

STATE OF MICHIGAN
COURT OF APPEALS

MICHIGAN CO-TENANCY
LABORATORY/TRINITY HEALTH, *et al.*,

UNPUBLISHED
November 14, 2013

Petitioner-Appellees,

v

No. 310376
Michigan Tax Tribunal
LC No. 326791

PITTSFIELD CHARTER TOWNSHIP,

Respondent-Appellant.

Before: MURRAY, P.J., and DONOFRIO and BOONSTRA, JJ.

PER CURIAM.

Respondent appeals by right from the order of the Michigan Tax Tribunal finding that the personal property collectively owned by the petitioner hospitals under an arrangement known as the Michigan Co-Tenancy Laboratory (MCL) was exempt from ad valorem taxation pursuant to MCL 211.9(1)(a) (personal property of charitable institutions incorporated under the laws of this state) and MCL 211.7o (real or personal property owned and occupied by a nonprofit charitable institution). We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Petitioners are a group of non-profit hospitals that entered into an arrangement whereby they each possess, as tenants in common, an undivided interest in the laboratory equipment that is the subject of this case (the subject property). This arrangement began in 1997, when seven hospitals purchased the laboratory assets from a partnership known as the Frances Warde Medical Laboratory (“Warde”). The number of co-tenant hospitals grew; at the time of the Tribunal’s opinion, the co-tenants numbered approximately thirty. New hospital co-tenants are required to execute an agreement that binds them to the terms of the 1997 Co-Tenancy and Operating Agreement; a Bill of Sale is also executed by which the existing tenants transfer an undivided ownership interest in each asset of the laboratory to the new co-tenant. Each co-tenant is a not-for-profit hospital. This co-tenancy arrangement, while not established as a legal entity, is known as the Michigan Co-Tenancy Laboratory.

The Co-Tenancy and Operating Agreement states that the purpose of the parties to the Agreement in purchasing, owning, and operating the subject laboratory equipment is to “enable each of them to reduce overall costs and more effectively and economically provide health care services and perform the charitable functions for which each was formed.” The Co-Tenancy and

Operating Agreement explicitly disclaims any intent by the parties to create a joint venture, partnership, association, or corporation.

The laboratory performs “esoteric testing” which has very high fixed costs; thus the more testing that is performed using the laboratory equipment, the more the cost per unit of testing can be reduced. To that end, when the original co-tenants purchased the laboratory equipment from Warde, they simultaneously leased and granted to Warde the right to use the “additional capacity” of the testing equipment beyond that needed by the co-tenants to conduct their laboratory testing (“Excess Capacity”). Testimony before the tribunal indicated that “excess capacity” consists of those times when the equipment and staff is idle, i.e. not being used by the co-tenants. Warde is only permitted to use the equipment when and to the extent that it is not being used to perform testing for the co-tenants, and the co-tenants receive priority for testing over Warde. The percentage of utilization of laboratory equipment by Warde was 36.6% in 1998, but decreased to approximately 10% for the last several years.

Warde also performs certain administrative functions on behalf of the co-tenants and acts as their agent. The physical laboratory is managed by a third-party corporation currently known as Michigan Multispeciality Physicians (MMP), which provides professional medical and laboratory management services on a contract basis with the co-tenants and Warde. The employees that operate the laboratory are hired by the co-tenants. The real property on which the laboratory is located is leased from an unrelated third party by co-tenant Trinity Health.

In 2006, respondent assessed the personal property at the laboratory facility as taxable to Warde. Warde did not appeal the assessments; instead an appeal was filed with the Tribunal in the name of “Michigan Co-Tenancy Laboratory/Trinity Health.” The petition alleged that the personal property of the laboratory was exempt from taxation as personal property of charitable organizations. Orders of the Tribunal added the tax years of 2007-2011 to the years under review.

Respondent’s answer to the petition denied that the subject property was exempt. Respondent then served petitioner with interrogatories to determine MCL’s legal status. Respondent moved the Tribunal for Summary Disposition on the grounds that the property was not exempt under the relevant statutes because MCL was not incorporated, and further that the property was not located on real property “owned and occupied by a nonprofit trust and used for hospital or public health purposes.”

