[Cite as *State ex rel. Newpart Ltd. Partnership v. Donofrio*, 2010-Ohio-2199.]

STATE OF OHIO))ss: COUNTY OF SUMMIT)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
STATE OF OHIO, ex rel. NEWPART LIMITED PARTNERSHIP Appellee v. JOHN DONOFRIO, FISCAL OFFICER COUNTY OF SUMMIT Appellant	C. A. No. 25009 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2007-10-7157

DECISION AND JOURNAL ENTRY

Dated: May 19, 2010

WHITMORE, Judge.

{¶1} Defendant-Appellant, John Donofrio, the Summit County Fiscal Officer, appeals from the decision of the Summit County Court of Common Pleas granting summary judgment in favor of Plaintiff-Appellee, Newpart Limited Partnership ("Newpart"). This Court affirms.

I

{¶2} Newpart owns Hunter's Lake Apartments in Cuyahoga Falls, Ohio, which were built between 1989 - 1990 on six contiguous parcels of land. From the point at which the Summit County Fiscal Office began keeping records on the property, its records indicated there were 474 apartment units on the property. On March 28, 2006, Newpart filed a complaint with the Summit County Board of Revision challenging the valuation of the property and alleging that the property contained only 404 apartment units. The Board of Revision held a hearing in the matter. Newpart presented evidence from a real estate appraiser verifying that the property

contained only 404 apartment units, not 474, as the Fiscal Office's records indicated. Donofrio does not dispute the claim that a field representative from his office was sent to assess the property and likewise found that the property contained 404 apartment units as Newpart contended.

{¶3} On October 6, 2006, the Board of Revision issued a finding that the market value of three of the parcels of land was incorrect. Accordingly, the Board of Revision ordered Donofrio to "correct his records and duplicate in accordance with this finding" which reduced the total taxable value of the three affected parcels from $22,740,100 to $18,394,150. As a result of this finding, Newpart was issued a tax refund for the 2005 tax year of over $94,000. The Cuyahoga Falls Board of Education, also a party to the action, filed a notice of appeal to the Board of Tax Appeals contesting the reduction of the property's taxable value.

{¶4} On March 7, 2007, Newpart wrote to the Fiscal Office asking that, pursuant to R.C. 319.36, it "call to the attention of the Board [of Revisions] erroneous taxes, assessments or charges that were charged or collected in previous years as a result of a clerical error." In response, Donofrio's counsel sent the Board of Revision a memorandum on April 2, 2007, noting that the Fiscal Office had corrected its records. The memorandum indicated that the taxable values of the three affected parcels "which [were] erroneously listed on the Fiscal Office records *** have now been corrected." Upon Newpart's further request that Donofrio's office comply with the tenants of R.C. 319.36, Donofrio's counsel indicated in a May 15, 2007 letter to Newpart that they had already advised the Board of Revision "of both the existence and correction of a listing error [on the three affected] parcels." The letter further indicated that "the listing error does not constitute a clerical error as defined in R.C. §319.35 and 319.36. The Fiscal Office will not take any further action while [Board of Tax Appeal] Case #2006-V-2151 is

pending." Based on this information, Newpart sought a writ of mandamus in the Summit County Court of Common Pleas to compel Donofrio to comply with R.C. 319.36, that is, to fulfill his legal duty to not only correct the clerical error in the Fiscal Office's records, but to inform the Board of Revision of the error, too. Newpart filed a motion for summary judgment. Donofrio filed a cross-motion for summary judgment and a memorandum in opposition to Newpart's summary judgment motion. The trial court granted Newpart's motion for summary judgment and ordered Donofrio to "perform his duties as prescribed in R.C. 319.[3]6." Donofrio timely appeals from the trial court's decision, asserting three assignments of error for our review. Some of his assignments of error have been consolidated as they relate solely to whether the trial court properly granted summary judgment in Newpart's favor.

II

Assignment of Error Number One

"THE TRIAL COURT ERRED IN GRANTING APPELLEE NEWPART'S MOTION FOR SUMMARY JUDGMENT [.]"

Assignment of Error Number Two

"THE TRIAL COURT ERRED IN DENYING APPELLANT DONOFRIO'S MOTION FOR SUMMARY JUDGMENT."

{¶5} In his first two assignments of error, Donofrio alleges that the trial court erred in granting Newpart's motion for summary judgment and denying his motion for the same. We disagree.

{¶6} An appellate court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. It applies the same standard as the trial court, viewing the facts of the case in the light most favorable to the non-moving party and resolving

any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co*. (1983), 13 Ohio App.3d 7, 12. Summary judgment is proper under Civ.R. 56(C) if:

> "(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in the favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc*. (1977), 50 Ohio St.2d 317, 327.

