[Cite as *State ex rel. Loupe-One v. Testa*, 2009-Ohio-2992.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

[State ex rel.] Loupe-One, LLC and Gryphon Asset Management, LLC,	:	
Relators,	:	
v.	:	No. 08AP-613
Joseph W. Testa, Franklin County Auditor and Edward Leonard, Franklin County Treasurer,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on June 23, 2009

Robert J. Behal Law Offices, LLC, *Robert J. Behal* and *John M. Gonzales*, for relator Loupe-One, LLC.

Adams Babner Gitlitz LLC, and *Jerry E. Peer, Jr.*, for relator Gryphon Asset Management, LLC.

Ron O'Brien, Prosecuting Attorney, *William J. Stehle* and *Paul M. Stickel*, for respondents.

Wiles, Boyle, Burkholder & Bringardner Co., LPA, and *Brian M. Zets*, for intervenor City of Gahanna.

IN PROHIBITION
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

CONNOR, J.

{¶1} Relators, Loupe-One, LLC and Gryphon Asset Management, LLC, ("relators") filed this original action requesting a writ of prohibition ordering respondents Franklin County Auditor, Joseph W. Testa ("auditor") and Franklin County Treasurer, Edward Leonard ("treasurer"), to stop the collection of previously exempted real estate taxes for tax years 2005, 2006, and 2007 arising from an alleged breach of the Community Reinvestment Area ("CRA") agreement executed between Loupe-One, LLC and the city of Gahanna ("Gahanna").

{¶2} The court referred this matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, including findings of fact and conclusions of law, which is appended to this decision, recommending that this court dismiss this action. Specifically, the magistrate concluded that because relators cannot show that the auditor or treasurer are about to exercise quasi-judicial power, or even that such power has already been exercised, the complaint fails to state a claim upon which relief in prohibition can be granted and therefore must be dismissed.

{¶3} By way of background, after the filing of the complaint, respondents filed their answer. Gahanna then moved to intervene. Following a conference held by the magistrate with counsel, the magistrate issued an order to show cause why this action should not be dismissed for failure to state a claim upon which relief in prohibition can be granted. Relators filed a written response to that order. Gahanna filed a reply. The auditor and treasurer also filed a joint reply.

{¶4} Relators have filed objections to the magistrate's decision. Relators dispute the magistrate's conclusion that there were no allegations in the complaint that respondents were about to or had exercised quasi-judicial power with respect to the matter at issue. Relators argue all factual allegations of the complaint must be presumed true and all reasonable inferences must be made in their favor. Relators argue they have met the first requirement for a writ of prohibition by alleging that the auditor and treasurer exercised quasi-judicial authority by erroneously determining there was a tax delinquency, recommending termination of the CRA agreement, and placing the disputed damages on the tax duplicate and tax bill. Relators assert that whether or not respondents' "acts" were ministerial or quasi-judicial is a factual issue. They further argue that a writ is necessary to prevent collection of these disputed damages.

{¶5} In order to be entitled to a writ of prohibition, relators must demonstrate that: (1) the auditor and treasurer are about to exercise quasi-judicial power; (2) the exercise of that power is unauthorized by law; and (3) denying the writ will result in injury for which no adequate remedy exists in the ordinary course of law. *State ex rel*. *Evans v. Blackwell*, 111 Ohio St.3d 1, 15-16, 2006-Ohio-4334, ¶30. In extreme cases, prohibition may lie against ministerial officers if they are abusing or usurping judicial functions. *Blackwell* at ¶31, citing *State ex rel. Nolan v. ClenDening* (1915), 93 Ohio St.264, 270.

{¶6} "Quasi-judicial authority is the power to hear and determine controversies between the public and individuals that require a hearing resembling a judicial trial." *State ex rel. Baldzicki v. Cuyahoga Cty. Bd. of Elections*, 90 Ohio St.3d 238, 241, 2000- Ohio-67; *State ex rel. Wright v. Ohio Bur. of Motor Vehicles*, 87 Ohio St.3d 184, 186, 1999-Ohio-17; *State ex rel. Keeler v. Levine* (1984), 19 Ohio App.3d 113, 114.

