STATE OF MICHIGAN

COURT OF CLAIMS

EXETER FINANCE CORP v NICK A. KHOURI *et al.*

Case No. **17-000270-MT** **Hon. Michael J. Talbot**

ORDER

At a session of said Court held,
Detroit, Wayne, Michigan, on
December 7, 2017.

Plaintiff having moved this Court to accept as timely its complaint filed on October 2, 2017;

Defendants having opposed the motion and having moved for summary disposition in their favor for lack of subject-matter jurisdiction;

IT IS HEREBY ORDERED that plaintiff's motion to accept the untimely complaint is DENIED.

IT IS HEREBY FURTHER ORDERED that summary disposition in favor of defendants is GRANTED pursuant to MCR 2.116(C)(4) and the matter is DISMISSED with prejudice, because the untimely complaint failed to invoke the Court's jurisdiction.

This is a final order that resolves the last pending claim and closes the case.

Michael J. Talbot, Judge

Court of Claims State of Michigan

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

December 7, 2017
Date

Clerk

STATE OF MICHIGAN

COURT OF CLAIMS

EXETER FINANCE CORP,

Plaintiff,

v

Case No. 17-000270-MT

NICK A. KHOURI, STATE OF MICHIGAN, and DEPARTMENT OF TREASURY,

Hon. Michael J. Talbot

Defendants.

OPINION

Pending before the Court is plaintiff's motion to accept as timely filed its October 2, 2017 complaint, as well as defendants' opposition of the same and their accompanying request for summary disposition based on lack of subject-matter jurisdiction. For the reasons stated herein, plaintiff's motion is DENIED and defendants' motion is GRANTED. As a result, the matter is DISMISSED for lack of jurisdiction pursuant to MCR 2.116(C)(4).

I. BACKGROUND

This case arises out of plaintiff's refund request of $618,939.57 under MCL 205.54i, the "bad-debt" deduction. Treasury denied the refund request on June 22, 2017. Pursuant to MCL 205.22(1), plaintiff had 90 days from that date to appeal Treasury's decision in this Court. There is no dispute that the 90-day period expired September 20, 2017, and that plaintiff's complaint was not received until October 2, 2017. Plaintiff moves this Court to accept the late-filed complaint as timely. According to plaintiff, the facts of this case justify overlooking its failure to comply with MCL 205.22(1)'s 90-day time period.

As can be gleaned from the affidavits submitted in support of plaintiff's motion, plaintiff's co-counsel, Michael J. Bowen,[1] works out of the Jacksonville, Florida office of Ackerman, LLP. Bowen prepared the complaint at issue for filing with this Court in early September 2017. Bowen averred that he prepared the complaint, summons, filing fee, and cover letter at this time because Hurricane Irma was scheduled to make landfall in Florida shortly thereafter. In order "to avoid any filing issues associated with the aftermath of Hurricane Irma," Bowen intended to have the complaint sent to this Court before the hurricane struck. According to Bowen, he prepared an envelope, addressed to this Court, as well as a return envelope, which was addressed to his office in Jacksonville, Florida.

The complaint was to be sent to this Court via Federal Express (FedEx) on September 6, 2017. Tracking information attached to plaintiff's motion indicates that the envelope containing the complaint was picked up from counsel's office in Jacksonville, Florida, on the evening of September 6, 2017, and delivered at 12:19 p.m. the next day, September 7. A staff member of Bowen's office received confirmation of the delivery via e-mail on September 7.

The tracking information from FedEx does not, however, show a delivery to this Court. Rather, the FedEx tracking information attached to plaintiff's motion shows that FedEx delivered the envelope to a location in Jacksonville, Florida[2]—not with the Court of Claims—on September 7, 2017, at approximately 12:19 p.m. As noted, Bowen provided two envelopes with

[1] Although plaintiff's motion suggests that Bowen was the attorney primarily responsible for preparing and filing plaintiff's complaint, the Court notes that Bowen is not licensed to practice law in Michigan and Steven L. Cottrell, also of Ackerman, LLP, is plaintiff's attorney of record in this matter.

[2] Later determined to be counsel's office.

shipping labels: an "external" one on which the Court of Claims' address was to be printed, and an "internal" envelope that was to be enclosed with the complaint, filing fee, summons, and cover letter, and on which Bowen's address was to be printed. As plaintiff now acknowledges, the envelopes were "mislabeled," resulting in the external envelope bearing the address of Bowen's office, and the internal envelope bearing the address of the Court of Claims. Because the address on the "external" envelope was that of Bowen's office, the envelope was delivered to Bowen's office early the next afternoon.