The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-93. Specifically, the moving party must support its motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). Id. Once this burden is satisfied, the non-moving party bears the burden of offering specific facts to show a genuine issue for trial. Id. at 293; Civ.R. 56(E).

{¶7} Because neither party disputes the facts underlying this matter, we must determine as a matter of law whether Newpart was appropriately awarded summary judgment on its writ of mandamus. A party is entitled to mandamus if it can establish: (1) it has a clear legal right to the relief requested; (2) another party has a clear legal duty to perform the requested act; and (3) the party seeking relief has no adequate remedy at law. *State ex rel. Lorain v. Stewart*, 119 Ohio St.3d 222, 2008-Ohio-4062, at ¶23.

{¶8} In its motion for summary judgment, Newpart argues that: (1) R.C. 319.35 imposes a legal duty upon Donofrio to correct all clerical errors and to correct the valuations on the tax list; (2) Donofrio acknowledged that the Fiscal Office's records contained a clerical error; and (3) Donofrio is required to notify the Board of Revision and to provide Newpart with a certificate to present to the county treasurer, which would in turn permit Newpart to pursue recovery of its overpaid taxes for the five years preceding its discovery of the error.

{¶9} Donofrio, on the other hand, argues that Newpart is not entitled to mandamus because it has not established that Donofrio has a legal duty to notify the Board of Revision based on the existence of a clerical error. Instead, Donofrio argues that Newpart's records contained a "listing error," which he asserts is different from the statutorily defined term, "clerical error." Donofrio further argues that, not only was there no evidence of a clerical error in this matter, there was no evidence that erroneous taxes have been collected as results of the "listing error" contained in the Fiscal Office's records. Donofrio also argues that Newpart had an adequate remedy at law to recover overpaid taxes, namely under R.C. 5715.19 and R.C. 2723.01, both of which provide for recovery of tax overpayments, but respectively limit such recovery to either the tax year within which the taxpayers' complaint was filed or within one year of when the taxes were collected.

{¶10} R.C. 319, et seq., establishes the position of county auditor and outlines the responsibilities of that position, which include maintaining tax records and levying taxes on real property. R.C. 319.36 addresses situations in which the county auditor has determined that a tax "has been erroneously charged as a result of a clerical error[.]" R.C. 319.35 defines a "clerical error" for the purposes of R.C. 319.36 as:

> "[A]n error that can be corrected by the county auditor from the inspection or examination of documents in the county auditor's office or from the inspection or examination of documents that have been presented to the county auditor and have been recorded by the county recorder. Except as otherwise provided by law, any error in the listing, valuation, assessment, or taxation of real property other than a clerical error constitutes a fundamental error and is subject to correction only by the county board of revision as provided by law."

The Supreme Court has noted that "clerical errors are those of the bookkeeping or copying genre while fundamental errors are those committed in the exercise of the subject administrative officer's judgment and discretion." *Ryan v. Tracy* (1983), 6 Ohio St.3d 363, 366, fn. 4. Other

courts have considered clerical errors as "those which are computational in nature" and do not require the auditor to employ any decision-making skills related to his position. *State ex rel. Ney v. DeCourcy* (1992), 81 Ohio App.3d 775, 780, citing *Amazon Ins. Co. v. Cappellar* (1883), 38 Ohio St. 560, 574.

{¶11} R.C. 319.35 further provides that the "county auditor shall correct all clerical errors the auditor discovers in the tax lists ***, the description of lands ***, [or] the valuation or assessment of property[.]" If the auditor finds a clerical error as defined under the statute, in addition to correcting his records, "the county auditor shall give the person so charged a certificate to that effect to be presented to the treasurer[.]" R.C. 319.36. Furthermore, the statute requires that:

> "If, at any time, the auditor discovers that erroneous taxes, assessments, or charges have been charged or collected in previous years as a result of a clerical error, *** the auditor shall call the attention of the county board of revision to such charge or collection at a regular or special session of the board. If the board finds that taxes, assessments, or charges have been erroneously charged or collected, as a result of a clerical error, it shall certify that finding to the county auditor." Id.

Thus, a plain reading of the statute reveals that the county auditor is imbued with the discretionary authority to correct clerical errors in his records, whereas fundamental errors are correctable only by the board of revision. R.C. 319.36. See, also, *Ryan*, 6 Ohio St.3d at 366 (noting that "[i]t is clear from a reading of R.C. 319.36 that the statute provides a discretionary, essentially administrative remedy for erroneously charged and collected property taxes"). The statute does not define, nor does it include any reference to, the term "listing error" which Donofrio claims is the nature of the correction he made in this case. Moreover, Donofrio does not advance before this Court or in his motion for summary judgment any authority, statutory or otherwise, to support his claim that a "listing error" exists under Ohio law. App.R. 16(A)(7).

