UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION at COVINGTON

CASE 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 KENTON COUNTY PUBLIC LIBRARY BOARD OF TRUSTEES' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO ESCROW ALL TAX PAYMENTS

The Defendant, Kenton County Library Board of Trustees, by and through counsel, for its Response in Opposition to Plaintiff's Motion to Escrow all Tax Payments, states as follows:

I. INTRODUCTION

On January 19, 2012, Plaintiff filed a Class Action Complaint against the Kenton County Library Board of Trustees ("the Library") in Kenton Circuit Court. In his Complaint, Plaintiff challenges the ad valorem tax rates imposed by the library since 2007 and seeks refunds on behalf of all property owners in Kenton County. Plaintiff also asserts claims for conversion, unjust enrichment, and unlawful taking under the 5th and 14th Amendments to the United States Constitution. When Plaintiff filed his Complaint, he also filed a Motion seeking an Order requiring the Library to escrow all payments received in excess of $0.60 per thousand dollars of assessed property value. On February 2, 2012 the Library timely removed the Kenton Circuit Court action to this Court in light of the federal constitutional claims asserted in the Complaint.

II. ARGUMENT

Plaintiff's Motion is styled a "Motion for an Order to Requiring (*sic*) the Kenton County Library Board of Trustees to Escrow All tax Payments Received in Excess of $0.60 per Thousand of Assessed Valuation." However, when a party is seeking an order to mandatorily direct the doing of an act, such relief can only be brought through a motion for preliminary injunction under Fed. R. Civ. P. 65. Because Plaintiff has not filed for a temporary injunction, his Motion is improperly pled. And, assuming, *arguendo*, that Plaintiff's Motion can be converted into a Motion for Preliminary Injunction; he still cannot prevail because he has not met the burden to warrant such extraordinary relief.

A preliminary injunction is an extraordinary remedy, which should be granted only if the moving party carries its burden of proving that the circumstances clearly demand it. *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 573 (6th Cir. 2002). The decision on whether to issue the injunction requires balancing four factors: (1) the likelihood that the moving party will succeed on the merits; (2) whether the moving party will suffer irreparable harm if the injunction does not issue; (3) the probability that granting the injunction will cause substantial harm to others; and (4) whether the injunction advances the public interest. *Jones v. Caruso*, 569 F.3d 258, 270 (6th Cir. 2009). A balancing of these four factors favors a denial of Plaintiff's motion.

A. Plaintiff is not likely to succeed on the merits.

With respect to a showing of a strong likelihood of success on the merits, "the proof required for the plaintiff to obtain a preliminary injunction is much more stringent than the proof required to survive a summary judgment motion." *Leary v. Daeschner,* 228 F.3d 729, 739 (6th Cir. 2000). Plaintiff has not made such a showing with his Motion.

The Kenton County Library was created in 1966 via petition pursuant to KRS 173.710 - .800.[1] Included in those provisions is 173.790 which states, in part, that an ad valorem tax levied by a library organized by petition:

> ...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 percent (51%) of the number of duly qualified voters voting at the last general election in each county in the district.

At the time of its creation, the Library's ad valorem tax rate was set at $0.60 per thousand dollars of assessed property valuation.[2] Plaintiff alleges that the Library has improperly increased its ad valorem tax rate because the increases were not accompanied by a petition of fifty-one percent (51%) of qualified voters as required under KRS 173.790. However, KRS 173.790 no longer applies to the Library because the statute was repealed by implication when the General Assembly enacted KRS Chapter 132.

The Kentucky General Assembly enacted House Bill 44 in the 1979 Special Session. *Hallahan v. Sawyer*, 390 S.W.2d 664 (Ky. 1965). The provisions of House Bill 44 were codified in KRS Chapter 132 and state that all ***taxing districts*** shall levy ad valorem property tax rates based upon the compensating tax rate as set forth in KRS 132.010(6). The compensating tax rate, as calculated by the terms of KRS 132.010(6), is designed to produce approximately the same amount of revenue collected in the previous year. Due to the fluctuating assessment of real property, the compensating tax rate will often fluctuate from year to year thus causing ad valorem tax rates to increase or decrease depending upon property assessments.

