

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

Karen Shanahan,) Case No. CI08-2348
)
Plaintiff,) Judge Charles Doneghy
)
vs.) **DEFENDANT'S SUPPLEMENT TO ITS**
) **OPPOSITION TO PLAINTIFF'S MOTION**
City of Toledo,) **FOR CLASS CERTIFICATION**
)
Defendant.) Adam Loukx, Acting Law Director
) (0062158)
) Keith J. Winterhalter, Senior Attorney
) (0037834)
) City of Toledo, Department of Law
) One Government Center, Suite 1710
) Toledo, Ohio 43604-2293
) Telephone: (419) 245-1020
) Fax: (419) 245-1090
)
) Counsel for Defendant
)
)

Plaintiff's Amended Complaint contends that the City of Toledo has enacted an invalid tax for which she seeks declaratory, injunctive and monetary relief for the refund of all monies collected under the invalid tax. See Amended Complaint. The Court of Common Pleas jurisdiction to enjoin the illegal levy or collection of taxes and to entertain actions to recover them under R.C. 2723.01. In fact, prior to enactment of the statute, there was practically no remedy to recover an illegal assessment. In *Pennsylvania Railroad Co. v. Sciato-Sandusky Conservancy District* (1956), 101 Ohio App. 61, the court stated the purpose of the original statute:

Prior to 1856, there was practically no remedy either at law or in equity to recover an illegal assessment. The 1856 statute created new statutory rights of action not theretofore existing. *Stephan v. Daniels*, 27 Ohio St. 527, 533.

Id. at 66. Thus, if Plaintiff in the instant action is to proceed, she does so under Chapter 2723.¹

A party seeking to recover an illegal tax or assessment under Chapter 2723 must satisfy the requirements of R.C. 2723.03, which provides:

If a plaintiff in an action to recover taxes or assessments, or both, alleges and proves that he or the corporation or deceased person whose estate he represents, at the time of paying such taxes or assessments, filed a written protest as to the portion sought to be recovered, specifying the nature of his intention to sue under sections 2723.01 to 2723.05 inclusive, of the Revised Code, such action shall not be dismissed on the ground that the taxes or assessments, sought to be recovered, were voluntarily paid.

(Emphasis added). Id. Thus, the only individuals who can make a claim for the recovery of illegal taxes or assessments are those who have filed a written protest of the payment and also have given notice of their intent to sue.

Plaintiff's proposed class consists of:

[A]ll current and former property owners in the City of Toledo who are or were required to pay a tax on their property for refuse collection without voter approval by referendum or City Council approval for the period of about April 28, 2007, until the present, and including, for the purposes of injunctive and declaratory relief, future property owners in the City of Toledo and renters, past and future, who pay the tax by contract with their landlords.

Amended Complaint, paragraph 7. This proposed class definition, however, is overbroad because it includes individuals who do not satisfy the written protest and notice requirements of R.C. 2723.03.

In *Gottlieb v. City of South Euclid* (2004), 157 Ohio App.3d 250, the court addressed the class certification of individuals seeking to enjoin the collection of an illegal licensing fee and to recover the fee.² The court reviewed the appropriateness of the class certification for the

¹ Although Plaintiff in the case at bar does not expressly plead a cause of action under R.C. 2723, for purposes of the class certification procedure, the City presumes that the allegations in the Amended Complaint are sufficient to state a claim under R.C. 2723.

² The terms "taxes and assessments" as used in R.C. 2723.01 includes licensing fees. *Paramount Film Distributing Corp. v. Tracy* (1963), 175 Ohio St. 55.

damages claim separately from the injunctive relief claim. With respect to the damages claim, the court stated:

While we recognize that the entire action was certified for class treatment in *Marchionda*, we do not believe certification of a damages claim to recover a license fee is appropriate in the absence of evidence showing that the class representatives paid the fee under protest and that the class, as restricted to those paying the fee under protest, meets the numerosity requirement. See *Hoffman v. Alliance* (May 20, 1996), Stark App. No. 1995CA00253, 1996 WL 363841 (finding that class certification was not appropriate where representatives did not file a written protest). ***

(Emphasis added). *Id.* at paragraph 32. The court remanded the case to the trial court stating that, “[t]he trial court must consider whether these requirements have been met.” *Id.* at paragraph 33.