{¶7} Relators allege that the auditor and treasurer are generally "ministerial officers," but also submit that respondents sometimes perform duties of a quasi-judicial or discretionary nature. It is relators' contention that the auditor and treasurer exercised quasi-judicial authority by erroneously determining there was a tax delinquency, recommending termination of the CRA agreement, and placing the disputed damages on the tax duplicate and tax bill. Yet, as the magistrate noted, relators have failed to point to any statute or other authority that requires respondents to conduct a quasi-judicial hearing as a precondition to the issuance of the tax duplicate or the tax bill. In short, relators have failed to allege that prior to determining the existence of a tax delinquency, the auditor and/or treasurer were required to conduct a hearing resembling a judicial trial.

{¶8} Relators have failed to cite to any authority which demonstrates that the placing of previously abated taxes on the tax duplicate and on the tax bill constitutes a quasi-judicial act. To the contrary, the levy and collection of taxes has been found to be legislative and nonjudicial in nature. Additionally, Ohio law has found the listing of taxable and exempt property by a county auditor is not a usurpation of judicial or quasi-judicial power. *State ex rel. Methodist Book Concern v. Guckenberger* (1937), 57 Ohio App.13, 15-16.

{¶9} Furthermore, we agree with the magistrate that there is no relevant authority to support relators' contention that the exercise of quasi-judicial authority is equivalent to the exercise of administrative discretion. Without the exercise of quasi-judicial authority or an allegation that the treasurer and/or auditor have abused or usurped judicial functions, no writ of prohibition can issue. Moreover, without this, the issue of when a governmental act should be viewed as ministerial or nonministerial is irrelevant.

{¶10} Finally, relators argue that neither the CRA agreement nor Ohio law authorize the collection of liquidated damages for an alleged violation of the agreement. Relators contend that the repayment of taxes pursuant to a liquidated damages provision in a CRA agreement can be perfected, collected and enforced in the same manner as a mortgage lien on real property under R.C. 3735.671. Relators argue the auditor and the treasurer acted contrary to law and abused their discretion by improperly placing the amount of the liquidated damages claimed by Gahanna on the tax duplicate and on the tax bill.

{¶11} While the magistrate did not directly address this specific argument, the magistrate did disagree with relators' general contention that respondents' actions must be deemed quasi-judicial if their actions are unlawful. This is clearly not the case. While we shall not address the lawfulness or unlawfulness of respondents' actions, whether or not respondents' actions are unlawful is of no consequence here if the actions do not amount to the exercise of quasi-judicial power.

{¶12} Following an independent review of this matter pursuant to Civ.R. 53, we find the magistrate has properly applied the relevant law to the pertinent facts and therefore overrule the objections. We adopt the magistrate's decision as our own, including the magistrate's findings of fact and conclusions of law. In accordance with that decision, this action is hereby dismissed.

Objections overruled; action dismissed.

KLATT and TYACK, JJ., concur.

A P P E N D I X

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Relators,	:	
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Joseph W. Testa, Franklin County Auditor and Edward Leonard, Franklin County Treasurer,	:	(REGULAR CALENDAR)
Respondents.	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on January 13, 2009

Robert J. Behal Law Offices, LLC, *Robert J. Behal* and *John M. Gonzales*, for relator Loupe-One, LLC.

Adams Babner Gitlitz LLC, and *Jerry E. Peer, Jr.*, for relator Gryphon Asset Management, LLC.

Ron O'Brien, Prosecuting Attorney, *William J. Stehle* and *Paul M. Stickel*, for respondents.

Wiles, Boyle, Burkholder & Bringardner Co., LPA, and *Brian M. Zets*, for intervenor City of Gahanna.

IN PROHIBITION
ON ORDER TO SHOW CAUSE

{¶13} In this original action, relators Loupe-One, LLC ("Loupe-One") and Gryphon Asset Management, LLC ("Gryphon") request that a writ of prohibition issue against respondents Franklin County Auditor Joseph W. Testa ("auditor") and Franklin County Treasurer Edward Leonard ("treasurer").

Findings of Fact:

THE PARTIES

{¶14} 1. Loupe-One is an Ohio limited liability company having its principle place of business at Plain City, Ohio. Loupe-One is the owner of real property known as 1800 Eastgate Parkway, Gahanna, Ohio ("the real property").