The Tribunal denied respondent’s motion for summary disposition. Its order found that there were questions of fact in this case. The order also stated that

the Tribunal does not know who the Petitioner is in this case. Petitioner asserts it is a co-tenancy; however this is a form of ownership, not an entity classification. The Tribunal requires further facts and information before a determination of whether Petitioner meets the requirements for exemption under MCL 211.7o or MCL 211.9 can be made.

Subsequently, petitioner filed a motion to amend the petition to change the name of petitioner. The motion requested that the name of petitioner be changed to a list of 25 non-profit

charitable hospitals. Respondent opposed the motion, arguing that “under the guise of amendment to its petition” petitioner was attempting to make a substitution of parties. Respondent further argued that none of the new petitioners had standing to appeal the assessment in question, because the taxes were assessed solely to Warde, which did not appeal the assessment.

Over two years later, the Tribunal granted the motion with modification. The Tribunal found that, contrary to respondent’s assertion, the addition of parties was governed by Tribunal Rules, not MCR 2.202, and that the Tribunal rules provide that parties may be added or dropped by the Tribunal at any stage of the proceedings “according to terms that are just.” The Tribunal further found that the ownership of the subject property had changed over time and was likely to change from time to time as new co-tenants were added, and therefore ordered that the name of petitioner be changed to the current-captioned name.

Respondent filed a second motion for summary disposition, arguing that the tribunal lacked jurisdiction over the appeal because Warde did not appeal any of the years in question and petitioners lacked standing to pursue the appeal. The Tribunal denied respondent’s second motion, holding that petitioners had standing to pursue their appeal, because they had a legally protected interest in the subject property. The Tribunal further held that it had jurisdiction over petitioners’ appeal, because petitioners were the legal owner of the subject property at the time the petition was filed.

A prehearing conference was held on August 16, 2011. A trial date was set for September 19, 2011. Following the prehearing conference, respondent submitted requests for the issuance of 8 subpoenas *duces tecum*, compelling the appearance of various officers of Warde and Laboratory Associates of Michigan. On September 13, 2011, the Tribunal partially granted respondent’s request, issuing subpoena for four officers of Warde.

At the hearing, the Tribunal heard testimony that established the pertinent facts listed above. Testimony was taken from Dr. Paul N. Valenstein, the chief operating officer of MCL, and Stephen Zawacki, its chief financial officer, as well as from an expert witness, David Armstrong, CPA, who testified on behalf of respondent that under his analysis of the sale-and-leaseback arrangement, Warde remained the owner of the personal property of the laboratory.

Following the hearing, the Tribunal issued a written opinion and judgment. The Tribunal made findings of fact consistent with the facts presented above. The Tribunal concluded that Warde did not own the subject personal property, and that it was owned by the hospital co-tenants, which are non-profit, charitable institutions. The Tribunal further concluded that “the for-profit, commercial arm of the co-tenancy [the leasing of excess capacity to Warde] is subordinate and incidental to the medical testing operations.” The Tribunal concluded that petitioners had proven by a preponderance of the evidence that the subject property qualified for a property tax exemption under MCL 211.91(1)(a) and MCL 211.7o.

Respondent moved the Tribunal for partial reconsideration on December 30, 2011, arguing that the Tribunal’s opinion failed to apportion the assessment based on the proportion of for-profit and exempt usage. Respondent additionally contended that the Tribunal’s opinion “lacks clarity in how and to whom any refund is to be directed.”

The Tribunal, in denying respondent's motion, noted that the apportionment argument was considered and rejected in its final judgment. Further, the Tribunal stated that it lacked the authority to determine who is ultimately entitled to a refund. This appeal followed.