Bowen averred that he often works from home and only comes into the office "on an as-needed basis." On September 7, 2017, he had to pick up his children from school, because his children's school dismissed early, due to the impending arrival of Hurricane Irma. The school closure was in effect from September 7, 2017, through September 15, 2017, during which time Bowen worked from home. During some of this time, Bowen's office was closed because of the hurricane as well. According to an e-mail attached to Bowen's affidavit, his law office was closed from Friday, September 8, 2017, through Wednesday, September 13, 2017.

On Monday, September 18, 2017, Bowen flew to a conference for tax professionals in San Antonio, Texas. He returned home to Jacksonville, Florida at 7:15 p.m. on September 20, 2017. Bowen worked from home between September 21, 2017, and September 28, 2017.

Bowen went into his office on Friday morning, September 29, 2017. Upon his arrival, he saw a FedEx envelope—containing the complaint, summons, filing fee, and cover letter—sitting on his desk. A subsequent discussion with a staff member led to the conclusion that the shipping labels were "likely reversed," resulting in the envelope being picked up from Bowen's office and then being delivered back to the office the next day. According to Bowen, at no time from

September 6, 2017, through September 28, 2017, did he have any indication or notice that there was a problem with the filing of the complaint, or that the envelope had been returned by FedEx. And, upon discovering the problem on September 29, 2017, he caused the complaint to be sent to this Court the next business day, i.e., October 2, 2017.

Plaintiff contends that "[t]here can be no question that Hurricane Irma played an important role in the late filing of the Complaint." As a result, plaintiff asks this Court to exercise its equitable discretion to treat the complaint as having been timely filed.

II. ANALYSIS

Plaintiff seeks to appeal Treasury's denial of its refund claim under the bad-debt deduction. In order to appeal the denial, plaintiff was required to comply with the procedures and deadlines described in MCL 205.22. The statute provides, in relevant part, that:

> A taxpayer aggrieved by an assessment, decision, or order of the department may appeal the contested portion of the assessment, decision, or order to the tax tribunal within 60 days, or to the court of claims within 90 days after the assessment, decision, or order.[3]

Failure to comply with the timing requirements is fatal to the maintenance of the claim. Indeed, "[t]he assessment, decision, or order of the department, if not appealed in accordance with this section, *is final and is not reviewable in any court by mandamus, appeal, or other method of direct or collateral attack*."[4] To this end, caselaw treats the timing requirements as jurisdictional, meaning that a failure to timely file a complaint deprives this Court—or the Tax

[3] MCL 205.22(1).

[4] MCL 205.22(4) (emphasis added).

Tribunal, depending on where the action is commenced—of subject-matter jurisdiction.[5] The Court of Appeals has explained that the language of MCL 205.22(1) is unambiguous and that "[r]easonable minds cannot differ regarding the meaning of" the number of days set forth in the statute; hence, the statute must be applied as it is written.[6]

Here, despite what appears to have been an attempt to comply with MCL 205.22(1), plaintiff has plainly failed to comply with the 90-day time limit set forth in MCL 205.22(1). The Court declines plaintiff's invitation to invoke its equitable discretion to consider the complaint timely filed. As an initial matter, caselaw has squarely rejected the idea that equity can be invoked in order to disregard the plain language of MCL 205.22(1).[7] While plaintiff points to cases addressing the Tax Tribunal's authority to invoke equity, this Court's ability to ignore unambiguous statutory language is not what plaintiff represents it to be. "Although courts undoubtedly possess equitable power, such power has traditionally been reserved for 'unusual circumstances,' such as fraud or mutual mistake."[8] However, "[a] court's equitable power is not an unrestricted license for the court to engage in wholesale policymaking . . . ."[9] In addition, a court may not, acting "under the guise of equity," cast aside plain statutory language.[10]

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[5] See, e.g., *Fradco, Inc v Dep't of Treasury*, 495 Mich 104, 117-118; 845 NW2d 81 (2014); *PIC Maintenance, Inc v Dep't of Treasury*, 293 Mich App 403, 407, 410; 809 NW2d 669 (2011); *Trostel, Ltd v Dep't of Treasury*, 269 Mich App 433, 440-442; 713 NW2d 279 (2006).

