E-FILED
Thursday, 31 August, 2017 02:52:50 PM
Clerk, U.S. District Court, ILCD

UNITED STATES DISTRICT COURT

FOR CENTRAL DISTRICT OF ILLINOIS

Robbie J. Perry and James Rex Dukeman, on behalf of themselves and others similarly situated as Mattoon Township (Coles County, Illinois) commercial and industrial property owners,

Plaintiffs,

vs.

Coles County,

Defendant.

Court File No. 17-CV-2133

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

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INTRODUCTION

The district court has subject matter jurisdiction over the claims asserted by the Plaintiffs Robbie Perry and James Rex Dukeman (collectively "Perry"). The Defendant Coles County misconstrues the underlying claims and in turn misunderstands the applicable law that gives this Court jurisdiction. First, the injunctive relief sought will increase tax revenue. Second, there is no effort to stop either the tax assessment of Coles County or the collection of the assessments. Third, equitable relief in state court is not available as the Perry claims allege procedural errors or irregularities in the assessment process. Fourth, there is no complete state remedy and hence no comity issue, which of itself is non-jurisdictional. Finally, if there is a state remedy, Perry would have no 42 U.S.C. § 1983 claim. Thus, Coles County's request for relief under Rule 12(b)(1) of the Federal Rules of Civil Procedure should be denied.

LEGAL STANDARD

Rule 12(b)(1) "allows a party to move to dismiss a claim for lack of subject matter jurisdiction." *Hallinan v. Fraternal Order of Police of Chicago Lodge No. 7*, 570 F.3d 811, 820 (7th Cir. 2009). Perry understands and accepts the burden that a plaintiff has to demonstrate that subject matter jurisdiction exists for the Plaintiffs' claims. *See Lee v. City of Chicago*, 330 F.3d 456, 468 (7th Cir. 2003). However, as Coles County has essentially sought a facial challenge to subject matter jurisdiction with its motion to dismiss, the court must accept the complaint's well-pleaded factual allegations, with all reasonable inferences drawn in Perry's favor as the plaintiff. *See Munson v. Gaetz,* 673 F.3d 630, 632 (7th Cir.2012); *Apex Digital,* 572 F.3d at 443–44; *Patel v. City of Chicago,* 383 F.3d 569, 572 (7th Cir.2004). The court must also

consider "documents attached to the complaint, documents that are critical to the complaint and referred to in it, and information that is subject to proper judicial notice," along with additional facts set forth in Perry's brief opposing dismissal, so long as those facts "are consistent with the pleadings." *Geinosky v. City of Chicago,* 675 F.3d 743, 745 n. 1 (7th Cir. 2012).

ARGUMENT

I. Because there is no complete state remedy for Perry to pursue his claims, the non-jurisdictional comity doctrine does not apply and, hence, the federal court retains subject matter jurisdiction over the Perry claims asserted.

Perry's Amended-Complaint does not assert that the Coles County assessment on commercial and industrial property is unauthorized by law nor that the tax was levied upon tax-exempt property nor that the County has no statutory power to tax in a certain area. If so, state injunctive relief would be available. As Illinois courts have opined,

> Only where the tax is unauthorized by law or where it is levied on tax-exempt property may the taxpayer bypass the statutory remedy and seek injunctive relief in the [state] circuit court.

Millennium Park Joint Venture, LLC v. Houlihan, 241Ill.2d 281, 296, 349 Ill. Dec. 898, 948, 948 N.E.2d 1 (2010). Perry did not allege the assessment was tax exempt or unauthorized by law, but because the allegations asserted procedural errors or irregularities in the taxing process, equity relief in state court is unavailable:

> [A] true "unauthorized by law" challenge arises where the taxing body has no statutory power to tax in a certain area or has been given no jurisdiction to tax a certain subject, as opposed to a complaint that merely alleges procedural errors or irregularities in the taxing process, in which case equity relief would not be available.