In Kentucky, libraries are considered taxing districts. See KRS 65.060; *Boggs v. Reep*, 404 S.W.2d 24 (Ky. 1966). Consequently, upon the enactment of House Bill 44 in 1979, all libraries in the Commonwealth of Kentucky (including seventy-seven library districts created via

[1] See attached Exhibit 1.
[2] *Id.*

petition) began setting their ad valorem tax rates pursuant to the provision of KRS Chapter 132. Since the passage of House Bill 44, the Kentucky Department of Libraries and Archives ("KDLA") has interpreted KRS Chapter 132 as the controlling authority with respect to setting ad valorem tax rates for libraries. In addition, KDLA calculates the compensating tax rate for library districts as a service.[3]

Under Kentucky law, a statute may be repealed by implication when the provisions of earlier and later statutes are repugnant to each other and irreconcilable, or when the subsequent statute covers the whole subject matter of the former and is manifestly intended as a substitute for it. *Hallahan v. Sawyer*, 390 S.W.2d 664 (Ky. 1965). KRS Chapter 132 repeals all other inconsistent statutes by implication because it covers the whole subject matter with respect to the levying of ad valorem tax rates for taxing districts. For example, KRS 132.023 states, in part:

> No ***taxing district***, other than the state, counties, school districts, cities, consolidated local governments, and urban-county governments, shall levy a tax rate which exceeds the compensating tax rate defined in KRS 132.010, until the taxing district has complied with the provisions of subsection (2) of this section. (Emphasis added)

In addition, KRS 132.010(6) defines the "compensating tax rate" as:

> ...that rate which, rounded to the next higher one-tenth of one cent ($0.001) per one hundred dollars ($100) of assessed value and applied to the current year's assessment of the property subject to taxation by a ***taxing district***, excluding new property and personal property, produces an amount of revenue approximately equal to that produced in the preceding year from real property. (Emphasis added)

Finally, KRS Chapter 132 also provides detailed and comprehensive procedures for ad valorem taxation for taxing districts including deadlines for setting rates (132.0225), recall petitions (132.017), and reductions of tax rates on personal property (132.018).

[3] *Id.*

In *Fiscal Court Commissioners of Jefferson County v. Jefferson County Judge/Executive*, 614 S.W.2d 954 (Ky. App. 1981), the Kentucky Court of Appeals held that the revisions to KRS 67.710, which said the Judge/Executive could not make appointments without Fiscal Court approval, repealed by implication any statutes that vested sole appointment power with the Judge/Executive. In their ruling, the Court noted that KRS 67.710 was a broad statute and that more specific statutes with respect to certain boards existed giving the Judge/Executive sole appointing authority. *Id.* at 958-959. However, the Court determined that because the revised KRS 67.710 covered the whole subject area with respect to appointments by the Judge/Executive, the inconsistent statutes were repealed by implication even though they were more specific. *Id.*

Regardless of Plaintiff's contention otherwise, there is significant case law and persuasive authority to support the fact that Chapter 132 is the proper legal authority governing taxation for libraries. For example, in *LFUCG v. Hayse*, 684 S.W.2d 301 (Ky. App. 1984), the Court of Appeals held that the provisions of Chapter 132 apply to public libraries despite contrary language in KRS 173.360. And, in *Daviess County Public Library Taxing District v. Boswell*, 185 S.W.3d 651 (Ky. App. 2005), the Court of Appeals held that the Davies County Library District was subject to the provisions of KRS 132.023.

Furthermore, it bears repeated emphasis that KDLA has interpreted KRS Chapter 132 as governing taxation for all library districts in Kentucky since the passage of House Bill 44 in 1979. This interpretation and application to libraries state-wide has gone unchallenged until now. Under Kentucky law, courts must accord great deference to an administrative agency's interpretation of a statute within its specific province. *Com. Ex rel. Beshear v. Kentucky Utilities Co.*, 648 S.W.2d 535, 537 (Ky. App. 1982). Indeed, KDLA is not the only administrative agency

to share this opinion. In 1995, the Casey County Library posed the question of whether KRS 173.790 or Chapter 132 controlled to the Kentucky Attorney General. The Attorney General responded with a letter stating:

> We do not believe that the General Assembly intended library districts to be exempt from the provisions of House Bill 44. The relevant provision in KRS 173.790 has existed since the statue's creation in 1964. House Bill 44 was enacted in 1979. In its original form, KRS 132.023 included the phrase "notwithstanding any statutory provisions to the contrary." These observations compel us to conclude that the legislature was aware of the library tax provision when it enacted House Bill 44 and it did not intend that the older library tax provision override the newly enacted House Bill 44. Indeed, this has been the construction acquiesced in during the sixteen years since House Bill 44 was enacted.[4]

The comprehensive language of Chapter 132, coupled with case law and administrative agency interpretations shows that it was designed to cover the entire subject area with respect to ad valorem taxation by taxing districts. As such, Chapter 132 repealed KRS 173.790 by implication, thereby making it highly unlikely that Plaintiff will ultimately succeed on the merits of this action.

B. Plaintiff has not shown irreparable harm.

Irreparable harm is the single most important prerequisite to consider when ruling on a motion for a preliminary injunction. *See Los Angeles v. Lyons,* 461 U.S. 95, 111, (1983); *see also Lexington-Fayette Urban County Gov't v. Bellsouth Telcoms., Inc.,* 14 F. App'x. 636, 639 (6th Cir. 2001). Plaintiff contends that despite only seeking monetary damages, he will suffer irreparable harm in that "tax money unlawfully collected will be paid out with the possibility it is unable to be returned." (Motion, p. 1). However, in *Sampson v. Murray,* 415 U.S. 61, 90 (1974), the Supreme Court explicitly held that claims for monetary damages do not constitute irreparable harm for the purposes of injunctive relief, stating:

[4] May 8, 1995 Letter from Asst. Attorney General Ross T. Carter to Jan J. Banks attached hereto as Exhibit 2.

