

2013 IL App (2d) 120641-U
Nos. 2-12-0641 & 2-12-0993 cons.
Order filed May 15, 2013

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

SAHIB INTERNATIONAL, INC.,)	Appeal from the Circuit Court
)	of Stephenson County.
Plaintiff-Appellant,)	
)	
v.)	No. 11-MR-24
)	
FREEPORT SCHOOL DISTRICT No. 145,)	
THE FREEPORT PARK DISTRICT, and)	
ADRIENNE BECKER, County Treasurer and)	
<i>ex officio</i> County Collector of Stephenson)	
County, Illinois,)	Honorable
)	Michael T. Mallon,
Defendants-Appellees.)	Judge, Presiding

JUSTICE BIRKETT delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

ORDER

¶ 1 *Held:* (1) We dismissed one of plaintiff's appeals: before the notice of appeal took effect, the trial court converted the judgment from a (final) dismissal with prejudice to a (nonfinal) dismissal without prejudice, such that the notice of appeal did not confer jurisdiction; (2) the trial court properly dismissed plaintiff's complaint for a declaratory judgment that it was entitled to a refund of property taxes, as such relief was not available where, despite plaintiff's argument to the contrary, plaintiff's objections did not challenge defendants' legal authority to levy the taxes.

¶ 2 These consolidated appeals arise from orders dismissing plaintiff Sahib International, Inc.’s original (case No. 2-12-0641) and amended (case No. 2-12-0993) complaints for a declaratory judgment that it is entitled to a refund of certain property taxes levied by Freeport School District No. 145 (School District) and the Freeport Park District (Park District). We dismiss the appeal in case No. 2-12-0641 and affirm the dismissal of plaintiff’s amended complaint in case No. 2-12-0933.

¶ 3 On June 7, 2011, plaintiff filed a 13-count complaint for declaratory relief in the circuit court of Stephenson County against the School District, the Park District, and the treasurer of Stephenson County. Plaintiff sought declaratory judgments that: (1) the School District (from 2004 through 2010) and the Park District (from 2004 through 2008) made unauthorized property tax levies under section 9-107 of the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/9-107 (West 2010)) that resulted in an excessive accumulation of funds; (2) that in 2004 and 2005 the School District made unauthorized property tax levies under section 9-107 to fund its “Equity Plan” (which is a program to close the gap in educational achievement between minority and nonminority students); and (3) plaintiff was entitled to a refund of taxes paid pursuant to the unauthorized levies. The School District and the Park District moved to dismiss the complaint pursuant to section 2-619(a)(5) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(5) (West 2010)), which provides for dismissal on the basis “[t]hat the action was not commenced within the time limited by law.” The School District and the Park District contended that plaintiff’s exclusive remedy was to seek relief under article 23 of the Property Tax Code (35 ILCS 200/art. 23 (West 2010)) and that the time for commencing an article 23 proceeding had lapsed. On May 11, 2012, the trial court granted the motion and dismissed plaintiff’s complaint with prejudice.

¶ 4 On June 8, 2012, plaintiff filed a motion to reconsider the dismissal. That same day, plaintiff filed a notice of appeal. We docketed the appeal as case No. 2-12-0641. Thereafter, while the motion to reconsider was pending, plaintiff moved to amend its complaint. On August 23, 2012, the trial court granted the motion to amend and ordered the amendment filed *instanter*. The order granting the motion to amend further provided that “[t]he Plaintiff’s Motion to Reconsider is withdrawn” and that “[t]he Motion to Dismiss previously filed shall now be applied to the Amended Complaint and the Amended Complaint is dismissed with prejudice.” Plaintiff filed a notice of appeal on September 12, 2012. We docketed the appeal as case No. 2-12-0993 and consolidated it with the appeal in case No. 2-12-0641.

