

**STATE OF MICHIGAN**  
**COURT OF CLAIMS**

**DY, INC. v MICHIGAN DEPARTMENT OF TREASURY**

Case No.      **17-000275-MT**

**Hon. Michael J. Talbot**

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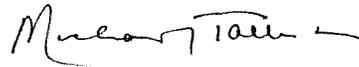
**ORDER**

At a session of said Court held,  
Detroit, Wayne, Michigan, on  
January 16, 2018.

Defendant having moved for summary disposition pursuant to MCR 2.116(C)(4), (8), and (10);

IT IS HEREBY ORDERED that defendant's motion is GRANTED pursuant to MCR 2.116(C)(8).

This order resolves the last pending claim and closes the case.



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Michael J. Talbot, Judge



A true copy entered and certified by Jerome W. Zimmer Jr., Clerk, on

**JAN 16 2018**

Date

  
Clerk

**STATE OF MICHIGAN**  
**COURT OF CLAIMS**

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DY, INC., d/b/a BENITOS OF COMMERCE,

Plaintiff,

v

Case No. 17-000275-MT

MICHIGAN DEPARTMENT OF TREASURY,

Hon. Michael J. Talbot

Defendant.

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**OPINION**

Pending before the Court is defendant's motion for summary disposition pursuant to MCR 2.116(C)(4), (8), and (10). Because plaintiff has failed to state a claim upon which relief can be granted, the motion is GRANTED pursuant to MCR 2.116(C)(8).<sup>1</sup>

This action involves plaintiff's tax liability to the state. According to the allegations in plaintiff's complaint, plaintiff paid "portions" of its tax liability in the 2013, 2014, and 2015 tax years. On or about October 5, 2015, plaintiff submitted an offer of compromise to defendant, in accordance, plaintiff alleges, with MCL 205.23a. The statute permits a taxpayer, in certain circumstances, to submit an offer of compromise of an outstanding liability. Plaintiff's offer of compromise included a certified check in the amount of \$2,500. On the back side of the check,

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<sup>1</sup> Plaintiff contends that summary disposition is inappropriate because defendant failed to support its motion with affidavits or other documentary evidence. However, a motion for summary disposition under MCR 2.116(C)(8) need not, and in fact cannot, be supported by documentary evidence. *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 305; 788 NW2d 679 (2010).

plaintiff wrote, in what it describes as a “restrictive endorsement,” that the check was “IN FULL AND COMPLETE SATISFACTION OF ANY AND ALL CLAIMS FOR ANY TAX LIABILITY OF DY, INC, ITS OFFICERS, DIRECTORS AND AGENTS WITH THE STATE OF MICHIGAN.” Plaintiff submitted a letter from counsel containing a similar sentiment as was made in the restrictive endorsement.

Shortly after receiving the offer, defendant deposited the check. According to the allegations in plaintiff’s complaint, defendant issued a rejection of the offer of compromise on or about April 5, 2017. On April 19, 2017, plaintiff purportedly informed defendant that plaintiff believed its tax liability was fully satisfied, because defendant accepted the \$2,500 check with the “restrictive endorsement.” On May 17, 2017, defendant informed plaintiff that it had an outstanding tax liability in the amount of \$29,989.84.

Plaintiff filed a one-count complaint in this Court on October 12, 2017, alleging that defendant violated Michigan’s Uniform Commercial Code (UCC).<sup>2</sup> According to the complaint, plaintiff attempted to avail itself of MCL 205.23a’s compromise provisions by submitting an offer of \$2,500 to settle its tax liability. According to plaintiff, its “restrictive endorsement” and letter from counsel made clear that the check could only be accepted in full and complete satisfaction of plaintiff’s tax debt. And because defendant deposited the check in the face of the express restrictions placed thereon, defendant completed an accord and satisfaction as provided by the UCC.<sup>3</sup> According to plaintiff, its tax liability has been satisfied.

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<sup>2</sup> MCL 440.1101 *et seq.*

<sup>3</sup> See MCL 440.3311.

Despite plaintiff's attempts to invoke the UCC, the outcome of his case is controlled by the plain language of MCL 205.23a, the "offer-in-compromise" statute. With limited exception, defendant "shall not compromise or reduce in any manner the taxes due to or claimed by this state or unpaid accounts or amounts due to any department, institution, or agency of state government."<sup>4</sup> At issue in this case is the exception found in MCL 205.23a. As provided in that statute, the state treasurer or authorized representative "may compromise all or any part of any payment of a tax subject to administration under this act including any related penalties and interest . . . ."<sup>5</sup> Any offer of compromise under the act is subject to a number of conditions, including that the taxpayer "who submits an offer to compromise a tax, penalty, or interest shall remit with its offer \$100.00 or 20% of the offer, whichever is greater, to the department."<sup>6</sup> And, of particular significance to this case, the statute expressly provides that "[t]he amount remitted with the offer *shall be applied to the outstanding balance of that taxpayer's liability and shall not be refunded if the offer to compromise is rejected or reduced.*"<sup>7</sup> Stated differently, the statute plainly provides that if the offer of compromise is rejected, the taxpayer is not entitled to a return of the amount tendered in connection with the offer. Furthermore, unless a taxpayer avails himself or herself of administrative review provided for by the statute,<sup>8</sup> "a rejection of an offer to

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<sup>4</sup> MCL 205.28(1)(e). The other methods of compromise listed in MCL 205.28(1)(e)—settlement offer after a timely request for an informal conference in cases involving failure or refusal to file a return or pay tax, see MCL 205.21(2)(e), and voluntary disclosure agreements, see MCL 205.30c—are not applicable to this case and neither party has mentioned the same.

<sup>5</sup> MCL 205.23a(1).

<sup>6</sup> MCL 205.23a(8).