Id. 241 Ill.2d at 307, 349 Ill. Dec. at 898, 948 N.E.2d at 17. *See also, Lackey v. Pulaski Drainage Dist.,* 122 N.E.2d 257, 258 (Ill. 1954); *Wood River Tp. v. Wood River Tp. Hosp.,* 772 N.E.2d 308, 311 (Ill. App. 5th Dist. 2002).

Here, there is no state statute or other process to challenge the procedural errors or irregularities complained of and Coles County fails to point to any such statute or process in which a complete state remedy is available.

The underlying Amended-Complaint's injunctive remedy, if granted, would increase tax revenue and correct the irregularity or procedural error regarding Coles County efforts to apply tax assessments on commercial and industrial properties. In order to ensure tax assessments were equitable as the County commenced a re-valuation of properties via assessment districts per Illinois Statutes § 9-155, a county-wide valuation of properties was necessary. However, although the law under § 9-155 required the valuation of properties in general assessment years since 1994, Coles County failed to do so in 2002, 2006, 2012 and 2016. Amended Compl. ¶ 3. While the same statute allows for the division of the County into assessment districts, because Coles County failed to value the properties since before 2002, when it re-valued commercial and industrial properties in Mattoon Township (in part to address the school district deficient, *see* Amended Compl. ¶¶ 75-77, 82) it resulted in a disproportionate tax increase triggering Perry's equal protection claim.

Then in 2016, because the re-valuation of commercial and industrial property occurred only in Mattoon Township, while all other township assessment values remained stagnate because taxes were based upon pre-2002 valuations, commercial and industrial properties in Mattoon Township paid a disproportionate and unequal tax on their properties

a compared to all others. *See* Amended. Compl. ¶¶ 85, 87-88, and 89-90. Notably, while Mattoon properties paid 97% of additional revenues collected in the tax year 2016, with the increase reflecting a proportional tax increase of 5%, other township commercial and industrial properties revealed a *decrease* or no difference in their respective proportionate tax.

Thus, had all the properties been properly valued before the assessment districts were created, the County would have had recognized an *increase* in tax revenue and with any subsequent re-valuation in subsequent four-year cycles under the recently created assessment districts per Illinois Statute § 9-155, would be equitable as the statute allows for the re-valuation of properties to proceed. But because Coles County failed to follow the law in the first instance, the process it created resulted in a procedural error or irregularity in the tax process of which Perry complains of and seeks relief.

Coles County asserts that comity prevents this Court from assuming jurisdiction. Coles Cty. Memo. to Dismiss 2-4. First, comity is nonjurisdictional:

> Unlike the TIA [Tax Injunction Act], the comity doctrine is nonjurisdictional.

Direct Mktg. Ass'n v. Brohl, 135 S. Ct. 1124, 1134 (2015). "More embracive than [its statutory counterpart], the comity doctrine ... restrains federal courts from entertaining claims for relief that risk disrupting state tax administration." *See Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 417 (2010). To that end, federal courts will not assume jurisdiction over state tax claims where a plain, adequate, and *complete* remedy exists at state law:

> [W]e hold that taxpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts. Such taxpayers must seek protection of their federal rights by state remedies, provided of course that

> those remedies are plain, adequate, and complete, and may ultimately seek review of the state decisions in this Court.

Fair Assessment in Real Est. Ass'n, Inc. v. McNary, 454 U.S. 100, 116 (1981)[1] (citations and footnote reference omitted).

As previously stated, there is no complete remedy available nor any plain or adequate remedy and Coles County points to no statute that would provide the relief Perry seeks. Notably, if there was an adequate state legal remedy available to Perry, there would be no 42 U.S.C. § 1983 claim for Perry to pursue. As of the United States Supreme Court opined,

> We simply do not read § 1983 to provide for injunctive or declaratory relief against a state tax, either in federal or state court, when an adequate legal remedy exists.

