

STATE OF MICHIGAN
COURT OF CLAIMS

FENTON HEIGHTS APARTMENTS, L.L.C.,

Plaintiff,

v

MICHIGAN DEPARTMENT OF TREASURY,

Defendants.

OPINION AND ORDER

Case No. 19-000009-MZ

Hon. Colleen A. O'Brien

Pending before the Court is defendant's motion for summary disposition filed pursuant to MCR 2.116(C)(4), (C)(6), (C)(7), and (C)(8). Because there is a pending circuit court action between the same parties that involves the same issues, the motion is GRANTED pursuant to MCR 2.116(C)(6).

I. BACKGROUND

According to the allegations in plaintiff's complaint, plaintiff purchased real property in Tyrone Township on or about February 22, 2018, by way of a quit claim deed in lieu of foreclosure. The property includes land that was part of a former condominium complex, "Fenton Heights Condominium." The former condominium complex included 24 individual units as well as a general common element (GCE). Plaintiff alleges that the GCE was exempt from the imposition of property taxes under MCL 559.231(1) of the Michigan Condominium Act. Nevertheless, plaintiff alleges that Tyrone Township improperly imposed tax on the GCE.

The complaint asserts that in October 2012, the condominium developer, Great Lakes Property of Fenton, LLC, terminated the condominium association; this termination became effective upon the recording of the requisite deed. Plaintiff alleges that, upon termination, the parcel identification numbers assigned to any of the former condominiums or the GCE should have been discontinued. Furthermore, plaintiff alleges that Tyrone Township has improperly combined the alleged past-due taxes on the former condominium units with the property plaintiff acquired in February 2018.

Plaintiff received notice of show cause and foreclosure hearings, to be conducted in January 2019, with respect to the former condominium units and the GCE property. The property taxes at issue relate to those assessed for the 2009-2012 tax years. Plaintiff alleges that, under MCL 211.47(4) of the General Property Tax Act, it is not liable for the outstanding assessments.

Pursuant to MCL 211.78k(2)-(3), plaintiff raised the objections noted above in the Livingston Circuit Court foreclosure proceeding, which by all accounts remains pending. As will be discussed *infra*, plaintiff's written objections to the foreclosure proceeding reveal that plaintiff raised the same arguments and objections in response to the foreclosure as it has asserted in the instant case.

In addition to the objections lodged in the foreclosure proceedings, plaintiff filed what purported to be an original action in Livingston Circuit Court. The case as it pertains to defendant Department of Treasury, which is acting as the foreclosing governmental unit pursuant to MCL 211.78(8) and MCL 211.78(3)(a), was transferred to the Court of Claims in January 2019 pursuant to MCL 600.6404(3). The complaint now before the Court asserts four counts, all

of which contest or purport to contest matters involving the pending foreclosure proceedings. For instance, ¶ 34 of the complaint expressly asserts that plaintiff “contests the foreclosure proceedings under MCL 211.78k(2)(a)” Plaintiff seeks declaratory relief regarding the alleged errors noted above with respect to the assessment of the property tax in the first instance. In addition, plaintiff argues that it did not receive adequate notice as required under the General Property Tax Act. Finally, plaintiff asks for injunctive relief to stop the foreclosure proceedings.

II. SUMMARY DISPOSITION

In lieu of filing an answer, defendant moved this Court for summary disposition under a number of subrules. The Court will only address the argument presented under MCR 2.116(C)(6), because it is dispositive. Summary disposition is appropriate under MCR 2.116(C)(6) when “[a]nother action has been initiated between the same parties involving the same claim.” “Under the unambiguous language of MCR 2.116(C)(6), summary disposition is appropriate whenever there is another action between the same parties involving the same claims currently initiated and pending at the time of the decision regarding the motion for summary disposition.” *Planet Bingo, LLC v VKGS, LLC*, 319 Mich App 308, 325; 900 NW2d 680 (2017) (citation and quotation marks omitted). The rule is a “codification of the former plea of abatement by prior action, the purpose of which was to protect parties from the harassment of new suits.” *Valeo Switches & Detection Sys, Inc v Emcom, Inc*, 272 Mich App 309, 313; 725 NW2d 364 (2006). In order to grant summary disposition under subrule (C)(6), the Court need only find that the two suits are “based on the same or substantially the same cause of action.” *Fast Air Inc v Knight*, 235 Mich App 541, 545 n 1; 599 NW2d 489 (1999). See also *JD Candler Roofing Co, Inc v Dickson*, 149 Mich App 593, 598; 386 NW2d 605 (1986) (same).