II. STANDARD OF REVIEW

Absent fraud, this Court's review of a decision of the Michigan Tax Tribunal is limited to determining whether it erred in applying the law or adopted an incorrect legal principle. *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 438; 716 NW2d 247 (2006). Factual findings of the Tribunal are conclusive and will not be disturbed if they are supported by competent, material, and substantial evidence on the whole record. *Stege v Dep't of Treasury*, 252 Mich App 183, 188; 651 NW2d 164 (2002). This Court reviews issues of statutory interpretation de novo. *Danse Corp v Madison Hts*, 466 Mich 175, 178; 644 NW2d 721 (2002). Tax exemptions are to be strictly construed in favor of taxation, and not extended by implication. *Michigan Baptist Homes & Development Co v City of Ann Arbor*, 396 Mich 660, 669-670; 242 NW2d 749 (1976).

III. JURISDICTION AND STANDING

Respondent alleges that the Tribunal erred in denying its summary disposition on the grounds that the Tribunal lacked jurisdiction over the appeal and petitioners lacked standing to pursue the appeal. We disagree.

With regard to jurisdiction, respondent argues that the Tribunal erred in allowing the amendment of the petition, because such amendment was an impermissible addition of new parties in violation of the jurisdictional time requirements of MCL 205.735(2). We disagree.

The original, timely filed petition was captioned in the name of "Michigan Co-Tenancy Laboratory/Trinity Health." Trinity Health is a co-tenant member of MCL, and was so at the time the appeal was filed. MCL 205.373 allows a petitioner to invoke the Tribunal's jurisdiction through the timely filing of a petition. Thus, the jurisdiction of the Tribunal was properly invoked. Contrary to respondent's characterization, the Tribunal's amendment did not add new parties. The Tribunal found that "there are multiple co-owners and the co-owners will change from time-to-time as new amendments to the Agreement are adopted." Therefore, the Tribunal amended the name of petitioners to "Michigan Co-Tenancy Laboratory/Trinity Health, *et al.*" in order to correctly indicate that petitioners were all co-tenant members of MCL. Thus, rather than add parties, the petition was simply amended to reflect the correct names of the parties rather than referring to petitioners *in toto* as "Michigan Co-Tenancy Laboratory." We conclude that the Tribunal acted within its authority to amend the petition to clarify the *existing* parties to the dispute, not add new parties. See Mich Admin Code, R 792.10221(1) ("A petition or answer may be amended or supplemented by leave of the tribunal only. . . . [L]eave to amend or supplement shall be freely given when justice so requires.")

Further, to the extent that new hospitals became co-tenants during the pendency of this case, the Tribunal was empowered to add them as new parties to the dispute. Tribunal Rule 219, Mich Admin Code R 792.10219(1), provides that

The party who commences a proceeding shall be designated as the petitioner and the adverse party as the respondent. Parties may be added or dropped by order of the tribunal on its own initiative or on motion of any interested person at any stage of the proceedings and according to terms that are just.

These new co-tenants could not have been parties to the original petition, yet they possess an interest in the subject property. The Tribunal was within its authority to add these new co-tenants as parties.

Next, respondent argues that petitioners lacked standing to appeal the assessment, because the property tax was assessed to Warde, not petitioners. In support of this argument, respondent cites *Walgreen Co v Macomb Twp*, 280 Mich App 58, 62, 66-67; 760 NW2d 594 (2008), where this Court stated:

At issue is whether the Tax Tribunal correctly determined that, on the basis of those facts, petitioner lacked standing to challenge the tax assessments. The concept of standing in the context of a legal proceeding means that a party must have suffered an actual, particularized impairment of a *legally protected* interest, that the opposing party can in some way be shown to be responsible for that impairment, and that a favorable decision by a court could likely redress that impairment. See *Lee v. Macomb Co. Bd. of Comm'rs*, 464 Mich. 726, 739, 629 N.W.2d 900 (2001).

* * *

Petitioner was not “a person whose property is assessed on the assessment roll” or the agent of that person. Rather, the assessment roll showed that another individual was responsible for the taxes. The lease might make petitioner the agent of the person whose property is assessed, but no evidence thereof was submitted to the board of review. Petitioner, as the party seeking the benefit of standing, had the burden of showing standing. *Nat'l Wildlife Federation v. Cleveland Cliffs Iron Co.*, 471 Mich. 608, 630–631, 684 N.W.2d 800 (2004). For all of these reasons, we conclude that the Tax Tribunal did not err in dismissing petitioner's appeal on the basis that it lacked standing to challenge the 2003 tax assessment before the board of review.