Natl. Priv. Truck Council, Inc. v. Oklahoma Tax Commn., 515 U.S. 582, 592 (1995). Thus, "plaintiffs seeking protection of federal rights in federal courts should be remitted to their state remedies if their federal rights will not thereby be lost." *Brooks v. Nance*, 801 F.2d 1237, 1241 (10th Cir. 1986). Although *National Private Truck Council, Inc.* regarded a state court challenge to the constitutionality of certain Oklahoma taxes, which the Oklahoma Supreme Court found unconstitutional, the state supreme court refused to reward relief under §1983. As Justice Thomas explained and his point is applicable here that

> When a litigant seeks declaratory or injunctive relief against a state tax pursuant to § 1983, however, state courts, like their federal counterparts, must refrain from granting federal relief under § 1983 when there is an adequate legal remedy.

Natl. Priv. Truck Council, Inc., 515 U.S. at 592.

Nor does the instant action disrupt the administration of the assessment. Here, the

[1] We note that Coles County inadvertently did not provide the Court with the complete quote, and thus is repeated here. *See* Coles Cty Memo. to Dismiss 3.

taxes were collected and will be continued to be collected. Challenges to the valuation of a property continues. *See e.g.* Amended. Compl. ¶ 15. It is the procedural process and irregularity of the assessment process county-wide in the application of Illinois Statute §9-155 that is complained of resulting in disproportionate tax burdens of one township's commercial and industrial properties against all others with the county upon which the underlying equal protection claim arises.

Perry's allegations and claims are wholly independent of the calculation of his assessment tax liability, determination of his tax schedule, or any claimed exemption status of his property (none of which are complained of). The claims asserted do not encroach on Coles County's ability to administer its tax laws. The relief sought regards conduct unrelated to the tax assessment itself, its levy, or collection so as to justify non-exercise of federal jurisdiction. *See Col. River Water Conservation Dist. v. United States,* 424 U.S. 800, 817 (1976) (noting "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them"). Therefore, if there existed adequate constitutional procedures to challenge the procedural error or irregularity of the Coles County assessment upon the commercial and industrial properties for Mattoon Township against that of all other similar properties in the County, federal court jurisdiction would not be available. But, this is not the case here.

II. Coles County failed to raise any issue regarding the Tax Injunction Act which provides the County no basis to seek dismissal and in fact, the analysis under the Act supports federal court jurisdiction for the relief Perry seeks.

Notably, Coles County relies solely on arguments regarding comity, which as described above is insufficient for this Court to reach a conclusion that it has no subject matter jurisdiction, and failed to address the Tax Injunction Act ("TIA"). The tactic is

justified as the TIA does not help Coles County either. Moreover, comity is not jurisdictional in nature. *Levin v. Commerce Energy, Inc.* 560 U.S. 413, 433-34 (2010) (Thomas, J. concurring); *see also Direct Mktg.,* 135 S.Ct. at 1134 ("Unlike the TIA, the comity doctrine is nonjurisdictional.").

Generally, the TIA bars federal courts from "enjoin[ing], supend[ing,] or restrain[ing] the assessment, levy or collection of taxes under [s]tate law." 28 U.S.C. § 1341. To that end, it divests the federal courts from subject matter jurisdiction over claims challenging state taxation procedures. *See e.g., Marcus v. Kan. Dep't of Rev.,* 170 F.3rd 1305, 1309 (10th Cir. 1999). *But not all claims.* "[A] suit cannot be understood to 'restrain' the 'assessment, levy or collection' of a state tax if it merely inhibits those activities." *Direct Mktg. Ass'n v. Brohl,* 135 S.CT. 1124, 1133 (2015). Rather, an action must "to some degree *stops*" state taxation activity to fall under the TIA. *Green Soltion Retail, Inc. v. United States,* 855 F.3d 1111, 118-19 (10th Cir. 2017) (citing *Direct Mktg.,* 135 S.CT. at 1130, 1133 (original emphasis).

Perry's § 1983 claims here do not seek to stop the Coles County assessment activity. Perry's claim reveals a legal injury embodied with the U.S. Constitution's Equal Protection Clause because of the procedural error or irregularity of the assessment process as described above.