In ascertaining whether this action is the same for purposes of MCR 2.116(C)(6) as the pending foreclosure action, a review of the General Property Tax Act's procedures with respect to property tax foreclosures is warranted. In general, the General Property Tax Act delineates procedures for forfeiture, foreclosure, and for the sale of property for which taxes are unpaid and delinquent. When property taxes are delinquent, the property is forfeited to the pertinent county treasurer. See *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 509; 886 NW2d 817 (2014), citing MCL 211.78a; MCL 211.78g. The statute demands that the foreclosing governmental unit provide the appropriate notice to property owners. See MCL 211.78b; MCL 211.78c; MCL 211.78f (notice pertaining to the forfeiture). The foreclosing governmental unit, which can include the state as occurred in this case, see MCL 211.78(8), MCL 211.78(3)(a), is to file a petition "with the clerk of the circuit court" of the appropriate county a list of all forfeited property on which the foreclosing governmental unit intends to foreclose, MCL 211.78h(1). The foreclosing governmental unit is also required to file a show-cause hearing in circuit court for all forfeited property. MCL 211.78j.

The property owner—or any person claiming an interest in the property—"may contest the validity or correctness of the forfeited unpaid delinquent taxes" for one or more of the statutorily enumerated reasons. MCL 211.78k(2). Those reasons include, among others, that "No law authorizes the tax," and that "The property was exempt from the tax in question, or the tax was not legally levied." MCL 211.78k(2)(a), (c). A person who desires to assert such challenges "shall file written objections with the clerk of the circuit court and serve those objections on the foreclosing governmental unit before the date of the hearing required" under

the statute. MCL 211.78k(3).¹ The “circuit court” is to enter judgment on the petition. MCL 211.78k(5). A party aggrieved by the circuit court’s ruling is entitled to appeal the circuit court’s order to the Court of Appeals. MCL 211.78k(7).

Thus, the General Property Tax Act expressly provides a means for taxpayers to contest the foreclosure proceedings. Plaintiff availed itself of this statutory procedure in the pending Livingston Circuit Court foreclosure action. Plaintiff seeks to do the same in the instant case under the exact same theories presented in that case without regard for the express mandates of the General Property Tax Act. Notwithstanding the impropriety of ignoring the statute’s mandates, the Court concludes, at a minimum, that summary disposition should issue in defendant’s favor pursuant to MCR 2.116(C)(6). Distilled to their essence, the allegations in plaintiff’s complaint represent a challenge to the foreclosure and to the underlying tax debt. For instance, ¶¶ 34 and 50 of the complaint expressly state that plaintiff “contests the foreclosure proceedings” because, in plaintiff’s view, the underlying tax liability should not be imposed for a variety of reasons. In addition, ¶ 56 of the complaint asserts that there can be no interest arising in the property “out of any past-due taxes or foreclosure proceedings” such that, as alleged in ¶ 58, the property “is not subject to any tax liens or foreclosure proceedings[.]” Furthermore, Count III expressly alleges certain shortcomings in the statutory notice required under the General Property Tax Act with respect to foreclosure proceedings. Finally, plaintiff’s complaint seeks to enjoin the foreclosure proceedings.

¹ However, certain matters pertaining to assessments can only be challenged before the Michigan Tax Tribunal. See, e.g., *In re Petition of Wayne Co Treasurer for Foreclosure*, 286 Mich App 108, 110-114; 777 NW2d 507 (2009).