In the case at bar, the class, pursuant to R.C. 2723.03, must be limited to those individuals who filed a written protest of the refuse collection tax and a notice of their intent to sue. R.C. 2723.03, *Gottlieb, supra*. To date, there has been no evidence that the representative Plaintiff has met these requirements. Moreover, there is no evidence that the class, as restricted to those paying the refuse collection tax under protest and giving notice of intent to sue, meets the numerosity requirement of Rule 23. As a result, class certification for the damages claim is not warranted.

In *Gottlieb*, the court also addressed the appropriateness of class certification for injunctive or declaratory relief. The court stated:

***Civ. R. 23(B)(2) permits class certifications when the defendant has acted in a manner generally applicable to the class, making injunctive or declaratory relief appropriate. (Citation omitted) However, it is not necessary to certify a Civ. R. 23(B)(2) injunctive class where an individual judgment as to the constitutionality of a statute or ordinance will enure to the benefit of all potential class members because the statute or ordinance will be found either constitutional or unconstitutional. *Id.* As stated in *State ex rel. Horvath*, “[c]ertification of the cause as a class action prior to the determination of the constitutionality of the statute may result in unnecessary discovery

procedures and the unjustified and unnecessary expenditure of judicial time and energy to determine a class action. *** [W]e must be ever mindful of the policy behind a class action lawsuit, i.e., to simplify the resolution of complex litigation, not to complicate it unnecessarily.” Id. Put simply, class certification is not the superior method for dealing with such constitutional claims, standing alone.

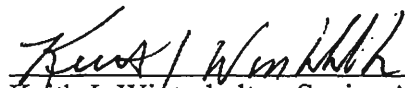
(Emphasis added). Id. at paragraph 33.

In the instant case, just as in *Gottlieb*, class certification as to the declaratory and injunctive relief regarding the ordinance is not appropriate. In this case, an individual judgment declaring the ordinance unconstitutional and enjoining its enforcement will enure to the benefit of all potential class members whether the class has been certified or not. As a result, class certification for declaratory or injunctive relief in the case at bar is unnecessary. Id.

As indicated above, Plaintiff’s proposed class definition is overbroad because it is not limited to property owners in the City of Toledo who were required to pay a tax on their property for refuse collection, and who filed a written protest and notice of intent to sue to recover the tax. Further, Plaintiff has not established that she meets the requirements of R.C. 2723.03 and there has been no showing that the proposed class, as restricted to those filing a written protest and notice, meets the numerosity requirement of Rule 23. Finally, if certification is not warranted for the damages claim, it is not necessary to certify a class because an individual judgment on the declaratory and injunctive claims will enure to the benefit of all potential class members. As a result, Plaintiff’s Motion for Class Certification should be denied.

Respectfully submitted,

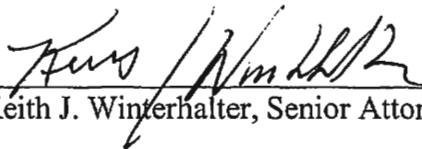
ADAM W. LOUKX, ACTING LAW DIRECTOR



Keith J. Winterhalter, Senior Attorney
Counsel for Defendant

CERTIFICATION OF SERVICE

This is to certify that a copy of the foregoing Supplement to its Opposition to Plaintiff's Motion for Class Certification, was sent by ordinary U.S. mail to Kurt J. Wicklund, Esq. and Scott A. Ciolek, Esq., Attorneys for Plaintiff, at Ciolek & Wicklund, 520 Madison Avenue, Suite 820, Toledo, OH 43604 and Anthony DeGidio, Esq., 28366 Kensington Lane, Perrysburg, OH 43551, this 21st day of November, 2008.



Keith J. Winterhalter, Senior Attorney

KJW/db/Shanahan-SupplementToOpposition
11/134/08