STATE OF MICHIGAN

COURT OF APPEALS

S G CEMETERY ASSOCIATION, INC,

Petitioner-Appellant,

v

CITY OF STERLING HEIGHTS,

Respondent-Appellee.

UNPUBLISHED
July 31, 2003

No. 239000
Tax Tribunal
LC No. 00-275542

Before: Hoekstra, P.J., and Fitzgerald and White, JJ.

PER CURIAM.

Petitioner appeals as of right a decision of the Tax Tribunal that concluded that only one acre of petitioner's roughly forty-one acres of property could be characterized as a cemetery that was tax exempt under MCL 211.7t and MCL 456.108. We affirm.

In 1971 or 1972, petitioner's predecessor, the Sterling Grove Cemetery Association, owned one acre of land that was a "completely subscribed cemetery." Around this time, petitioner was incorporated under the rural cemetery act, MCL 456.101, *et seq.,* and the Sterling Grove Cemetery Association deeded the property to petitioner. Petitioner continued to purchase the adjoining parcels of land. Ultimately, petitioner amassed over forty-one acres of land, enabling it to register the land as a cemetery in December 1973. From the time petitioner purchased the land through December 21, 1999, the land was subject to tax-exempt status pursuant to MCL 456.108 and MCL 211.7t. Beginning with tax year 2000, respondent refused to grant tax-exempt status to the property. Respondent's board of review denied petitioner's appeal, stating that petitioner "fails to show concrete plans for development of specified property. No development as a cemetery since 1972. 98% of property remains undeveloped."

Petitioner appealed to the Tax Tribunal. Following a hearing, the tribunal determined that petitioner's property had been made up of four different parcels of land: The first parcel of land was roughly two acres, the second parcel of land was roughly 34.5 acres, the third parcel of land was approximately 3.984 acres, and the one acre of land that was the former Sterling Grove Cemetery. The tribunal concluded that the only part of the property that met the definition of a cemetery was the one-acre parcel that was once the Sterling Grove Cemetery. Thus, the tribunal concluded that the other parts of the land did not qualify as cemeteries and were not exempt from taxation under either MCL 211.7t or MCL 456.108. The tribunal also ordered that separate tax identification numbers be assigned.

Petitioner first asserts that the tribunal erred as a matter of law in concluding that petitioner's land is not exempt from taxation under MCL 456.108 and MCL 211.7t.

This Court's authority to review a decision of the Tax Tribunal is very limited. In the absence of an allegation of fraud, this Court's review of a Tax Tribunal decision is limited to determining whether the tribunal committed an error of law or adopted a wrong legal principle. The tribunal's factual findings will not be disturbed as long as they are supported by competent, material, and substantial evidence on the whole record. *Michigan Milk Producers Ass'n v Dep't of Treasury*, 242 Mich App 486, 490-491; 618 NW2d 917 (2000).

MCL 456.108, which is part of the rural cemeteries act, MCL 456.101 *et seq*., provides that:

> All the lands of said corporation enclosed and set apart for cemetery purposes, and all rights of burial therein, shall be wholly exempt from taxation of any kind whatsoever."

MCL 211.7t, which is part of the general property tax act, MCL 211.1 *et seq*., states, in part, that:

> Land used exclusively as burial grounds, the rights of burial, and the tombs and monuments in the land, while reserved and in use for that purpose is [sic] exempt from taxation under this act.

The plain language of MCL 456.108 requires that land be both "enclosed" and "set apart for cemetery purposes" in order to be tax exempt. With regard to the "enclosed" requirement, the Tax Tribunal determined:

> Toussaint testified that originally there was a fence surrounding the entire parcel but a contractor had tore down the fence along 19 Mile Road sometime between 1977 and 1979, that another contractor had knocked down a fence along the west boundary of the property when an adjacent subdivision was being developed, and the school on the south side of the property had removed a portion of the fence some years ago. [Petitioner] never replaced any of the fencing that had been removed, although Toussaint testified that the boundaries were readily distinguishable from the adjoining properties.