<sup>7</sup> MCL 205.23a(8) (emphasis added).

<sup>8</sup> There are no indications that plaintiff sought such review in this case.

compromise, in whole or in part, *is final and is not subject to further challenge or appeal under this act.*”<sup>9</sup>

The plain language of MCL 205.23a compels an order of summary disposition in favor of defendant. As an initial matter, the manner of review sought by plaintiff in this case is not even permitted under MCL 205.23a(9), because, despite plaintiff’s contentions, it is challenging the rejection of its offer of compromise; this type of action is expressly precluded by MCL 205.23a(9). Moreover, plaintiff is unable to show entitlement to relief on the merits. MCL 205.23a(8) required plaintiff to submit with its offer of compromise at least some portion of the offer. In this case, plaintiff appears to have submitted the entire offer, rather than the \$100 or 20% described in the statute. The statute is clear that “[t]he amount remitted with” an offer of compromise “shall be applied to the outstanding balance” and, if defendant rejects the offer, the amount remitted “*shall not be refunded . . .*”<sup>10</sup> The term “shall” denotes mandatory, rather than discretionary, action.<sup>11</sup> Accordingly, once plaintiff submitted the \$2,500 check to defendant in an attempt to compromise its liability under MCL 205.23a, defendant was required to apply it to plaintiff’s outstanding liability and, upon rejection of the same, defendant was not permitted to refund the amount submitted. That plaintiff remitted more than 20% of the offer does not change the mandatory language in MCL 205.23a(8). By remitting \$2,500 to defendant with its offer to compromise, plaintiff allowed defendant, under the statute, to retain the same. Thus, under the

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<sup>9</sup> MCL 205.23a(9) (emphasis added).

<sup>10</sup> MCL 205.23a(8) (emphasis added).

<sup>11</sup> *Yachcik v Yachcik*, 319 Mich App 24, 36-37; 900 NW2d 113 (2017).

plain language of the statute, plaintiff has failed to state a claim on which relief can be granted, and defendant is entitled to summary disposition under MCR 2.116(C)(8).

In urging this Court to reach a different conclusion, plaintiff does not address MCL 205.23a(8) or the mandate that defendant is required to retain the amount remitted with an offer of compromise. Instead, plaintiff cites its purported “restrictive endorsement,” which stated that the check was tendered only as full satisfaction of its liability. According to plaintiff, the restrictive endorsement, combined with defendant’s acceptance of the check, amounted to an accord and satisfaction under MCL 440.3311(1) of the UCC.

These arguments do not change the result. With the “restrictive endorsement,” plaintiff attempted, in essence, to add additional terms to its offer to compromise. However, plaintiff’s attempt to add these terms was ineffective. Plaintiff could no sooner ignore the dictates of MCL 205.23a(8) than it could create a contract that was expressly contrary to the dictates of MCL 205.23a(8).<sup>12</sup> Nor could plaintiff create a new method of compromise apart from that which was available to it under the plain language of the statute.

Plaintiff’s attempt to invoke the UCC is ineffective as well. Whether the UCC applies to a particular case is a question of law for the court to decide.<sup>13</sup> Plaintiff is correct that, in general, Article III of the UCC—which contains the provision on accord and satisfaction—applies to

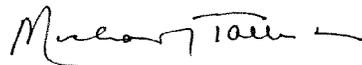
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<sup>12</sup> See *Epps v 4 Quarters Restoration LLC*, 498 Mich 518, 538 n 15; 872 NW2d 412 (2015) (“Courts have long stated that illegal contracts are void.”); *1031 Lapeer LLC v Rice*, 290 Mich App 225, 231; 810 NW2d 293 (2010) (holding that a contract “founded on an act prohibited by statute . . . was . . . void.”).

<sup>13</sup> *Bev Smith, Inc v Atwell*, 301 Mich App 670, 681; 836 NW2d 872 (2013).

negotiable instruments, such as checks.<sup>14</sup> However, the UCC generally applies to commercial transactions and contractual agreements.<sup>15</sup> Tax liability does not fall into the categories to which the UCC applies. Indeed, a “tax is an extraction[ ] or involuntary contribution [ ] of money the collection of which is sanctioned by law and enforceable by the courts.”<sup>16</sup> Taxes, in general, are “pecuniary burden[s] laid upon individuals or property for the purpose of supporting the government.”<sup>17</sup> Given the nature of taxation and the UCC, the principles established in the UCC are simply inapplicable to tax liability. Moreover, even if the UCC could apply, in theory, to tax liability, the accord and satisfaction procedures plaintiff cites would be of no moment in this case. The accord and satisfaction principle espoused in MCL 440.3311 conflicts with the plain language of MCL 205.28(1)(e) and MCL 205.23a, which, in general, prohibit compromise or settlement of tax liability, absent compliance with the narrowly drawn statutory provisions. The specific provisions in the Revenue Collection Act would apply over any general, conflicting provisions in the UCC.<sup>18</sup>

Dated: January 16, 2018



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Michael J. Talbot, Judge

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<sup>14</sup> See MCL 440.3102(1); MCL 440.3104(6).

<sup>15</sup> *Ramirez v Bureau of State Lottery*, 186 Mich App 275, 282; 463 NW2d 245 (1990).

<sup>16</sup> *People v Cameron*, 319 Mich App 215, 222; 900 NW2d 658 (2017) (quotation marks and citation omitted; alterations in original).

<sup>17</sup> *New Jersey v Anderson*, 203 US 483, 492; 27 S Ct 137; 51 L Ed 284 (1906).

<sup>18</sup> See *Ter Beek v City of Wyoming*, 495 Mich 1, 22; 846 NW2d 531 (2014) (“It is well accepted that when two legislative enactments seemingly conflict, the specific provision prevails over the more general provision.”).