{¶15} 2. Gryphon was appointed receiver of the real property in a foreclosure action pending in the Franklin County Court of Common Pleas.

{¶16} 3. Joseph W. Testa is the auditor of Franklin County, Ohio. Edward Leonard is the treasurer of Franklin County, Ohio.

{¶17} 4. The City of Gahanna ("Gahanna") successfully moved to intervene in this original action.

ALLEGED FACTS OF THE COMPLAINT

{¶18} 5. On or about January 19, 2005, Loupe-One and Gahanna executed a Community Reinvestment Area ("CRA") agreement pursuant to R.C. 3735.671.

{¶19} 6. Under the CRA agreement, Gahanna granted Loupe-One a ten year tax exemption on the real property. In return, Loupe-One agreed to create and preserve

job opportunities by investing $17,050,000 into a project which included the construction of a new 308,000 square foot facility on the real property.

{¶20} 7. On November 5, 2007, Loupe-One's tenant, Amerigraph, filed a bankruptcy petition that resulted in a liquidation proceeding.

{¶21} 8. On January 3, 2008, the Gahanna Tax Incentive Review Council ("TIRC") recommended that the Gahanna City Council terminate the CRA agreement on grounds that Loupe-One had violated its terms by being delinquent on its real and personal property tax obligations as documented by the auditor.

{¶22} 9. On January 14, 2008, the Gahanna City Council accepted TIRC's recommendation and determined that Loupe-One had breached the CRA agreement. Consequently, the Gahanna City Council enacted an ordinance that "terminated the CRA Agreement canceling all tax incentives under the agreement and seeking collection of liquidated damages pursuant to the liquidated damages provision in the CRA Agreement." (Complaint, at ¶12.)

{¶23} 10. Without obtaining judgment against Loupe-One for the alleged breach of the CRA agreement, Gahanna "requested that the Franklin County Auditor and the Franklin County Treasurer collect liquidated damages in the amount of $599,256.58 from Loupe-One as outstanding or delinquent real property taxes for the tax years 2005, 2006 and 2007 pursuant to the liquidated damages provision contained in the CRA Agreement." (Complaint, at ¶13.)

{¶24} 11. According to the complaint, neither the terms of the CRA agreement nor the Ohio Revised Code authorize respondents "to collect, in the form of a property tax, the liquidated damages contained in the CRA." (Complaint, at ¶14.)

{¶25} 12. According to the complaint, the auditor acted contrary to law "by improperly placing the amount of liquidated damages claimed by the City of Gahanna * * * on the tax duplicate." (Complaint, at ¶16.)

{¶26} 13. According to the complaint, the treasurer acted contrary to law when he sent Loupe-One the tax bill that included "liquidated damages."

THE PRAYER FOR RELIEF

{¶27} 14. In the prayer for relief, the complaint requests "that this Court issue a Writ of Prohibition against Respondents, prohibiting them from collecting the liquidated damages claimed by the City of Gahanna ($599,256.58) arising from the CRA Agreement." (Complaint, at 5.)

PROCEDURAL CHRONOLOGY OF THIS ACTION

{¶28} 15. Following the filing of the complaint, respondents filed their answer. Thereafter, Gahanna moved to intervene.

{¶29} 16. On September 11, 2008, the magistrate held a conference with counsel. Following discussion, the magistrate indicated that he would issue an order for relators to show cause why this action should not be dismissed for the failure of the complaint to state a claim upon which relief in prohibition can be granted.

{¶30} 17. On September 12, 2008, the magistrate issued an order to show cause. The magistrate also granted the motion to intervene.

{¶31} 18. On September 26, 2008, Loupe-One filed its written response to the show cause order.

{¶32} 19. On October 14, 2008, Gahanna filed its reply to Loupe-One's response to the show cause order. On that date, the auditor and treasurer also jointly filed a reply to Loupe-One's response.

Conclusions of Law:

{¶33} It is the magistrate's decision that this court dismiss this action for the failure of the complaint to state a claim upon which relief in prohibition can be granted.

{¶34} The magistrate's show cause order is analogous to a motion to dismiss. *State ex rel. Sladoje v. Belskis*, 149 Ohio App.3d 190, 2002-Ohio-4505.