[6] *PIC Maintenance*, 293 Mich App at 410.

[7] See, e.g., *PIC Maintenance*, 293 Mich App at 416; *Curtis Big Boy, Inc v Dep't of Treasury*, 206 Mich App 139, 142-143; 520 NW2d 369 (1994).

[8] *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 590; 702 NW2d 539 (2005) (citations omitted).

[9] *Id*.

[10] *Id*. at 591. See also *Linden v Citizens Ins Co of Mich*, 308 Mich App 89, 100-101; 862 NW2d 438 (2014).

As noted, the language of MCL 205.22 is plain and unambiguous. Subsection (1) provides that a taxpayer has 90 days to appeal Treasury's decision in the Court of Claims. The statute provides no means to disregard this 90-day limit, and in fact expressly mandates in subsection (4) that if a taxpayer fails to appeal Treasury's decision "in accordance with this section," the decision of Treasury "is final and is *not reviewable in any court by mandamus, appeal, or other method of direct or collateral attack*."[11] A court, acting "under the guise of equity" should not cast aside such unambiguous language.[12] Indeed, "[s]tatutes lose their meaning if an aggrieved party need only convince a willing judge to rewrite the statute under the name of equity."[13]

Moreover—and assuming the Court could disregard unambiguous statutory language—the instant case does not represent "unusual circumstances" that would warrant the invocation of equity. As already noted, a court's equitable power is traditionally only invoked in cases of "fraud or mutual mistake."[14] Here, there is no fraud, and the only mistake made in this case was made by plaintiff's counsel in failing to properly address[15] the FedEx envelope and in failing to follow up on a returned envelope for several days. This envelope was returned to plaintiff's law office less than 24 hours after it was picked up by FedEx and was in counsel's law office at a time when the office was still open, before the hurricane forced its closure. In addition, the

[11] MCL 205.22(4) (emphasis added).

[12] *Devillers*, 473 Mich at 591.

[13] *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 407; 738 NW2d 664 (2007) (citation and quotation marks omitted).

[14] *Devillers*, 473 Mich at 590.

[15] To this end, counsel remains responsible for his non-lawyer assistants. See MRPC 5.3.

tracking information provided by plaintiff shows that the envelope was delivered in Jacksonville, Florida on September 7, 2017, rather than its intended destination of Lansing, Michigan. As a result, the notion that there could be no reason to know the complaint was not delivered to this Court is rendered dubious.

Furthermore, the Court disagrees with plaintiff's assessment of the role played by Hurricane Irma in the filing delay in this case. Although Hurricane Irma caused the closure of counsel's law office from September 8, 2017, through September 13, 2017, there were still a number of days during which the law office was open and the returned envelope was sitting at the office, apparently with no regard being paid thereto by anyone at the office. For instance, the envelope was returned on September 7, 2017; by all accounts, the law office was open that day. Moreover, after the office re-opened and the hurricane passed, the envelope sat in the law office for nearly a week before the deadline expired. And, at the time the envelope sat in the office unopened, there was information from FedEx stating that the envelope had been delivered to the law office, rather than to the Court of Claims.[16] Although plaintiff gives account for counsel's whereabouts during some of the time period before the 90-day period expired, not all of his absences—for instance, his attendance at a seminar—are attributable to the hurricane. Nor has plaintiff alleged that everyone in counsel's law office was unable to go into the office *after* the office re-opened and before the 90-day deadline expired.

[16] Paragraph 7 of Plaintiff's Motion to Accept Complaint states that the FedEx information shows that the enveloped had, in fact, been delivered to Lansing, Michigan. However, the documentary evidence in this case, including the FedEx tracking information provided by plaintiff, flatly contradicts this assertion.

Had Hurricane Irma entirely prevented plaintiff from complying with the 90-day deadline, plaintiff's case would be decidedly more sympathetic and the case for the Court to exercise its limited equitable discretion would be much stronger. However, on the facts of this case, it is apparent that the hurricane played a smaller role than plaintiff's counsel alleges. Accordingly, the Court adheres to the plain language of MCL 205.22 and is compelled to dismiss the matter as untimely.[17]

Dated: December 7, 2017

Michael J. Talbot, Judge

[17] See *PIC Maintenance*, 293 Mich App at 410, 416.