¶ 5 Initially, we consider our jurisdiction in case No. 2-12-0641. Although neither party has raised any issue concerning appellate jurisdiction, we have an independent duty to examine our jurisdiction and to dismiss an appeal if jurisdiction is wanting. *Ferguson v. Riverside Medical Center*, 111 Ill. 2d 436, 440 (1985). Our jurisdiction is limited to appeals from final judgments unless an appeal is within the scope of one of the exceptions established by our supreme court permitting appeals from interlocutory orders in certain circumstances. *Puleo v. McGladrey & Pullen*, 315 Ill. App. 3d 1041, 1043 (2000). A judgment is final if it terminates the litigation between the parties on the merits or disposes of the parties’ rights with regard to either the entire controversy or a separate part of it. *R.W. Dunteman Co. v. C/G Enterprises, Inc.*, 181 Ill. 2d 153, 159 (1998). The trial court entered a final judgment when it dismissed plaintiff’s original complaint with prejudice on May 14, 2012. However, during the pendency of plaintiff’s motion to reconsider the May 11, 2012, order, the trial court permitted plaintiff to amend its complaint. Doing so effectively converted the May 11 order from a dismissal with prejudice to a dismissal *without* prejudice. Such an order

is not a final judgment. See *Richardson v. Economy Fire & Casualty Co.*, 109 Ill. 2d 41, 46 (1985). Pursuant to Illinois Supreme Court Rule 303(a)(2) (eff. June 4, 2008), plaintiff's June 8, 2012, notice of appeal took effect upon the disposition of its motion to reconsider. However, because at that point the order dismissing the original complaint was no longer final, the notice of appeal did not confer jurisdiction. We therefore dismiss the appeal in case No. 2-12-0641 and turn our attention to the merits of the appeal in case No. 2-12-0993.

¶ 6 Article 23 of the Property Tax Code establishes a procedure by which a taxpayer may object to his or her property taxes after paying the taxes under protest within 60 days from the first penalty date of the final installment of taxes for the year in question. 35 ILCS 200/23-5 (West 2010). In counties with fewer than 3 million inhabitants, a taxpayer who pays his or her property taxes under protest may file a tax objection complaint "within 75 days after the first penalty date of the final installment of taxes for the year in question." 35 ILCS 200/23-10 (West 2010). Plaintiff does not argue that its complaint can be considered a timely tax objection complaint pursuant to these provisions. Instead, plaintiff contends that, given the nature of its objections, the remedy under article 23 is not exclusive and the limitations period applicable to proceedings under article 23 does not bar the complaint for declaratory relief.

¶ 7 In *Board of Education of Park Forest-Chicago Heights School District No. 163 v. Houlihan*, 382 Ill. App. 3d 604, 610 (2008), it was noted that declaratory relief is ordinarily unavailable "in any tax case that would not require relief in equity by injunction." The *Houlihan* court explained that "[t]he law is well established that 'equity will not assume jurisdiction unless special grounds for equitable jurisdiction are established and unless the plaintiff does not have an adequate remedy at law subject to two exceptions; namely, where a tax is unauthorized by law or is levied upon exempt

property.’ ” *Id.* (quoting *Lopin v. Cullerton*, 26 Ill. App. 3d 748, 752 (1975)). Plaintiff argues that its complaint challenges defendants’ legal authority to levy the taxes at issue.

¶ 8 Our supreme court has held that “[a] tax is *** ‘unauthorized’ when the taxing body has no statutory power to tax.” *Millenium Park Joint Venture LLC v. Houlihan*, 241 Ill. 2d 281, 295 (2010). As noted, plaintiff alleged that the School District and the Park District levied taxes under section 9-107 of the Tort Immunity Act that resulted in an excessive accumulation of funds and that the School District levied taxes under that provision for an unauthorized purpose—to fund its equity plan. We first consider the allegation pertaining to the funding for the equity plan.

¶ 9 Section 9-107(b) of the Tort Immunity Act provides, in pertinent part, as follows:

“(b) A local public entity may annually levy or have levied on its behalf taxes upon all taxable property within its territory at a rate that will produce a sum that will be sufficient to: *** pay the cost of insurance, individual or joint self-insurance (including reserves thereon), including all operating and administrative costs and expenses directly associated therewith, claims services and risk management directly attributable to loss prevention and loss reduction, legal services directly attributable to the insurance, self-insurance, or joint self-insurance program, and educational, inspectional, and supervisory services directly relating to loss prevention and loss reduction[;] *** *pay judgments and settlements* under Section 9-104 of this Act; *** and *** pay the cost of risk management programs.” (Emphasis added.) 745 ILCS 10/9-107(b) (West 2010).

