STATE OF MICHIGAN

COURT OF APPEALS

APEX OIL COMPANY, INC.,

Plaintiff-Appellee,

v

DEPARTMENT OF TREASURY,

Defendant-Appellant.

UNPUBLISHED
November 22, 1996

No. 171532
LC No. 92-014542-CM

Before: Corrigan, P.J., and Taylor and D. A. Johnston,* JJ.

PER CURIAM.

In this single business tax dispute, defendant appeals as of right from a Court of Claims order denying its motion for summary disposition pursuant to MCR 2.116(C)(4), and a subsequent order that granted plaintiff's motion for summary disposition of defendant's counterclaim pursuant to MCR 2.116(C)(7) and (10) and granted summary disposition to plaintiff (thereby awarding plaintiff $616,152.68 plus interest). We affirm in part and reverse in part.

I

Defendant argues that the Court of Claims erred in finding that it had subject matter jurisdiction under MCL 600.6440; MSA 27A.6440, of plaintiff's claim for overpayment of single business taxes for 1982 through1988. We disagree.

MCL 600.6419; MSA 27A.6419 sets forth the jurisdiction of the Court of Claims and provides in pertinent part:

> Except as provided in sections 6419a and 6440, the jurisdiction of the court of claims, as conferred upon it by this chapter, shall be exclusive. The state administrative board is hereby vested with discretionary authority upon the advice of the attorney general, to hear, consider, determine, and allow any claim against the state in an amount less than $1,000.00. Any claim so allowed by the state administrative board shall be

* Circuit judge, sitting on the Court of Appeals by assignment.

> paid in the same manner as judgments are paid under section 6458 upon certification of the allowed claim by the secretary of the state administrative board to the clerk of the court of claims. The court has power and jurisdiction:
>
> (a) To hear and determine all claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state and any of its departments, commissions, boards, institutions, arms, or agencies. [MCL 600.6419; MSA 27A.6419.]

However, the jurisdiction conferred under MCL 600.6419; MSA 27A.6419 does not extend to claims for which an adequate remedy at law exists in federal court. MCL 600.6440; MSA 27A.6440; *MSEA v Civil Service Comm*, 177 Mich App 231, 238; 441 NW2d 423 (1989).

The first question is whether plaintiff was compelled to raise its 1982 through 1988 overpayment of the single business tax as a counterclaim in the previous litigation in Federal Bankruptcy Court, or, by failure to do so, is precluded from seeking a refund in Michigan's Court of Claims. Because defendant filed a claim in plaintiff's Chapter 11 bankruptcy proceedings for 1987 tax deficiencies for use, sales, withholding, motor fuel, and single business taxes, defendant argues that Michigan thereby waived its sovereign immunity, and plaintiff had to adjudicate in the bankruptcy court any claim, including the overpayment issue.

Section 106 of the Bankruptcy Code, 11 USC 106, governs the waiver of immunity by a sovereign in bankruptcy court proceedings. Section 106 provides a limited waiver of sovereign immunity in bankruptcy cases and is the only source for a waiver of immunity. *In re Price*, 42 F3d 1068 (CA 7, 1994).

Under § 106, there can be a waiver of sovereign immunity with regard to monetary relief in two settings: (1) compulsory counterclaims to governmental claims; and (2) permissive counterclaims to governmental claims capped by a setoff limitation. 11 USC 106(a) and (b); *United States v Nordic Village, Inc*, 503 US 30; 112 S Ct 1011; 117 L Ed 2d 181 (1992). Defendant argues that plaintiff's request for a refund of previously overpaid taxes in the form of a setoff against defendant's claim for unpaid taxes was a compulsory counterclaim under § 106(a). Sovereign immunity is totally waived for affirmative recovery against a governmental unit under § 106(a) only when the following conditions are met: (1) the estate has a claim against the governmental unit and the governmental unit has a claim against the estate; (2) the claim against the governmental unit is property of the estate; and (3) the claims of both the estate and the governmental unit must arise out of the same transaction or occurrence. *In re Pinkstaff*, 974 F2d 113 (CA 9, 1992).