At the time *Walgreen Co* was issued, the general statement it made about standing was correct. However, by the time the Tribunal issued its order denying summary disposition, *Lee* and *Nat'l Wildlife Federation* were overruled by *Lansing Schools Education Ass'n v Lansing Bd of Education*, 487 Mich 349, 349; 792 NW2d 686 (2010).

In *Lansing Schools*, our Supreme Court rejected a view of standing based on the federal standing requirements and returned to a more “limited, prudential approach.” *Id.* at 355. The Court stated that:

The purpose of the standing doctrine is to assess whether a litigant's interest in the issue is sufficient to “ensure sincere and vigorous advocacy.” Thus, the standing inquiry focuses on whether a litigant “is a proper party to request adjudication of a

particular issue and not whether the issue itself is justiciable.” [*Lansing Schools Educ Ass’n v Lansing Bd of Educ*, 487 Mich 349, 355; 792 NW2d 686 (2010) (citations omitted).]

Where a cause of action is not provided at law, “a court should, in its discretion, determine whether a litigant has standing.” *Id.* A prospective plaintiff lacks standing if it is not a real party in interest, because the “standing doctrine recognizes that litigation should be begun only by a party having an interest that will assure sincere and vigorous advocacy.” *City of Kalamazoo v Richland Twp*, 221 Mich App 531, 534; 562 NW2d 237 (1997), citing *Michigan Nat’l Bank v Mudgett*, 178 Mich App 677, 679; 444 NW2d 534 (1989).

However, although the general statement regarding standing in *Walgreen Co* is no longer accurate, we agree with the Tribunal’s conclusion. Here, the petitioners have an interest in the subject property—in fact they own the property. They thus have an interest in whether the property is tax exempt, and they have standing under the current approach of *Lansing Schools*.

Walgreen Co does not compel a different conclusion. In *Walgreen Co*, this Court determined that the petitioner was not “the person whose property is assessed on the assessment roll or . . . his or her agent” under MCL 211.30(4), and thus petitioner lacked standing to pursue an appeal of the assessment before a local board of review. *Walgreen Co*, 280 Mich App at 599. The petitioner in that case was a long-term lessee that was responsible for the payment of property taxes under its lease agreement with the owner of the property; the property owner was assessed the taxes, and the lessee attempted to appeal the assessment. *Id.* at 62-65. Here, the polar opposite has occurred; property tax has been assessed against a lessee of the property, and the property’s owner is attempting to appeal the assessment. By the plain language of MCL 211.30(4), petitioners are “the person[s] whose property is assessed on the assessment roll” notwithstanding the fact that the property was assessed *in the name of* another entity.

Further, MCL 205.373 allows “a party in interest” to petition the Tribunal regarding an improper assessment. In *Walgreen Co*, this Court implied that a party in interest was the party who is ultimately liable for the payment of tax on the property. *Id.* at 65-66. Here, although the property taxes were erroneously assessed to Warde, petitioners, as owners of the subject property, are ultimately responsible for the payment of the property taxes, if any, on the subject property.

We find that the Tribunal did not err in determining that it had jurisdiction over petitioners’ appeal, or that petitioners had standing to pursue the appeal.

IV. CHARITABLE TAX EXEMPTION

The Tribunal found that the subject property was exempt under both MCL 211.9(1)(a) and MCL 211.7o. We agree.

MCL 211.9(1)(a) provides that the following property is exempt from taxation:

The personal property of charitable, educational, and scientific institutions incorporated under the laws of this state. This exemption does not apply to secret or fraternal societies, but the personal property of all charitable homes of secret or

fraternal societies and nonprofit corporations that own and operate facilities for the aged and chronically ill in which the net income from the operation of the nonprofit corporations or secret or fraternal societies does not inure to the benefit of a person other than the residents is exempt.