{¶35} In order for a court to dismiss a complaint for failure to state a claim upon which relief can be granted (Civ.R. 12[B][6]), it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery. *O'Brien v. University Community Tenants Union* (1975), 42 Ohio St.2d 242, syllabus.

{¶36} In ruling on a motion to dismiss pursuant to Civ.R. 12(B)(6), a court must presume all factual allegations of the complaint are true and make all reasonable inferences in favor of the nonmoving party. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190.

{¶37} In order to be entitled to a writ of prohibition, relators must establish that (1) the auditor and treasurer are about to exercise quasi-judicial power; (2) the exercise of that power is unauthorized by law; and (3) denying the writ will result in injury for which no adequate remedy exists in the ordinary course of law. See *State ex rel. Evans v. Blackwell*, 111 Ohio St.3d 1, 2006-Ohio-4334, at ¶30.

{¶38} "Quasi-judicial authority is the power to hear and determine controversies between the public and individuals that require a hearing resembling a judicial trial."

State ex rel. Wright v. Ohio Bur. of Motor Vehicles (1999), 87 Ohio St.3d 184, 186; *State ex rel. City of Upper Arlington v. Fr. Cty. Bd. of Elections*, 119 Ohio St.3d 478, 2008-Ohio-5093, at ¶16 (adopting the quote with emphasis on the word "require"); *State ex rel. Parrott v. Brunner*, 117 Ohio St.3d 175, 2008-Ohio-813, at ¶8 (prohibition could not lie against the secretary of state when there was no requirement for the secretary of state to hold a quasi-judicial hearing).

{¶39} Here, relators' complaint does not allege that respondents are about to exercise quasi-judicial power with respect to the matter at issue nor does it even allege that respondents have exercised quasi-judicial power with respect to the matter at issue. The complaint fails to cite any statute that requires the respondents to conduct a quasi-judicial hearing as a precondition to issuance of the tax duplicate and tax bill at issue. However, the complaint does allege that the auditor and treasurer are generally "ministerial officers." It further alleges, generally, that respondents are at times authorized to perform duties of a "quasi-judicial or discretionary" character.

{¶40} In its September 26, 2008 response to the show cause order, Loupe-One argued:

> * * * In this case, the County Auditor erroneously determined that that [sic] Loupe-One was delinquent on its personal property taxes. This determination was reported to the City of Gahanna with a recommendation that the City terminate the CRA agreement with Loupe-One. * * *
>
> Loupe-One has sufficiently alleged the first requirement for a writ of prohibition by showing that the County Auditor and County Treasurer exercised quasi-judicial authority by erroneously determining that there was a tax delinquency, recommending termination of the CRA agreement and placing the disputed liquidated damages on the tax duplicate and tax bill. * * *

Id. at 4.

{¶41} Loupe-One's argument is unpersuasive. To begin, there is no authority to support relator's suggestion that the exercise of quasi-judicial authority is equatable to the exercise of administrative discretion. The cases cited here indicate otherwise. Accordingly, relator's discussion of when a governmental act can be viewed as ministerial versus nonministerial is largely irrelevant to the question of whether respondents are about to exercise quasi-judicial power. Secondly, relators erroneously seem to suggest that, if respondents' actions are unlawful, they must necessarily be deemed quasi-judicial. Again, the cases cited indicate otherwise. Relators have alleged no facts showing that respondents' alleged determination that there was a tax delinquency required a hearing resembling a judicial trial.

{¶42} In short, the complaint fails to allege any set of facts upon which this court could determine that respondents are about to exercise quasi-judicial power or even that respondents have exercised quasi-judicial power. The failure of the complaint in this regard is fatal, and requires this court to dismiss the complaint.

{¶43} According to respondents, the complaint for a writ of prohibition should be dismissed on the further ground that relators allegedly have an adequate remedy at law which they are pursuing in two actions filed in the Franklin County Court of Common Pleas. This court need not address the question of whether those actions provide an adequate remedy or whether the respondents have violated any law for which a remedy may exist in the common pleas court. Given that relators cannot show that the auditor or treasurer are about to exercise quasi-judicial power, or even that such power has been exercised, this action must be dismissed on that ground.

{¶44} Accordingly, for all the above reasons, it is the magistrate's decision that this court dismiss this action.

KENNETH W. MACKE
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).