The parties dispute the meaning of "enclosed" and the term is not defined in the statute. In *In re Petition of Auditor General*, 294 Mich 221, 224; 292 NW 709 (1940), our Supreme Court approved of a lower court interpretation that "the word 'inclosed' of the statute 'means no more than lands set apart or set off or sufficiently identified by definite boundaries, subject of ascertainment.'" *Id.* The Court continued,

> In *White Chapel Memorial Park Ass'n* v *Willson*, [260 Mich 238, 242-243; 244 NW 460 (1934)] we stated that the word "inclose" as used in the act of 1869 had a meaning "doubtless more extended than at the present time when the rights of ownership and the use of property are less dependent upon the use of fences to inclose it, if a claim of ownership or use is otherwise clearly indicated." In the case before us, although the original barriers have fallen into disrepair, the land is

> sufficiently identified and is still within the purpose for which it was dedicated. [*Id.* at 226.]

Therefore, the question is whether the land is "sufficiently identified" and "within the purpose for which it was dedicated."

The tribunal did not make any specific findings of fact with regard to whether the property is sufficiently identified. However, the tribunal observed:

> Other than the one-acre parcel owned by Petitioner, the balance of the acreage comprising Petitioner's tax parcel is not enclosed and set apart from cemetery purposes. The only portion of the acreage that is in any way identified as a cemetery is the fenced-in portion on the one-acre parcel that has a small sign stating "Sterling Grove Cemetery." [Emphasis in original.]

Thus, aside from the small sign within the fenced-in portion of the one-acre parcel, there is nothing that identified the forty-acre parcel as a cemetery. The remaining property was not "*set apart* for the purpose of cemetery business."

The next inquiry is whether the property "is still within the purpose for which it was dedicated." *In re Petition of Auditor General, supra*. This requirement is essentially the same as the statutory requirement that the land be set apart for cemetery purposes under MCL 456.108, and the requirement that the land be used for burial purposes under MCL 211.7t. Here, the tribunal determined that the forty-acre parcel was not being used for the purpose of cemetery business at all. The tribunal found:

> The only burials that have occurred since 1974 have been in the old Sterling Grove Cemetery (1 acre parcel) and Toussaint indicated that since 1974 a total of about 60 bodies have been buried on the one-acre parcel. No lots have been sold since the old Sterling Grove Cemetery had been totally subscribed at the time it was acquired by the Association. Since the Association had no lots to sell, the Association had never advertised . . ..

While the one-acre parcel was being used for cemetery business, there is nothing to suggest that the remaining portion of property was being used as a cemetery or was intended for future burials. Because the forty-acre parcel does not fall within the parameters of MCL 211.7t and MCL 456.108, we cannot conclude that the tribunal committed an error or law or adopted a wrong legal principle. Further, the tribunal's factual findings are supported by competent, material, and substantial evidence on the whole record.

Petitioner next asserts that the tribunal erred[1] by denying its motion for summary disposition. Petitioner asserts that respondent failed to present any evidence to rebut petitioner's

[1] We point out that the tribunal stated the wrong standard of review applicable to the test for summary disposition under MCR 2.116(C)(10). The tribunal stated:

(continued…)

allegation that no genuine issue of material fact existed, and thus summary disposition was appropriate in petitioner's favor. Petitioner's argument has no merit.

Respondent presented evidence, in the form of Kermith Billette's affidavit, that Toussaint, petitioner's agent, expressed that petitioner had no intent to develop the property as a cemetery, but instead would hold on to the property until it could be sold. According to Billette's affidavit, Toussaint indicated that as long as petitioner maintained the preexisting cemetery, it could characterize the remaining portion as a cemetery and recognize the tax benefit. Respondent asserted that the structure of the land contract transaction between Toussaint and petitioner suggested that the property had not been "sold," which suggested that it was a "sham" transaction intended only to avoid taxes on the property. The brunt of respondent's argument was that the land remains undeveloped to this day, which respondent illustrated through the deposition of Donald Mende, Matthew Schmidt, and Toussaint. Respondent relied heavily on Toussaint's testimony that the land remains devoid of burial sites. All of this evidence created a genuine issue of material fact as to whether the property was intended to be a cemetery. Petitioner's argument that respondent failed to present sufficient evidence is without merit.