As Perry also previously noted, the U.S. Supreme Court in *Hibbs v. Winn,* 542 U.S. 88 (2004), the Court distinguished between "taxpayer claims that would reduce state revenues and third-party claims that would enlarge state receipts." *Id.* at 108. The Court held that the latter category of claims does not implicate the Tax Injunction Act because those claims *do not* "seek to impede [a state's] receipt of tax revenues." *Id.* at 93. The Court explained, the

TIA was not intended to "insulate state tax laws from constitutional challenge in lower federal courts even when the suit would have no negative impact on tax collection." *Id.* at 94.

Hence, *Hibbs* stands for the proposition that challenges to the validity of state-here, county-taxing schemes fall outside the ambit of the Tax Injunction Act if the challenges, if proved successful, would result in the increase of tax liabilities of others (the increase in tax revenues to the county). This is essentially how the Seventh Circuit (and others) have read *Hibbs*. *Johnson v. Orr,* 551 F.3d 564, 571 (7th Cir. 2008). *See Henderson v. Stalder,* 407 F.3d 351, 359 (5th Cir. 2005); *City of Jefferson City v. Cingular Wireless, LLC,* 531 F.3d 595, 603-04 (8th Cir. 2008); *May Trucking Co. v. Oregon Dept. of Transp.*388 F.3d 1261, 1267 (9th Cir. 2004); *Hill v. Kemp,* 478 F.3d 1236, 1249 & n. 12 (10th Cir. 2007); and *Il. V. Alabama,* 739 F.3d 1273, 1283 (11th Cir. 2014).

While Coles County may suggest that if Perry prevails tax revenues will not increase, whether they rise or fall becomes a jurisdictional factual question. Coles County not only failed to raise any issue related to the Tax Injunction Act (hence, waiving that issue), but did not in its memorandum suggest or offer any reason why taxes would not rise but for the procedural error or irregularity of the County in the first instance.

Moreover, Coles County has failed to suggest that an injunction would halt all property tax collections—it would not—because Perry is not seeking to strip the County of the power necessary to issue valid property valuations. Hence, Perry's federal action is not barred by the Tax Injunction Act.

Finally, the U.S. Supreme Court in *Levin v. Commerce Energy, Inc.* recently, albeit in dicta, supports Perry's argument that the Tax Injunction Act does not bar this Court's

jurisdiction of his claims: "*Hibbs* held that the TIA d[oes] not preclude a federal challenge by a third party who object[s] to a tax credit received by others, but in no way object[s] to her own liability under any revenue-raising tax provision." *Levin,* 560 U.S. at 430. Here, Perry is not objecting to his liability to Coles County's ability to assess taxes on the value of his commercial property, but does challenge the procedural error or irregularity of the imposition in a manner that establishes an inequitable assessment received by others.

Therefore, Coles County's motion to dismiss on the basis of the comity doctrine should be denied.

CONCLUSION

Because the Plaintiffs injunctive relief sought will increase tax revenue; there is no effort to stop either the Coles County tax assessment or the collection of tax. Equitable relief in state court is not available as Perry's claims allege procedural errors or irregularities in the assessment process and there is no complete state remedy. Comity, which of itself is non-jurisdictional, does not divest the federal court of subject matter jurisdiction. Thus, Coles County's request for relief under Rule 12(b)(1) of the Federal Rules of Civil Procedure should be denied.

Dated: August 31, 2017

/s/Erick G. Kaardal

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PROOF OF SERVICE

I hereby certify that on August 31, 2017, I electronically filed the foregoing *Memorandum of Law in Opposition of Motion to Dismiss Plaintiffs' First Amended Complaint* with the Clerk of the Court using the CM/ECF system, which will send notification to:

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I also hereby certify that on August 31, 2017, I have mailed by United States Postal Service the foregoing to the following non-CM/ECF participant: None

/s/Erick G. Kaardal
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