In *In re Objections to Tax Levies of Freeport School District No. 145*, 372 Ill. App. 3d 562 (2007), we specifically addressed the following question certified by the trial court for an interlocutory appeal pursuant to Illinois Supreme Court Rule 308 (eff. Dec. 17, 1993): “Whether the use of the tort

immunity levy by Freeport School District to partially fund its equity program is authorized by the Tort Immunity Act.” *Freeport School District*, 372 Ill. App. 3d at 564. The School District argued that funding the equity plan qualified as payment of a settlement with Freeport African-American Ministers United for Change of threatened litigation. We disagreed. We relied on *In re Consolidated Objections to Tax Levies of School District No. 205*, 193 Ill. 2d 490, 49798 (2000), in which our supreme court held that revenue collected under section 9-107(b) may be used to pay tort judgments or settlements *for compensatory damages*, but may not be used to pay the costs of complying with an injunction. In *Freeport School District*, we concluded that the costs of implementing the equity plan did not qualify as a settlement for compensatory damages, even though the equity plan forestalled litigation that might have left the School District liable for compensatory damages.

¶ 10 Here, plaintiff equates the School District’s lack of authority to *spend* section 9-107(b) revenues to fund the equity plan with a lack of authority to *levy* the tax for that purpose. However, absent fraud, it is no defense in a tax collection proceeding that the tax in question was levied for an improper purpose. In *People ex rel. Smith v. Hassler*, 262 Ill. 133 (1914), an appeal was taken from a judgment for delinquent taxes. The defendant taxpayer objected to a school district’s levy of \$3,200 for building purposes. There was evidence that the district had intended to spend about \$1,000 for the purpose of “fitting up” a schoolroom. The evidence also established that several hundred dollars levied for building purposes had been used to pay bills for educational purposes. In affirming the judgment against the defendant, the *Hassler* court reasoned as follows:

“An assessment is not fraudulent merely because of its being excessive, if the assessor has acted from proper motives. [Citation.] The tax-payer is entitled to the honest

judgment of the person or persons authorized by law to levy the tax. If such tax is founded upon an assessment which from corrupt and malicious motives is made excessive or is rendered unfair by fraudulent practices, or if the property is arbitrarily assessed fraudulently at too high a valuation, it may be held fraudulent. Proof of fraud must be clear and convincing to warrant interference by the courts in matters of taxation. [Citation.] If the proof in this record showed, without contradiction, that a certain specific amount of this levy for building purposes had been made by the directors for educational purposes, then the objection, to that extent, should have been sustained by the trial court. [Citations.] But, as has been stated, the evidence is not in harmony on this point. Whether or not there is fraud on account of an excessive levy will depend largely upon the circumstances of each particular case. [Citations.] *** Our statute has committed to the just and reasonable discretion of the board of directors the question as to what is the proper amount of tax to be raised for the current expenses. The courts will not interfere except to prevent a clear abuse of such discretionary power. In *Cleveland, Cincinnati, Chicago and St. Louis Railway Co. v. People*, 208 Ill. 9 [(1904)], where the school authorities levied \$1800 for school purposes when it was shown that they needed only \$1100, and it was contended that the additional amount was intended to be used for other purposes and therefore was illegally and fraudulently levied, the court refused to sustain the contention, holding that even though \$1100 was all that was needed for that purpose it did not deem the entire levy so excessive as to be fraudulent, stating that so long as such boards kept within the limit of the statute [citation], ‘and no fraud in the tax levy is shown, the discretion vested in the board of directors cannot be controlled by the courts.’ ***

The board of directors was not authorized, under the law, to use a portion of the money levied and collected for building purposes to pay obligations incurred for educational purposes. The two funds should be kept separate,—not only by the township treasurer on his books, but in the payment of the bills of the district. This court, however, has frequently stated that it will not decline to enforce the collection of a tax legally levied by reason of the fact that it may be proposed to divert the tax, when collected, to a purpose other than that for which it was levied; that after the tax has been collected, equity will readily interfere, at the suit of the tax-payer, to prevent a misappropriation of the fund. [Citations.] The evidence in this record as to fraudulent intent of the directors in levying the tax for building purposes is not of such a character as to justify interference by the courts.” *Id.* at 135-37.

¶ 11 In contrast, in *People ex rel. Price v. Illinois Central Ry. Co.*, 266 Ill. 636 (1915), our supreme court recognized the rule announced in *Hassler*, but found that the evidence of bad faith or fraud on the part of the taxing authority was sufficient to warrant reversal of a judgment for delinquent taxes.