However, “[t]he requirement that to be tax-exempt, an institution be incorporated within the state has been found to be unconstitutional.” *Wexford Medical Group v City of Cadillac*, 474 Mich 192, 203 n 5; 713 NW2d 734 (2006) (discussing a previous version of MCL 211.7o), citing *American Youth Foundation v Benona Twp*, 37 Mich App 722, 724; 195 NW2d 304 (1972) (discussing a previous version of MCL 211.9), in turn citing *WHYY v Glassboro*, 393 US 117; 89 S Ct 286; 21 L Ed 2d 242 (1968).

The requirement that an institution be incorporated in Michigan is severable from the remainder of the statute, such that the exemption is still available. *American Youth Foundation*, 37 Mich App at 724. Thus, MCL 211.9(1)(a) only requires that the personal property be owned by a charitable institution in order to be exempt from taxation. See *City of Ann Arbor v University Cellar, Inc*, 401 Mich 279, 289; 258 NW2d 1 (1977).

Here, the Tribunal heard evidence that the laboratory equipment was owned by the hospital co-tenants. Although respondent’s expert testified that under generally accepted accounting principles, the personal property should be considered property of Warde, the Tribunal found that “[t]he hospitals acquired, own and operate the laboratory equipment as tenants-in-common” and that “[t]he Lease Agreement leases to Warde only the right to use the excess capacity of the equipment” and concluded that “Warde . . . does not own the personal property equipment. Petitioner’s operating agreements specifically give an undivided ownership interest in the medical testing equipment to each co-tenant hospital. The operating agreements give no ownership interests to any other party or entity.”

We find no error in the Tribunal’s conclusion. As the Tribunal noted, all relevant documents, including the Co-Tenancy and Operating Agreement, Asset Purchase Agreement, Lease Agreement, and Bill of Sale, purport to convey 100% ownership of the property to petitioners, and disclaim any ownership interest on behalf of Warde. Further, the property at issue was purchased for the use and benefit of the hospital co-tenants, who retain control over the property. Each item of laboratory equipment is tagged with the name “Michigan Co-Tenancy Laboratory.” The laboratory itself is managed by a third-party contractor paid by the co-tenants to provide laboratory management services. The Tribunal did not err in determining that the plain language of the relevant documents, as well as the facts of this case, supported its finding that petitioners own the subject personal property. See *University Cellar*, 401 Mich at 291-292.

Because petitioners are charitable institutions that own the subject property, we affirm the Tribunal’s finding that the subject property is exempt from taxation under MCL 211.9(1)(a) as personal property of charitable institutions.

MCL 211.7o(1) provides that “[r]eal or personal property owned and occupied by a nonprofit charitable institution while occupied by that nonprofit charitable institution solely for the purposes for which that nonprofit charitable institution was incorporated is exempt from the collection of taxes under this act.”

Our Supreme Court has described the three-part test for determining whether subject property qualifies for this exemption as follows:

- (1) The [property] must be owned and occupied by the exemption claimant;
- (2) the exemption claimant must be a nonprofit charitable institution; and
- (3) the exemption exists only when the buildings and other property thereon are occupied by the claimant solely for the purposes for which it was incorporated. [*Wexford Medical Group*, 474 Mich at 203.]

Here, respondent argues that the petitioners do not “own and occupy” the subject personal property, and that the property is not used “solely” for charitable purposes. As stated above, the Tribunal found that petitioners own the subject property. The Tribunal also found that “the utilization of the testing equipment is predominantly used by the non-profit hospitals and not by Warde,” and further found that the rationale of *Hospital Purchasing Service of Mich v City of Hastings*, 11 Mich App 500, 510; 161 NW2d 759 (1968), applies to the instant case. In *Hospital Purchasing Service*, this Court found that a nonprofit corporation organized to purchase supplies for its member hospitals was exempt from taxation of its personal property under MCL 211.7o because it was “a non-profit corporation engaged exclusively in performing hospital services which otherwise would be performed by tax-exempt hospitals.” *Id.*

Respondent argues that the subject property is not “solely” used for charitable purposes, because excess capacity of the laboratory is leased to Warde, who sells it, at least occasionally, to for-profit hospitals. In *Webb Academy v Grand Rapids*, 209 Mich 523, 538-539; 177 NW 290 (1920), our Supreme Court held that incidental use of an educational institution’s property, during times when it would otherwise go unused, did not remove the property from tax-exempt status. A similar result was reached in *Saginaw County Agricultural Society v City of Saginaw*, 142 Mich App 173, 178; 368 NW2d 878 (1984), where this Court held that “tax exemption for property owned by agricultural societies is not lost by virtue of occasional or incidental use of other purposes” and concluded that the entire property was exempt notwithstanding the petitioners’ use of a small portion of the property for private storage.