These issues are all matters that must be raised—and in fact have been raised—in the foreclosure proceedings pending in circuit court. See MCL 211.78k(2)-(3). Specifically, MCL 211.78k(3) directs that the issues asserted by plaintiff in this case—concerning the underlying tax debt and the notice issues pertaining to the foreclosure proceedings—are to be raised as “written objections with the clerk of the circuit court” Here, plaintiff has taken issues which are permitted to be asserted as defenses in the foreclosure action and has attempted to assert the same as claims in an original action. Stated otherwise, plaintiff has fabricated a cause of action by ignoring the unambiguous proceedings delineated in the General Property Tax Act and has essentially launched a collateral attack on the foreclosure proceedings by filing what purports to be an original action in which it raises the same issues presented in the foreclosure action.

Therefore, because “[a]nother action has been initiated between the same parties involving the same claim,” summary disposition is warranted under MCR 2.116(C)(6). Indeed, defendant is the foreclosing governmental unit in the foreclosure action, and no matter the labels plaintiff affixes to the claims, plaintiff cannot escape that it is raising the exact same claims as are at issue in the matter currently pending before the Livingston Circuit Court in the foreclosure action. See *JD Candler Roofing*, 149 Mich App at 601. The plain language of MCR 2.116(C)(6) compels the Court to dismiss this duplicative matter. See *Planet Bingo, LLC*, 319 Mich App at 325.

In arguing to the contrary, plaintiff’s primary response is to direct this Court’s attention to an unpublished Court of Appeals decision, *Carola Condominium Ass’n v Chappell*, unpublished per curiam opinion of the Court of Appeals, issued July 19, 2016 (Docket No. 325851). Plaintiff’s citation to *Carola* is unavailing. Initially, the case is unpublished and it does not constitute binding precedent. *Eager v Peasley*, 322 Mich App 174, 186 n 3; 911 NW2d


470 (2017). Furthermore, the case is not persuasive under the circumstances presented in the instant case. In *Carola*, the plaintiff was a condominium association that sought equitable relief in circuit court after the Wayne County Treasurer foreclosed upon certain property under the General Property Tax Act. *Carola Condominium Ass'n*, unpub op at 1. In that case, the panel invoked equity on the grounds that a mistake had been made during the foreclosure proceedings which allowed the plaintiff to challenge the foreclosure. *Id.* at 3-6. However, a key difference between that case and the instant case exists. In *Carola Condominium Ass'n*, the defendants were private parties who purchased the property following the foreclosure sale, not the foreclosing governmental unit. *Id.* at 1. The plaintiff's cause of action in that case was a post-foreclosure attempt to obtain some form of relief. *Id.* The panel in that case did not permit the plaintiff to eschew the provisions of the General Property Tax Act and to launch the type of parallel and collateral attack on the foreclosure proceedings that plaintiff is attempting to carry out in the instant case. The *Carola Condominium Ass'n* case does not provide a reason to avoid the structure of the General Property Tax Act or to invoke equity because the foreclosure proceedings remain pending and plaintiff can obtain relief, if appropriate, in the pending circuit court action, as intended by the provisions of the General Property Tax Act.

III. CONCLUSION

IT IS HEREBY ORDERED that defendant's motion for summary disposition is GRANTED pursuant to MCR 2.116(C)(6).

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

Dated: June 27, 2019


Colleen A. O'Brien, Judge
Court of Claims

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MICHIGAN DEPARTMENT OF TREASURY,

Hon. Colleen A. O'Brien

Defendant.

_____ /

ORDER DENYING PLAINTIFF'S MOTION FOR PRELIMINARY
INJUNCTION

IT IS HEREBY ORDERED that plaintiff's motion for preliminary injunction filed on January 9, 2019 is DENIED for the reasons explained in this Court's Opinion and Order dated June 27, 2019 granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(6).

Date June 27, 2019

Colleen A. O'Brien
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