Plaintiff does not dispute that the first two conditions are met in this case. Instead, plaintiff contends that its claim for a refund and defendant's claim for unpaid taxes did not arise out of the same transaction or occurrence. In determining whether the claim arose out of the "same transaction or occurrence," the "logical relationship" test under Rule 13(a) of the Federal Rules of Civil Procedure is applied. *In re Price*, *supra*; *In re Pinkstaff*, 974 F2d 113, 115 (CA 9, 1992); *Montgomery Ward Dev Corp v Juster*, 932 F2d 1378, 1381 (CA 11, 1991); *Savarese v Agriss*, 883 F2d 1194, 1208 (CA 3, 1989); *Pochiro v Prudential Ins Co of America*, 827 F2d 1246, 1249 (CA 9, 1987). In

applying the "logical relationship" test to § 106(a) of the Bankruptcy Code, federal courts have adopted the analysis in *In re Bulson,* 117 Bankr 537, 541 (1990), aff'd 974 F2d 1341 (CA 9, 1992), as follows:

> The basic approach under the ["logical relationship"] test is to analyze whether the essential facts of the various claims are so logically connected that considerations of judicial economy and fairness dictate that all issues should be resolved in one lawsuit. A logical relationship exists when the counterclaim arises from the same aggregate set of operative facts as the initial claim, in that the same operative facts serve as the basis of both claims or the aggregate core of facts upon which the claim rests activate additional legal rights otherwise dormant in the defendant. [*In re Bulson, supra* at 541 citations omitted).

The inquiry is not intended to be "a wooden application of the common transaction label," but rather a careful examination of the factual allegations underlying each claim in determining whether the test is met. *Burlington N R Co v Strong,* 907 F2d 707, 711 (CA 7, 1990). There is no formalistic test to determine whether the claims are logically related. A court should consider the totality of the claims, including the nature of the claims, the legal basis for recovery, the law involved, and the respective factual backgrounds. *Price, supra* at 1073; *Burlington, supra* at 711-712. Generally, a logical relationship exists where the claims are based upon the same operative facts and resolution of both claims would involve similar issues and evidence. See *In re Rebel Coal Co, Inc v Brown,* 944 F2d 320, 321-322 (CA 6, 1991); *Pochiro, supra* at 1249. In addition, the "logical relationship" standard should be applied in a manner that effectuates the purpose of FRCP 13(a), which is to resolve all claims dependent upon a common factual background in a single proceeding. *Timberland Co v Sanchez,* 129 FRD 382, 384 (D DC, 1990).

Applying the "logical relationship" test to the facts of this case, we conclude that there is no logical relationship between defendant's claim for unpaid taxes and plaintiff's claim for a refund. Plaintiff's refund claim against defendant involves an overpayment of single business taxes for the years 1982 through 1988, and the facts and circumstances surrounding those overpayments. Defendant's claim against plaintiff, on the other hand, was for 1987 tax deficiencies, including deficiencies for use, sales, withholding, motor fuel, and single business taxes. The claims are based on separate transactions. Furthermore, resolution of the two claims will not involve common factual issues or similar evidence. The facts and evidence needed to determine plaintiff's refund claim have no relation to defendant's deficiency claim. Hence, the facts that gave rise to defendant's claim against plaintiff are not "logically related" to the facts that form the basis for plaintiff's refund claim.

Accordingly, because plaintiff's claim against defendant in the bankruptcy court was not a compulsory counterclaim, sovereign immunity was not waived under § 106(a). Therefore, plaintiff was without an adequate remedy in the federal court. Because plaintiff lacked an adequate remedy in the bankruptcy court, the Court of Claims had subject matter jurisdiction under MCL 600.6440; MSA 27A.6440 and properly denied defendant's motion for summary disposition pursuant to MCR 2.116(C)(4).

Defendant next argues that the federal bankruptcy ruling should preclude plaintiff from seeking a refund in the Court of Claims because it constitutes a second bite at the apple. Because the federal court declined to exercise its jurisdiction as to the amounts here in dispute, res judicata does not apply.