Donofrio did admit, however, that his records contained erroneous taxable values for three of Newpart's parcels based on a miscounting of the apartment units contained therein. This finding was consistent with the Board of Revision's finding that the property's market value was incorrect as a result of the miscounting. Based on this error, Donofrio corrected the Fiscal Office's records for those parcels. Given the nature of the error and Donofrio's response in correcting the error in the property's records, it is evident that the error was a clerical error as defined by R.C. 319.35.

{¶12} Having concluded that the Fiscal Office's records contained a clerical error which reduced the taxable value of Newpart's property by over $4.5 million dollars, we next consider whether Newpart was entitled to the relief it sought under R.C. 319.36. Newpart's motion for summary judgment indicates that it received a refund for the 2005 tax year in the amount of $94,738.28 following the Board of Revision's determination that the Fiscal Office's records contained an error. Newpart relies on the Supreme Court's holding *Blisswood Village Homeowners Ass'n v. McCormack* (1988), 38 Ohio St.3d 73, to support the claim that it is entitled to relief under R.C. 316.36. In *Blisswood*, a condominium's home owners association was overtaxed for a period of twelve years for a parcel that no longer existed because it had been absorbed into the overall property of the development. The auditor's records, however, still listed the parcel separately, and as a result, Blisswood continued to be taxed, and paid taxes on the property, from 1969 - 1982.

{¶13} Blisswood filed a complaint with the county board of revision as to the previous tax year, 1982, when the error was discovered. The county auditor agreed there was an error in the records and informed the board of revision that the parcel has been subsumed by the development and that the parcel's taxable value was zero. After a hearing in the matter, the

board of revision agreed. Blisswood was refunded $5,091.50 for the taxes it had paid on the parcel in 1982.

{¶14} Blisswood pursued a claim against the auditor's office seeking reimbursement for previous years' tax payments on the parcel based on the auditor's admission that his records contained a clerical error. The trial court granted summary judgment in Blisswood's favor and awarded it $101,564.43 for taxes erroneously paid in the years 1969 - 1981. On appeal, the Eighth District construed Blisswood's action as having arisen under R.C. 2723.01, which permits taxpayer actions to recover illegal tax collections, but requires the taxpayer to first comply with the statute's protest and notice provisions. Because Blisswood failed to comply with these requirements, the court concluded that its action was statutorily barred under R.C. 2723.01. Blisswood argued that its claim was not brought under R.C. 2723.01, but was instead brought under R.C. 319.36. The Eighth District rejected that argument, noting that "R.C. 319.36, as construed by [*Ryan v. Tracy* (1983), 6 Ohio St.3d 363], does not provide Blisswood with a remedy within the court of common pleas[,] as R.C. 319.36 is essentially an administrative remedy." *Blisswood Village Homeowners Ass'n v. McCormack* (July 2, 1987), 8th Dist. No. 52251, at *4. Consequently the appellate court reversed the trial court's judgment in Blisswood's favor.

{¶15} On appeal, the Supreme Court affirmed the Eighth District's decision that an action under R.C. 2723.01 was barred given Blisswood's noncompliance with the statutory protest and notice requirements associated with that provision. With respect to any potential cause of action under R.C. 319.36, however, the Supreme Court distinguished *Ryan* from *Blisswood* by noting that, in *Blisswood*:

> "[T]he auditor and the board of revision have discovered their error. Footnote 5 of the *Ryan* opinion states that '[s]hould the board of county commissioners,

> however, find that taxes have been erroneously collected and fail to order the auditor to draw his warrant in favor of the injured taxpayer or should the auditor refuse to draw his warrant once so instructed, an action in mandamus may lie against said officers.[]' [*Ryan*, 6 Ohio St.3d at 366, fn. 5]. We see no reasonable difference between a situation where the board of county commissioners first finds that the taxes have been erroneously collected, and then informs the auditor of the error, and the situation where the auditor first discovers such error. The duty is the same for the auditor to draw his warrant in favor of the aggrieved taxpayer. Thus, Blisswood [] could have pursued an action in mandamus, compelling the auditor to perform the duties prescribed in R.C. 319.36, but it did not do so. This avenue yet remains open to appellant. *** Should appellant pursue an action in mandamus, it would be limited in recovery to the statutory five-year period." *Blisswood Village Homeowners Ass'n*, 38 Ohio St.3d at 74-75.

In the case at bar, as was the situation in *Blisswood*, both Donofrio and the Board of Revisions have acknowledged that the records for Newpart's property contained an error which affected the valuation of the property. Additionally, in both cases the aggrieved taxpayer was awarded a tax refund for the taxes paid in the year prior to the discovery and acknowledgement of the error. Therefore, we conclude based on the Supreme Court's holding in *Blisswood*, that Newpart was legally entitled to the relief it sought under R.C. 319.36.

{¶16} Though Donofrio argues that our holding in *Premier Empire v. Brown* (1990), 69 Ohio App.3d 144, is binding upon the Court in this case, we disagree. In that case, we expressly distinguished the Supreme Court's holding in *Blisswood* by noting that "[w]ithout the auditor or board of commissioners having found an improper assessment to have been made, [the complaining taxpayer] cannot compel the auditor to make such a finding pursuant to R.C. 319.36." *Premier Empire*, 69 Ohio App.3d at 147. Because both Donofrio and the Board of Revisions have acknowledged the error in the number of apartment units contained on Newpart's property, and consequently its valuation, and because Newpart has been issued a refund for overpaid taxes based on their error, *Premier Empire* is not factually analogous to this case and does not control our decision. Donofrio's assertion otherwise lacks merit.

{¶17} Finally, we consider whether Newpart is without an adequate remedy at law. Donofrio argues that Newpart can pursue other remedies under R.C. 2723.01 and R.C. 5715.19. "For an alternate remedy to constitute an adequate remedy so as to preclude the requested extraordinary relief in mandamus, it must be complete, beneficial, and speedy." *State ex rel. Gilmour Realty, Inc. v. Mayfield Hts.*, 119 Ohio St.3d 11, 2008-Ohio-3181, at ¶14. The Supreme Court has clarified that "R.C. 5715.19 provides a taxpayer a plain and adequate remedy in the ordinary course of law for the correction of any overvaluation, undervaluation, discriminatory valuation, or illegal valuation which appears upon the tax duplicate of a county for the current year." *State ex rel. Corron v. Wisner* (1971), 25 Ohio St.2d 160, paragraph one of the syllabus. See, also, R.C. 5715.19. Similarly, R.C. 2723.01 permits a taxpayer to bring a cause of action in the Court of Common Pleas to "enjoin the illegal levy or collection of taxes and assessments" within one year after the taxes or assessments are collected. Neither one of these provisions, however, permits a taxpayer to recover tax overpayments based on a clerical error contained in the records of the fiscal office, nor do they permit recovery for a look-back period of five years. Consequently, these provisions do not provide Newpart with an alternate remedy at law based on the clerical error contained in the Fiscal Office's records of its property. Because R.C. 319.36 is the only statutory provision under which Newpart could seek recovery of its tax overpayments based on the discovery of this clerical error, it has no other adequate remedy at law.

{¶18} Based on the foregoing analysis, Newpart has met its burden on summary judgment of establishing as a matter of law that it is entitled to mandamus because it had a clear legal right to the relief requested, Donofrio had a clear legal duty to act under R.C. 319.36, and Newpart has no adequate remedy at law to recover its previous five years of tax overpayments. Accordingly, Donofrio's assignments of error are not well taken and are overruled.

Assignment of Error Number Three

"THE TRIAL COURT ERRED IN FAILING TO SPECIFY WHAT DUTIES APPELLANT DONOFRIO MUST COMPLETE IN ORDER TO COMPLY WITH R.C. § 319.36."

{¶19} In his third assignment of error, Donofrio argues that the trial court erred by failing to specify what he must do to comply with R.C. 319.36. Donofrio argues that the trial court's order is too vague and he asks this Court to remand the matter and order that the trial court "detail the actions" that he must take. While acknowledging that Newpart is seeking a writ of mandamus, Donofrio argues that the specificity requirements imposed upon an action for injunctive relief under Civ.R. 65(D) should be applied to Newpart's mandamus action. We disagree.

{¶20} The trial court's entry indicated that Donofrio "is hereby ordered to perform his duties as prescribed in R.C. 319.[3]6." Donofrio has not argued that the statute is ambiguous or unclear, or that he is unable to perform the duties imposed upon him by statute. Moreover, Donofrio does not articulate any reasonable rationale or legal basis for his request that we apply Civ.R. 65 to this mandamus action. Therefore, we decline to remand the matter to the trial court for further clarification under this rule, particularly in light of the express and mandatory procedures set forth in R.C. 319.36. Accordingly, Donofrio's third assignment of error is overruled.

III

{¶21} Donofrio's three assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

CARR, J.
BELFANCE, P. J.
CONCUR

APPEARANCES:

SHERRI BEVAN WALSH, Prosecuting Attorney, and CORINA STAEHLE GAFFNEY, Assistant Prosecuting Attorney, for Appellant.

IRVING B. SUGERMAN, Attorney at Law, for Appellee.