KRS 134.590(6) currently reads in part " No refund shall be made unless each *taxpayer individually applies* within two (2) years from the date payment was made."

Taulbee, 706 S.W.2d 827, 829 (Ky. 1986).[3] Accordingly, even if this Court found that the Library raised the ad valorem tax rate in violation of KRS 173.790, Plaintiff cannot obtain refunds on a class wide basis. Thus, Plaintiff's request for class wide compensatory damages in the form of refunds must be dismissed.

C. Plaintiff's claim for tax refunds prior to 2010 is barred by the statute of limitations.

Plaintiff seeks tax refunds for all alleged excessive taxes due from 2007 to the present. Complaint, ¶ 9. KRS 134.590, however, provides for a two-year statute of limitations. Plaintiffs filed this action on January 20, 2012. Therefore, even if Plaintiffs were successful on the merits, their claims seeking a tax refund for alleged excess tax payments made prior to 2010 must be dismissed.

Pursuant to KRS 134.590(6), "No refund shall be made unless each taxpayer individually applies within two (2) years from the date payment was made." Accordingly, Plaintiff, as well as each class member individually, is required to seek a refund within two years from the date he allegedly made the excessive tax payment. While the statute also provides that "if the amount of taxes due is in litigation, the taxpayer shall individually apply for a refund within two (2) years from the date the amount due is finally determined," this provision does not save any claim for a tax refund Plaintiff may have had prior to January 20, 2012, the date he filed this lawsuit. "If no litigation is filed in two years, the time for administrative application will expire after two years elapse from the date payment was made." *Griggs*, 759 S.W.2d at 596. Thus, subsequent litigation challenging the amount of taxes owed that is filed more than two years after the tax is paid "will not benefit the taxpayer individually by extending the time for applying for a refund." *Id.* Translated into present circumstances, Plaintiff's right to file for a refund under KRS 134.590

prior to this lawsuit expired two years after the taxes were paid because no litigation was filed that would have otherwise tolled the statute of limitations. *Id.*

A taxpayer is required to comply with the two-year statute of limitations in KRS 134.590, even if the results are "harsh." *Department of Revenue v. Curtsinger*, No. 2006-CA-001378 and 2006-CA-001462, 2007 Ky. App. Unpub. LEXIS 699, at *13 (Ky. App. Oct. 26, 2007). "The two-year statute of limitations is necessary to protect the state's fiscal security, shielding the state from having to repay to taxpayers millions of dollars, which had presumably been allocated to various requirements of the state's budget, years after a tax was collected." *Revenue Cabinet v. Gossum*, 887 S.W.2d 329, 335 (Ky. 1994).

D. Plaintiff's conversion claim must be dismissed because the Library has sovereign immunity against tort liability.

Plaintiff's conversion claim against the Library fails to state a claim upon which relief can be granted because the Library has sovereign immunity against tort liability. "[T]he sovereign state cannot be held liable in a court of law for either intentional or unintentional torts committed by its agents." *Calvert Investments, Inc. v. Louisville & Jefferson Co. Metro. Sewer Dist.*, 805 S.W.2d 133, 139 (Ky. 1991). If an entity is a state agency, then it "is entitled to immunity from tort liability to the extent that is performing a governmental, as opposed to a proprietary, function." *Yanero v. Davis*, 65 S.W.3d 510, 519 (Ky. 2001) (holding that the Kentucky High School Athletic Association is the agent of the Kentucky Board of Education, which is an agent of the Commonwealth, and therefore, qualifies for sovereign immunity).

It is well-settled law that counties are state agencies, and that, not only are they cloaked with sovereign immunity, but agencies which derive their genesis from county government likewise enjoy sovereign immunity from tort claims. *See Caneyville Volunteer Fire Dept. v. Green's Motorcycle Savage, Inc.*, 286 S.W.3d 790, 805 (Ky. 2009) (finding that fire departments

are government agents engaging in governmental functions, and thus, "are cloaked in immunity from suit in tort"); *Comair Inc. v. Lexington-Fayette Urban County Airport Corporation*, 295 S.W.3d 91 (Ky. 2009) (holding that a city-county airport board has sovereign immunity). The key to the inquiry is whether the entity is exercising a function that is integral to state government. Thus, in *Comair, supra,* the Kentucky Supreme Court observed that sovereign immunity should "extend . . . to departments, boards or agencies that are such integral parts of state government as to come within regular patterns of administrative organization and structure." 801 S.W.2d at 332 (internal quotation marks omitted). The focus, however, is on state level governmental concerns that are common to all of the citizens of this state, even though those concerns may be addressed by smaller geographic entities (*e.g.*, by counties). Such concerns include, but are not limited to, police, public education, corrections, tax collection, and public highways.

Applying the *Comair* analysis, sovereign immunity clearly extends to protect a library from tort claims, in the same manner as it does for all other similarly-situated state agencies, departments, or boards. Indeed, at least one Kentucky court has expressly acknowledged that operation of a county library "is manifestly a governmental function" and a library board acts in a "governmental capacity." *Alvey v. Birgham*, 150 S.W.2d 935, 940 (Ky. App. 1940). County libraries were created by state statutes solely for the purpose of providing public library services on a state-wide basis to the general public, and are subject to state administrative regulation and control. Therefore, the Library, and its governing board are cloaked with sovereign immunity, and cannot be held liable on Plaintiff's tort claims. Consequently, Plaintiff's conversion claim must be dismissed as a matter of law.

III. CONCLUSION

For the foregoing reasons, the Library's Motion to Dismiss should be granted, and the Plaintiff's Complaint should be dismissed, with prejudice at Plaintiff's cost.

Respectfully submitted,

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Attorneys for Defendant Kenton County Public Library Board of Trustees

CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following: Brandon N. Voelker, THE VOELKER FIRM, 4135 Alexandria Pike , Suite 109, Cold Spring, KY 41076, *Attorney for Plaintiff.*

\s\ *Michael W. Hawkins*

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