II

Defendant also argues that the Court of Claims erred in granting summary disposition under the doctrines of res judicata and accord and satisfaction of its counterclaim for interest, penalties and damages arising from the failure of plaintiff to timely pay the taxes that were the subject of defendant's claim in bankruptcy court. Defendant argues that it is entitled to a setoff of this amount against plaintiff's claim for a refund. We agree.

The bankruptcy court denied defendant's claim for interest and penalties solely because the reorganization plan that the court had already confirmed "provides that the debtors will make no distribution for punitive damages or penalties." The bankruptcy court found that absent any other statutory basis for Michigan's request for interest, this section of the plan was dispositive of the issue and required denial of Michigan's request for interest. Plaintiff contends that this meant that any such debt was discharged in bankruptcy proceedings and, accordingly, that defendant is subject to the automatic injunction that attends any bankruptcy court adjudication that prohibits the attempt to collect on a discharged claim. 11 USC 1141(d)(1). However, the bankruptcy court did not discharge the debt; it simply declined to allow the claim against the bankruptcy estate because the plan of reorganization barred payment out of the estate for claims traceable to a penalty provision. Defendant argues correctly that such debt could not be discharged where it arose from the failure to remit tax monies withheld or otherwise collected in trust. 11 USC 507(a)(7) and 523(a)(1). Just as plaintiff's claim was not adjudicated on its merits in bankruptcy court, defendant's claim based on penalties and interest was similarly not adjudicated on its merits such that res judicata or the doctrine of preclusion should apply.

The Court of Claims also erred in finding that defendant's acceptance of the net payment ordered by the bankruptcy court constituted an accord and satisfaction.

The proponent of the defense of accord and satisfaction has the burden of establishing that there was, in fact, an accord and satisfaction. *Nationwide v Quality Builders*, 192 Mich App 643, 646; 482 NW2d 474 (1992). Accord and satisfaction is based on contract principles and is generally contractual in nature. *Fuller v Integrated Metal Technology, Inc*, 154 Mich App 601, 607; 397 NW2d 846 (1986). An "accord" is an agreement between parties to give and accept, in settlement of a claim or previous agreement, something other than that which is claimed to be due; "satisfaction" is the performance or execution of the new agreement. *Nationwide, supra*; *Fuller, supra*. However, as this Court noted in *Fuller:*

> [W]here one party tenders an item in full satisfaction of a claim and the other party accepts the thing tendered . . . an accord and satisfaction may arise regardless of the lack of an agreement between the parties. An accord and satisfaction may be effected by payment of less than the amount which is claimed to be due if the payment is

> tendered by the debtor in full settlement and satisfaction of the claim. In order to effect an accord and satisfaction under such circumstances, the tender must be accompanied by an explicit and clear condition indicating that, if the money is accepted, it is accepted in discharge of the whole claim. [*Fuller, supra* at 607-608.]

To accomplish an accord and satisfaction, the statement that is so intended must be clear, full, and explicit. *DMI Design & Mfg, Inc v ADAC Plastics, Inc,* 165 Mich App 205; 418 NW2d 386 (1987).

On October 22, 1992, plaintiff forwarded to defendant a check in the amount of $3,791,897.28 "in full payment of claim no. 2512 filed by the State of Michigan in the Apex Oil Company . . . consolidated chapter 11 proceedings." The check itself contained the following description: "Payment in full of Michigan Bankruptcy Claim per Court Order." The letter and check indicate that the tender of funds by plaintiff to defendant was not accompanied by an explicit and clear condition indicating that, if the money was accepted, it was accepted in discharge of the whole claim. *Fuller, supra* at 607-608. There was no explicit indication that the tender was meant to discharge defendant's potential counterclaim. Plaintiff was obviously aware of defendant's counterclaim, and if plaintiff had meant for the October 22, 1992, tender of funds to be in full satisfaction of all of defendant's claims against plaintiff, plaintiff could have easily explicitly stated so in the letter that accompanied the check or on the check itself. However, plaintiff failed to do so. Hence, we hold that that summary disposition should not have been granted on the basis of accord and satisfaction.

Affirmed in part, and reversed in part, and remanded for a determination of the exact amount of defendant's setoff. We do not retain jurisdiction.

/s/ Maura D. Corrigan
/s/ Clifford W. Taylor
/s/ Donald A. Johnston