Petitioner next contends that the tribunal's factual findings were not supported by substantial evidence. However, petitioner's argument is, essentially, that the tribunal should

---

(…continued)

> Under MCR 2.116(C)(10), a motion for summary disposition will be granted if the documentary evidence demonstrates that that [sic] there is not genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. *Smith v Globe Life Insurance*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). In the event, however, it is determined an asserted claim can be supported by evidence at trial, a motion brought under subsection (C)(10) will be denied, *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 436 (1991). Such a motion tests "whether there is a factual support for a claim," *Libralter Plastics, Inc. v Chubb Group of Insurance Companies*, 199 Mich App 482, 485; 502 NW2d 742 (1993). In ruling upon a motion so brought, the benefit of reasonable doubt and of all reasonable inferences must be in favor of the nonmoving party; and it must be determined whether a record, <u>which could be developed</u>, would leave open any issue upon which reasonable minds would differ. *Libralter Plastics, supra.* [Emphasis added.]

However, pursuant to *Smith, supra* at 455-456, n 2, the test is not whether "a record 'might be developed'" or "when the court is satisfied that 'it is impossible for the nonmoving party to support his claim at trial because of a deficiency that cannot be overcome'" but rather whether "evidentiary proofs [are presented] creating a genuine issue of material fact for trial." To the extent that prior decisions of this Court allowed "plaintiffs to *promise to offer* factual support for their claims at trial" those decisions were overruled. *Smith, supra* (emphasis in original). The tribunal's recitation of a standard which allowed for the nonmoving party to develop a genuine issue of material fact was improper. However, this misstatement as to the applicable standard of review does not affect our ruling.

have believed Toussaint's testimony, disbelieved the testimony of the other witnesses, and concluded that petitioner's argument was correct. Petitioner's argument has no merit. "Due regard shall be given to the trial court's superior opportunity and ability to judge the trial court's superior opportunity and ability to judge the credibility of witnesses." *Sparling Plastic Ind Inc v Sparling*, 229 Mich App 704, 716; 583 NW2d 232 (1998), citing *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 99; 535 NW2d 529 (1995). We conclude that the trial court's factual findings were supported by substantial evidence. *Michigan Milk Producers Ass'n, supra.*

Finally, petitioner contends that that Tax Tribunal lacked the equitable powers to "divide" petitioner's property. As set forth in its opinion, the tribunal directed respondent's tax assessor to assign a separate tax identification number to the one acre parcel so that it would remain tax exempt. By assigning a separate tax identification number, the tribunal was able to effectuate its judgment, which retained the tax exempt status on the one acre portion, allowing the forty acre parcel to be taxed.

In *Johnston v Livonia*, 177 Mich App 200, 205; 441 NW2d 41 (1989), this Court stated, "[A]lthough the Tax Tribunal lacks equitable powers, it has broad statutory powers and is authorized to grant such relief or issue such "writs, orders, or directives which it deems necessary or appropriate in the process of disposition of a matter of which it may acquire jurisdiction." MCL 205.732(c)."

We conclude that the tribunal's actions amounted to issuing a "directive[] which it deems necessary or appropriate in the process of disposition of a matter of which it may acquire jurisdiction." The tribunal did not actually "split" any property, but rather ordered respondent to assign different tax identification numbers to petitioner's parcel on the basis of each portion's characteristics. Petitioner fails to show how this order is outside the scope of the Tax Tribunal's powers.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald