ORIGINAL

IN THE SUPREME COURT OF OHIO

MASON CITY SCHOOL DISTRICT, BOARD OF EDUCATION,	:	Case No. 2012-2107
Appellee,	:	On Appeal from the Ohio Board of Tax Appeals Case No. 2009-K-2364
v.	:	
WARREN COUNTY BOARD OF REVISION, *et al.*,	:	
Appellees,	:	
And	:	
SQUIRE HILL PROPERTIES II, LLC,	:	
Appellant.	:	

FILED
MAR 15 2013
CLERK OF COURT
SUPREME COURT OF OHIO

APPELLANT'S MEMORANDUM OPPOSING THE MOTION OF MASON CITY SCHOOL DISTRICT TO DISMISS

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MAR 15 2013
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SUPREME COURT OF OHIO

MEMORANDUM IN OPPOSITION

Introduction

Appellee Mason City School District, Board of Education ("Mason"), moves to dismiss the appeal on the grounds that Appellant Squire Hill Properties II, LLC ("Squire Hill"), failed to serve Wasserpach IV, LLC ("Wasserpach"). Mason asserts this is a defect of jurisdictional dimension. Mason's argument is without merit.

Mason files this motion in hopes that it may avoid review of this case on the merits. The substantive appeal will address whether a decision of the Board of Tax Appeals ("BTA") may be upheld despite the fact that the hearing was conducted with only Mason present; at the time, Mason and the BTA had full knowledge that the only property owner who received notice of the hearing—Wasserpach—had already sold the property and would not appear. Instead of notifying the new owner of the property, Mason preferred to present its case at an unopposed hearing.

As might be expected, Mason bested its absent adversary and persuaded the BTA to reverse the decision of the Warren County Board of Revision that the property be assessed at a lower rate for 2008. But three years before the BTA made that decision—before Mason had even filed its appeal with the BTA—the Warren County Auditor had unlawfully[1] given Wasserpach $36,792.16 as a refund of the taxes that would be deemed overpaid if the Board of Revision's 2008 valuation had been upheld. After the BTA

[1] The actions of the Warren County Auditor were doubly wrong. Under Ohio Revised Code §5715.22, the auditor is not to take any action in such circumstances until "final action upon such . . . appeal." Moreover, the auditor is not to issue a check for a refund as was done here. Instead, the auditor is authorized only to give the property owner a credit that may later be applied and deducted from future taxes due.

reversed the Board of Revision, the Warren County Auditor discovered that he could not recover the money he improperly paid to Wasserpach because Wasserpach no longer exists. With that avenue blocked, the Warren County Auditor took steps to foist the financial consequences of his own statutory violation on Squire Hill. Without so much as an explanation of his mistake or the background of the case (about which Squire Hill knew nothing), the Warren County Auditor presented Squire Hill with a "delinquent" tax bill for $39,792.16 plus interest. The Motion to Dismiss must be denied to permit these issues to be resolved on the merits.

Facts

The key facts from Mason's Motion are not in dispute:

- "The former owner, Wasserpach IV, LLC ('Wasserpach'), filed the Original Complaint in this case with the Warren County Board of Revision ('BOR') requesting a decrease in the subject property's true value to $3,031,110 for tax lien date, January 1, 2008."[2]

- "On its Complaint, Wasserpach cited to a 'reduction in fair market value of property due to decreased profitability resulting from decreased market rents, large vacancies, lower rental income, and increased property expenses.' (See Complaint.) Wasserpach also disclosed that the property sold for $5,350,000 on December 15, 2006."[3]

- "At the hearing before the BOR, Wasserpach submitted the written appraisal and testimony of appraiser Gene Minion who opined a value of $2,942,000 for the leased fee interest in the subject property. The BOR voted to reduce the value of the property to $3,353,900."[4]

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[2] Mason's Motion, at 3 (footnote omitted).

[3] Mason's Motion, at 3 (emphasis removed).

[4] Mason's Motion, at 3.

- Mason "appealed the decision of the BOR to the Board of Tax Appeals on or about September 16, 2009."[5]

- "While the case was pending before the BTA, a transfer of the subject property took place from Wasserpach to Viking Partners Deerfield on June 21, 2010."[6]

- "On April 17, 2012, the day prior to the BTA hearing, Bardach [Wasserpach's lawyer] contacted the BTA to say that he would not be in attendance since Wasserpach no longer owned the property. Counsel for the county Appellees also waived appearance at the hearing. Counsel for the BOE was the only party present at the BTA hearing."[7]

- "[W]hile the case was still pending before the BTA, another transfer of the subject property took place from Viking Partners Deerfield to Squire Hill Properties II ('Squire Hill') on July 12, 2012 . . . ."[8]

- The decision of the BTA was entered on November 16, 2012.

Before leaving those undisputed facts, Mason's assertion that Squire Hill acquired the property "for $0 consideration"[9] must be refuted. To do that, we need only look at the "counter-complaint" that Mason filed in Warren County. Just ten days before filing this motion, Mason's lawyers—the same attorneys representing Mason here—noted that Squire Hill paid not $0 but $3.2 million for the property:[10]

10) Was property sold the last 3 years? Yes ☒ No ☐ Unknown ☐. If yes, show date of sale 7/10/2012 and sale price $3,200,000.00; and attach information explained in "Instructions for Question 10" on back.

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5 Mason's Motion, at 3.

6 Mason's Motion, at 3-4.

7 Mason's Motion, at 4.

8 Mason's Motion, at 4.

9 Mason's Motion, at 4.

10 A copy of Mason's counter-complaint with cover letter is attached at **Exhibit 1** hereto.

Squire Hill is unable to speculate on the purpose of Mason's deception as to the amount Squire Hill paid for the property but the Court should be presented with accurate facts.

Argument

Mason's legal argument begins, as it should, by citation to this Court's decision in *Columbus City School Dist. Bd. of Educ. v. Franklin Cty. Bd. of Revision*, (2007) 114 Ohio St. 3d 1224, 871 N.E.2d 602 ("*Columbus*"). In *Columbus*, this Court held that in a case which reaches the Board of Tax Appeals ("BTA") from a county board of revision, the party that appeals the BTA's decision to the Ohio Supreme Court must serve its notice of appeal as set forth in the sixth paragraph of R.C. 5717.04.

The *Columbus* Court further interpreted the statute's phrase: "the person in whose name the property is listed, or sought to be listed, if such person is not a party to the appeal" to mean the "person whom the record shows to be the owner of the property as of the time that the BTA was required to certify its decision." *Columbus,* ¶4. Thus, the Court dismissed the appeal filed by a former owner who sold the property before the BTA issued its decision and did not serve the buyer. Similarly, in *Cincinnati School Dist. Bd. of Educ. v. Hamilton Cty. Bd. of Revision* (2007), 116 Ohio St. 3d 1220, 879 N.E.2d 774 ("*Cincinnati*"), the appellant, a former owner, failed to serve its notice of appeal on the party to whom it sold the property, i.e., the property owner at the time the BTA issued its decision.[11] Mason knows this. Indeed, Mason's lawyers here were the same attorneys who litigated the *Cincinnati* case.

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[11] This Court, however, decided that the rule in *Columbus* would be applied prospectively only.

Here, we have the opposite situation from that presented in *Columbus* and *Cincinnati*. This case is not appealed by a former owner. It is undisputed that Squire Hill was the owner of the property on the date the BTA entered its decision.

Mason asserts that the Court lacks jurisdiction because Squire Hill did not serve Wasserpach. Mason's argument fails because it mischaracterizes Wasserpach's role. The pertinent part of Ohio Revised Code §5717.04 reads:

> In all such appeals the tax commissioner or all persons to whom the decision of the board appealed from is required by such section to be sent, other than the appellant, shall be made appellees. Unless waived, notice of the appeal shall be served upon all appellees by certified mail. The prosecuting attorney shall represent the county auditor in any such appeal in which the auditor is a party.

As Mason's recitation of facts makes plain, Squire Hill is the successor in title to Wasserpach. As such, the only role that the former-owner Wasserpach could have in this case is "appellant." Going back to the statute, the people that have to be served are those "***other than*** the appellant." (Emphasis added). Thus, Mason's argument boils down to the suggestion that jurisdiction is lacking because Squire Hill failed to serve itself. This argument is untenable.

Moreover, Mason's argument is predicated on Squire Hill's failure to perform a futile act. At the time of the hearing before the BTA, Wasserpach was no longer the owner of the property at issue.[12] Prior to the date of the hearing, the property was transferred to Viking Partners Deerfield. On December 15, 2010, while the BTA was

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12 "The day prior to the hearing, counsel for Wasserpach advised this board that he would not be in attendance as Wasserpach no longer owns the subject property." Board of Tax Appeals, Decision and Order, November 16, 2012, at 3, n.1.

deliberating, Wasserpach was legally dissolved.[13] Two years after the hearing before the Board of Tax Appeals, Squire Hill acquired the property. Four months later, the BTA issued its Order. Essentially, Mason urges that this Court lacks jurisdiction because Squire Hill failed to serve a defunct limited liability company having no interest in the property at issue in the appeal. Neither Ohio Revised Code §5717.04 nor common sense requires a litigant to perform this futile gesture.

The fact that Ohio Revised Code §1705.44 permits the members of a dissolved limited liability company may wind up its affairs does not affect this analysis. Nor does the fact that under Ohio Revised Code §1705.45, an agent's authority may survive dissolution. The central fact is that Wasserpach was formed for the purpose of owning this property. Because of "reduction in fair market value of property due to decreased profitability resulting from decreased market rents, large vacancies, lower rental income, and increased property expenses," Wasserpach was unable to keep current on its obligations. After Viking Partners Deerfield took a deed in lieu of foreclosure—what Mason calls a transaction "for $0 consideration"[14]—Wasserpach had nothing left. Serving a notice of appeal on a former owner who lost the property involuntarily is a gesture that the statute never intended to require.

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13 A copy of the Secretary of State filing is attached at **Exhibit 2**.

14 Mason's Motion, at 4.

Conclusion

For the foregoing reasons, no service defect, jurisdictional or otherwise, exists and Mason's motion must be denied.

Respectfully submitted,

Scott R. Thomas (0061040)
Carlo R. Wessels (0051291)
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250 Grandview Drive, Suite 500
Ft. Mitchell, Kentucky 41017
(859) 344-1188
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sthomas@hemmerlaw.com

Trial Attorneys for Appellant
Squire Hill Properties, II, LLC

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellant's Response to Motion to Dismiss has been served by ordinary U.S. Mail this 14th day of March, 2013 upon the following counsel of record:

Jennifer B. Antaki, Esq.
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Mason City School District,
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Warren County Board Of Revision
and Warren County Auditor

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Counsel For Appellee
Joseph W. Testa, Ohio Tax Commissioner

Scott R. Thomas

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TELEPHONE (513) 338-1990

FACSIMILE (513) 263-9010

legaltrial@yahoo.com

February 22, 2013

Belinda Hatfield
Warren County Board of Revision
406 Justice Drive
Lebanon, Ohio 45036

Re: **Squire Hill Properties, LLC**
BOR No. 12-102

Dear Belinda:

I have enclosed an original and one copy of a counter-complaint for BOR No. 12-102. Please file the original and return a date-stamped copy to me in the enclosed self-addressed stamped envelope. Thank you for your assistance with this matter.

Sincerely,

David C. DiMuzio

Encl.

RECEIVED
2013 FEB 25 PM 1:06
LEBANON, OHIO

EXHIBIT 1

DTE FORM 1 (Revised 4/96)
ORC 5715.13, 5715.19

COPY

BOR NO. 12-102

DATE RECEIVED
RECEIVED 2013 FEB 25 PM 1:05 OHIO

COMPLAINT AGAINST THE VALUATION OF REAL PROPERTY

ANSWER ALL QUESTIONS AND TYPE OR PRINT ALL INFORMATION
READ INSTRUCTIONS ON BACK BEFORE COMPLETING FORM
ATTACH ADDITIONAL PAGES IF NECESSARY

TAX YEAR 2012
COUNTY Warren

☐ **ORIGINAL COMPLAINT**
☒ **COUNTER-COMPLAINT**

NOTICES WILL BE SENT ONLY TO THOSE NAMED BELOW		
	Name	Street Address, City, State, Zip Code
1) Owner of property	Squire Hill Properties II, LLC	9910E Berberich Drive Florence KY 41042
2) Complainant if not owner	Mason City School Dist. Bd. of Ed.	211 North East St., Mason, Ohio 45040
3) Complainant's agent	David C. DiMuzio, Inc.	810 Sycamore St. 6th Floor Cincinnati, OH 45202
4) Telephone number of contact person (513) 338-1990		
5) Complainant's relationship to property if not owner School District		

If more than one parcel is included, see "Multiple Parcels" on back.	
6) Parcel number from tax bill	Address of Property
16334760011	5123 Bowen Drive Mason Ohio
16334760012	5123 Bowen Drive Mason Ohio
7) Principle use of property:	

8) The increase or decrease in taxable value sought. Counter-complaints supporting auditor's value may have zero in Column D.

Parcel Number	Complainant's Opinion of Value: Column A True Value (Fair Market Value)	Complainant's Opinion of Value: Column B Taxable Value (35% of Column A)	Column C Current Taxable Value (From Tax Bill)	Column D Change in Taxable Value (Col. B minus Col. C)
16334760011				
16334760012				
Total	$3,615,000	$1,265,010	$1,265,010	-0-

9) The requested change in value is justified for the following reasons

No Change requested. Need to see circumstances of sale and supporting documentation.

10) Was property sold the last 3 years? Yes ☒ No ☐ Unknown ☐. If yes, show date of sale 7/10/2012 and sale price $3,200,000.00; and attach information explained in "Instructions for Question 10" on back.

11) If property was not sold but was listed for sale in the last 3 years, attach a copy of listing agreement or other available evidence.

12) If any improvements were completed in the last 3 years, show date ____________ and total cost $ ______________.

13) Do you intend to present the testimony or report of a professional appraiser? Yes ☐ No ☐ Unknown ☒

14) If you have filed a prior complaint on this parcel since the last reappraisal or update of property values in the county, the reason for the valuation change requested must be one of those below. Please check all that apply and explain on attached sheet. See ORC 5715.19(A)(2) for a complete explanation.

☐ The property was sold in an arm's length transaction;
☐ A substantial improvement was added to the property;
☐ The property lost value due to casualty;
☐ Property's occupancy changed by at least 15%.

I declare under penalties of perjury that this complaint (including any attachments) has been examined by me and to the best of my knowledge and belief is true, correct and complete.

Date 2/21/2013 Complainant or Agent ______________ Title (If Agent) Attorney
Signature

Sworn to and signed in my presence, this 21st day of February 2013.

NOTARIAL SEAL STATE OF OHIO

Linda Kenkel
Notary Public, State of Ohio
My Commission Expires 09-20-2017

Linda Kenkel
Notary Public

33366.1

DATE:	DOCUMENT ID	DESCRIPTION	FILING	EXPED	PENALTY	CERT	COPY
12/03/2010	201033700230	DISSOLUTION/LIMITED LIABILITY COMPANY (LDS)	50.00	.00		.00	.00

Receipt
This is not a bill. Please do not remit payment.

STATMAN, HARRIS & EYRICH, LLC
3700 CAREW TOWER
441 VINE STREET
CINCINNATI, OH 45202

STATE OF OHIO
CERTIFICATE
Ohio Secretary of State, Jennifer Brunner

1656635

It is hereby certified that the Secretary of State of Ohio has custody of the business records for

WASSERPACH IV, LLC

and, that said business records show the filing and recording of:

Document(s)	Document No(s):
DISSOLUTION/LIMITED LIABILITY COMPANY	201033700230

Witness my hand and the seal of the Secretary of State at Columbus, Ohio this 2nd day of December, A.D. 2010.

United States of America
State of Ohio
Office of the Secretary of State

Jennifer Brunner

Ohio Secretary of State

EXHIBIT 2

Prescribed by:

The Ohio Secretary of State
Central Ohio: (614) 466-3910
Toll Free: 1-877-SOS-FILE (1-877-767-3453)

www.sos.state.oh.us
e-mail: busserv@sos.state.oh.us

Expedite this Form: (Select One)
Mail Form to one of the Following:
○ Yes PO Box 1390 Columbus, OH 43216
*** Requires an additional fee of $100 ***
⊙ No PO Box 1329 Columbus, OH 43216

RECEIVED
DEC 02 2010
SECRETARY OF STATE

CERTIFICATE OF DISSOLUTION OF LIMITED LIABILITY COMPANY/ CANCELLATION OF FOREIGN LLC

(Domestic or Foreign)
Filing Fee $50.00

(CHECK ONLY ONE (1) BOX)

(1) ☑ Domestic Limited Liability Company (140-LDS)	(2) ☐ Foreign Limited Liability Company (131-LFS)

Complete the general information in this section for the box checked above.

Name of Limited Liability Co. Wasserpach IV, LLC

Ohio Registration Number 1656635

Complete the information in this section if box (1) is checked.

An Ohio Limited Liability Company, hereby certifies that said Limited Liability Company was or shall be dissolved as of December 15, 2010
(Date)

Complete the information in this section if box (2) is checked.

The undersigned limited liability company hereby certifies that it is no longer transacting business in the state of Ohio.

FIRST: The name of the limited liability company in its state of organization or registration is:

____

SECOND: The name under which the limited liability company registered to transact business in Ohio is:

____

THIRD: The limited liability company is formed under the laws of the state/country of: ____________ (state or country)

(Please enter does revoke or does not revoked below)
FOURTH: The limited liability company ____________ the authority of its registered agent to accept service of process, notices and demands on its behalf.

If the authority of the limited liability company's statutory agent is revoked, then item fifth must be completed.

Complete the information in this section if box (2) is checked Cont.

FIFTH: The address to which a person may mail a copy of any process, notice, or demand against the company is:

(street address) NOTE: P.O. Box Addresses are NOT acceptable.

(city, township, or village) (state) (zip code)

If this mailing address changes in the future, the limited liability company hereby agrees to notify the Ohio secretary of state of such change.

REQUIRED
Must be authenticated (signed) by an authorized representative

Authorized Representative

11/23/10
Date

David Propach, Manager
(Print Name)