The Tribunal heard evidence that Warde was only leased the use of testing equipment during times when the equipment and personnel would otherwise be idle. Further, co-tenants receive priority for testing over Warde. Testimony was also taken that indicated that the more testing that is performed using the laboratory equipment, the more the cost per unit of testing can be reduced, to the benefit of the co-tenants. Finally, the percentage of utilization of laboratory equipment by Warde was 36.6% in 1998, but decreased to approximately 10% for the last several years.

As in *Webb Academy*, the non-charitable use occurs only when the subject property would otherwise go unused. Further, the non-charitable use actually still benefits the charitable use of the property by reducing the cost per unit of testing. Finally, the lease of excess capacity to Warde is at all times subordinate to the co-tenant’s use of the subject property. We therefore find no error in the Tribunal’s grant of tax exempt status to the subject property pursuant to MCL 211.7o.

V. ISSUANCE OF SUBPOENAS

Respondent also argues that the Tribunal abused its discretion and denied respondent a fair hearing by only partially granting respondent's request for subpoenas on the eve of trial. We disagree. A trial court's decision regarding the issuance of subpoenas is reviewed for an abuse of discretion. See *Detroit Bar Ass'n v American Life Ins Co*, 264 Mich 495, 499; 250 NW 288 (1933).

Respondent notes that the language of the Tribunal Rule in place at the time of the hearing provides that the clerk "shall" issue subpoenas, and notes that the rule does not provide for review by the Tribunal judge, or objection by the other party, prior to the issuance of subpoenas. Mich Admin Code R 205.1280, rescinded by 2013 Mich Reg 6, effective March 20, 2013.¹ Respondent is correct that the rule uses the word "shall" rather than "may"; however, the Tribunal Rules provide that "the Tribunal may exclude irrelevant, immaterial, or unduly repetitious evidence." Mich Admin Code R 792.10255. In this case, the Tribunal noted that respondent's request for the production of individual tax returns was not relevant to the underlying exemption issue in this case and further noted that respondent's request for four officers of Laboratory Associates of Michigan, Inc was "cumulative and redundant." As the Tribunal was within its discretion to deny the admission of the testimony of these persons and to deny the admission of the requested documents, we find that it did not abuse its discretion in only partially granting respondent's subpoena request.

Further, to the extent that respondent was hampered by the "late" issuance of the subpoenas, this Court notes that the pendency of this case spanned almost five years before the Tribunal. Further, the trial date was set at the August 16, 2011 prehearing conference, yet respondent waited until September 6, 2011 to file its request for subpoenas, with the hearing scheduled for September 19, 2011. Respondent knew it needed to serve subpoenas at least three business days before the hearing, leaving a very short window of time for the Tribunal to receive and process its request and issue the subpoenas. We decline to allow respondent to benefit from an error to which it has contributed by plan or negligence. *Smith v Musgrove*, 372 Mich 329, 331; 125 NW2d 869 (1964).

Finally, because we affirm the trial court's grant of tax exemption under both MCL 211.9(1)(a) and MCL 211.7o, we also affirm the trial court's denial of respondent's motion for partial reconsideration. MCR 2.119(F)(1).

Affirmed.

/s/ Christopher M. Murray

/s/ Pat M. Donofrio

/s/ Mark T. Boonstra

¹ The current Tribunal Rule governing subpoenas, Mich Admin Code R 792.10253, provides that the Tribunal shall "if appropriate" issue a subpoena for the production of evidence at a hearing or deposition.