¶ 12 Moreover, we are aware of at least one decision—*Bass v. South Cook County Mosquito Abatement Dist.*, 236 Ill. App. 3d 466 (1992)—that, for practical purposes, differentiated a *fraudulent* levy from an *unauthorized* levy. The complaint in *Bass* “alleged that defendants overtaxed property owners by appropriating approximately \$1.5 million more than was needed for the operation of the [South Cook County Mosquito Abatement] District, and thereby created an illegal surplus from which funds were used by the trustees for unauthorized and unnecessary items benefitting the trustees and managers of the District.” *Id.* at 467. Acknowledging precedent holding that a “fraudulently excessive assessment” may warrant equitable relief (*id.* at 469 (citing *Clarendon*

Associates v. Korzen, 56 Ill. 2d 101 (1973)), the *Bass* court nonetheless concluded that relief on such grounds is available only when there is no adequate remedy at law. The court held that the statutory tax objection process provided an adequate legal remedy. *Bass*, 236 Ill. App. 3d at 471. Because there was no dispute that the defendants had the legal authority to levy taxes, the *Bass* court affirmed the dismissal of the plaintiff's complaint for equitable relief.

¶ 13 In view of these principles, we conclude that neither injunctive nor declaratory relief is available. Although it was improper to use revenues raised under section 9-107(b) of the Tort Immunity Act to fund the equity plan, there is no basis to conclude that the School District was guilty of fraud or bad faith. In addition, to the extent that *Bass* was correctly decided, injunctive and declaratory relief would be unavailable because plaintiff had an adequate legal remedy under article 23 of the Property Tax Code.

¶ 14 We next consider whether the tax levies under section 9-107(b) that allegedly resulted in an excessive accumulation of funds were unauthorized. In *Central Illinois Public Service Co. v. Miller*, 42 Ill. 2d 542, 543 (1969), our supreme court noted that “[i]t has long been the fixed policy in this State not to permit the unnecessary accumulation of monies in the public treasury.” And although the taxing authorities have reasonable discretion in fixing the amount necessary to be raised, the courts will interfere to prevent a clear abuse of their discretionary powers. In *Allegis Realty Investors v. Novak*, 379 Ill. App. 3d 636 (2008), we explained the process for determining whether such an abuse of discretion occurred:

“Our supreme court set forth the proper method for analyzing excess accumulations of money in *Central Illinois Public Service Co. v. Miller*, 42 Ill. 2d 542 (1969). In *Miller*, the court determined the total funds available for the fiscal year by adding the fund balance

at the beginning of the fiscal year to the taxes extended for the prior year. This total was then divided by the average annual expenditure from the fund for the previous three fiscal years. In *Miller*, the total funds available were 2.84 times the annual average expenditure for the past three fiscal years and 3.24 times the amount expended in the last previous fiscal year. The court then concluded that any further tax levy would result in an illegal excess accumulation. However, the *Miller* test is not one to be applied with mathematical precision [citation], and the term ‘accumulation’ has been equated with an amount that exceeds two to three times the foreseeable expenditures of the taxing body. [Citation.] Once such an accumulation is shown, the taxing body is to be given an opportunity to present evidence showing the need for an accumulation of such magnitude.” *Id.* at 638.

¶ 15 According to plaintiff’s complaint, for the tax years at issue, the ratio of the taxes levied by the School District under section 9-107(b) to the average “authorized” expenditures in the prior three fiscal years ranged from a low of 2.5-to-1 to a high of 7.8-to-1. For the Park District, the ratio ranged from a low of 1.96-to-1 to a high of 2.24-to-1. However, even the highest ratios merely signify, at most, *prima facie* evidence that the School District and the Park District *abused their discretion* in the exercise of their authority to levy taxes, not that they *lacked* the authority to levy the taxes in question. Accord *People ex rel. Weber v. Commonwealth Edison Co.*, 287 Ill. App. 3d 784, 786-87 (1997) (initially examining school district’s authority to levy taxes and, after concluding that levy was authorized, considering whether levy was an abuse of discretion).

¶ 16 For the foregoing reasons we dismiss the appeal in case No. 2-12-0641 and, in case No. 2-12-0993, we affirm the judgment of the circuit court of Stephenson County.

¶ 17 No. 2-12-0641, Appeal dismissed.

¶ 18 No. 2-12-0993, Affirmed.