> The key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money**,** time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

The Sixth Circuit offers further guidance on measuring irreparable harm when a sum of money is involved. In *Basicomputer Corp. v. Scott,* the Court of Appeals held that "a plaintiff's harm is not irreparable if it is fully compensable by money damages." 973 F.2d 507, 511 (6th Cir. 1992) (citing *Roland Mach. Co. v. Dresser Indus., Inc.,* 749 F.2d 380, 386 (7th Cir. 1984)).

The only claimed harm Plaintiff is seeking to avert a potential monetary loss for alleged overpayment of taxes. Since recovery of that amount, and nothing more, would return Plaintiff to the status quo, a preliminary injunction is unwarranted. *Metro. Life Ins. Co. v. Vanlue*, 2011 U.S. Dist. LEXIS 56699 (W.D. Ky. May 23, 2011). Furthermore, the amount of monetary damages claimed by Plaintiff can be precisely determined. Only when "an injury is not fully compensable by money damages [or] if the nature of the plaintiff's loss would make damages difficult to calculate" should a court classify the harm as irreparable." *Basicomputer*, 973 F.2d at 511. In short, because Plaintiff will not suffer irreparable harm, his Motion should be denied.

C. A preliminary injunction in favor of Plaintiff would harm others and is not in the public interest.

A preliminary injunction is an extraordinary remedy never awarded as of right. *Munaf v. Geren*, 553 U.S. 674 (2008). In each case, "courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531 (U.S. 1987). "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo*, 456 U.S.

305, 312 (1982); see also *Railroad Comm'n of Tex.* v. *Pullman Co.*, 312 U.S. 496, 500 (1941); *Winter v. NRDC,* 555 U.S. 7, 24 (2008).

Plaintiff does not address, much less acknowledge, the adverse impact the requested relief would have on others and the public at large. Plaintiff simply asks the Court to escrow all taxes collected in excess of $0.60 per thousand dollars of assessed property valuation since the Library's creation. (Motion, p. 1). While not providing a total figure, Plaintiff claims that the alleged excess funds for 2011 alone exceeds $5 million. (Complaint, ¶ 1). And, it is certainly within the realm of possibility that the total amount Plaintiff seeks to escrow could exceed $10 million. Under these circumstances, forcing the library to escrow an amount that constitutes most of its yearly budget would in essence shut down most, if not all, library operations. Salaries of staff could not be paid; regular and ordinary purchases of resources would have to be discontinued; public services and programs would have to be eliminated; and, the facilities themselves might have to be shut down if they cannot be maintained in a safe, clean, and operable manner. The public consequences alone call for the denial of Plaintiff's Motion.

Of course, the general function of a preliminary injunction is to maintain the status quo pending determination of an action on its merits. *Blaylock v. Cheker Oil Co.*, 547 F.2d 962, 965 (6th Cir. 1976). Injunctive relief in this case would do the exact opposite. Plaintiff knows full well that forcing the Library to escrow the tax revenues at issue would deal a crippling, and possibly devastating blow to the Library's ability to serve the public. Rather than maintaining the status quo, Plaintiff's motion would severely alter the status quo, causing an immediate and irreparable negative consequence to the thousands of Library patrons who rely upon the Library on a daily basis. The interests of the public must be weighed against any perceived harm that

Plaintiff might endure if the motion to escrow is denied. Here, Plaintiff posits no real, individual harm that he may suffer if the motion to escrow is denied, and indeed, no such harm exists.

In sum, the equities, and in particular, the harm to the public if the Motion is granted, weigh heavily against Plaintiff's motion. If Plaintiff is successful in his lawsuit he has adequate remedy and redress, and the pre-trial issuance of extraordinary relief, especially relief which has far-reaching, substantial negative consequences to the public on what is at best, a dubious claim, is both unnecessary and unwarranted.

D. Assuming, *arguendo*, that the Court grants his Motion, Plaintiff must provide security to cover damages associated with the injunction.

Assuming, *arguendo*, that the Court is inclined to grant his Motion, Plaintiff is required to satisfy Fed. R. Civ. P. 65(c), which states that, "[t]he court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Because he is seeking to freeze millions of dollars and cripple the operations of the Library, Plaintiff should be required to post a bond which will adequately compensate the Library for the damages suffered from this action.

II. CONCLUSION

Based upon the foregoing, Defendant Kenton County Library Board of Trustees, respectfully request that Plaintiff's Motion be denied.

Respectfully submitted,

/s/ *Michael W. Hawkins*

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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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