

OHIO BOARD OF TAX APPEALS

Board of Education of the Westerville City Schools,)	
)	
Appellant,)	CASE NO. 2003-P-460
)	
vs.)	(REAL PROPERTY TAX)
)	
Franklin County Board of Revision, Franklin County Auditor and ARFO Eastwind LLC,)	DECISION AND ORDER
)	
Appellees.)	

APPEARANCES:

For the Appellant Board of Education	-	Rich, Crites and Dittmer, LLC Jeffrey A. Rich Mark H. Gillis James R. Gorry 300 East Broad Street, Suite 300 Columbus, Ohio 43215-3704
For the County Appellees	-	Ronald J. O'Brien Franklin County Prosecuting Attorney Paul M. Stickel Assistant Prosecuting Attorney 373 South High Street, 20th Floor Columbus, Ohio 43215
For the Appellee Property Owner	-	Wayne E. Petkovic Attorney at Law 840 Brittany Drive Delaware, Ohio 43015

Entered May 6, 2005

Ms. Margulies, Mr. Eberhart, and Mr. Dunlap concur.

We now consider the board of education's motion to remand this matter to the Franklin County Board of Revision with instructions to dismiss the original complaint filed on behalf of ARFO Eastwind LLC. The board of education asserts that ARFO Eastwind LLC improperly filed two complaints within the same triennium in

violation of the provisions of R.C. 5715.19(A)(2).¹ The appellees concede that two original complaints were filed within the same triennium.² Appellees also acknowledge that ARFO Eastwind LLC failed to allege any of the four circumstances set forth in R.C. 5715.19(A)(2) in its 2001 tax year complaint. Instead, they argue that R.C. 5715.19(A)(2) does not require ARFO Eastwind LLC to allege the existence of any of the four circumstances on the face of its original complaint. The appellees state in their joint memorandum: “Appellees believe that *** the taxpayer may assert and then prove such claims at a public hearing before the BOR.”³

The record before us consists of the notice of appeal, the statutory transcript filed by the Franklin County Auditor in accordance with the provisions of R.C. 5717.01, the memoranda filed by counsel for the respective parties, and the record of the hearing we conducted upon the motion. Upon careful review of this record, we find that the board of education’s motion has merit.

R.C. 5715.19(A)(2) provides:

“No person, board, or officer *shall file a complaint* against the valuation or assessment of any parcel that appears on the tax list if it filed a complaint against the valuation or assessment of that parcel for any prior tax year in the same interim period, *unless the person, board, or officer alleges* that the valuation or assessment should be changed due to

¹ 1999 was a sexennial reappraisal year for Franklin County. Thus, the triennium extended from 1999 through 2001. The board of education offers a certified copy of an original complaint filed on behalf of ARFO Eastwind LLC for tax year 2000. See Motion to Remand, Exhibit A. The present matter began with an original complaint filed on behalf of ARFO Eastwind LLC for tax year 2001. See Statutory Transcript, Exhibit 1.

² The Appellees state in their joint memorandum: “Appellees agree that this complaint was the second complaint filed by ARFO Eastwind LLC during the interim period.” See “Brief of Appellees Franklin County Board of Revision, Franklin County Auditor and ARFO Eastwind LLC,” page 2, footnote 1.

³ See “Brief of Appellees Franklin County Board of Revision, Franklin County Auditor and ARFO Eastwind LLC,” page 6.

one or more of the following circumstances that occurred after the tax lien date for the tax year for which the prior complaint was filed and that circumstance was not taken into consideration with respect to the prior complaint:

“(a) The property was sold in an arm’s length transaction, as described in section 5713.03 of the Revised Code;

“(b) The property lost value due to some casualty;

“(c) Substantial improvement was added to the property;

“(d) An increase or decrease of at least fifteen per cent in the property’s occupancy has had a substantial economic impact on the property.” (Emphasis added.)

Thus, the question before us is: Did ARFO Eastwind LLC “allege” one of the four enumerated circumstances in the manner contemplated by the General Assembly as manifested in R.C. 5715.19(A)(2)?

The Supreme Court observed in *Wachendorf v. Shaver* (1948), 149 Ohio

St. 231:

“The only mode in which the will of the legislature is spoken is the statute itself. Hence, in the construction of statutes, it is the legislative intent manifested in the statute that is of importance, and such intent must be determined primarily from the language of the statute, which affords the best means of the exposition of the intent. *** [T]he Legislature must be assumed or presumed to know the meaning of words, to have used the words of a statute advisedly and to have expressed legislative intent by the use of the words found in the statute ***.” *Id* at 236 – 237.

And in *Holiday Inn, Inc. v. Limbach* (1990), 48 Ohio St. 3d 34, the

Supreme Court stated:

“The question regarding what the General Assembly intended to enact will not be entertained when the

meaning of what was enacted is clear and plainly expressed. *Slinguff v. Weaver* (1902), 66 Ohio St. 621, 64 N.E. 574, paragraph two of the syllabus. In ascertaining legislative intent, this court will give effect to the words used in the statute and it is not the duty of this court to insert words not used.” Id. at 36.

Similarly, the court in *City of Heath v. Licking County Regional Airport*

(1967), 16 Ohio Misc. 69, observed:

“In the construction of a statute the court must be guided by it as it exists. It is not the function of the court to set forth what it thinks the statute under construction should provide. There is no authority under any rule of statutory construction for a court to add to, enlarge or extend the provisions of the statute to meet a situation not provided for, or contemplated thereby.” Id. at 78 – 79.

In *Provident Bank v. Wood* (1973), 36 Ohio St.2d 101, the Supreme

Court noted:

“It is a cardinal rule that a court must look first to the language of the statute itself to determine the legislative intent. See, e.g., *Katz v. Department of Liquor Control* (1957), 166 Ohio St. 229. If that inquiry reveals that the statute conveys a meaning which is clear, unequivocal and definite, at that point the interpretative effort is at an end, and the statute must be applied accordingly.” Id. at 105 - 106.

Finally, the Supreme Court held in *State, ex rel. Stilson v. Ferguson*

(1950), 154 Ohio St. 139:

“As a general rule words of a statute in common use and other than the terms of art or science will be construed in their ordinary acceptance and significance and with the meaning commonly attributed to them. Indeed, the intention of the General Assembly to use statutory phraseology in such a manner is presumed.” Id. at 147.

In this regard, we would observe that Black's Law Dictionary (4th Ed. 1968) defines the term *allege* as: "To state, recite, assert, or charge; to make an allegation. To affirm, assert or declare." Id. at 99. The same edition of Black's Law Dictionary defines *allegation* as: "The assertion, declaration, or statement of a party to an action, *made in a pleading, setting out what he expects to prove.*" (Emphasis added.) Id. at 99. A later version of Black's Law Dictionary⁴ defines *allegation* as: "1. The act of declaring something to be true. 2. Something declared or asserted as a matter of fact, *esp. in a legal pleading*; a party's formal statement of a factual matter as being true or provable, *without its having yet been proved.*" (Emphasis added.) Id. at 74. And Black's Law Dictionary (7th Ed. 1999), defines *alleged* as: "1. Asserted to be true as described. 2. Accused *but not yet tried.*" (Emphasis added.)

From the foregoing, we discern a distinction between an *allegation* ("esp. in a legal pleading") on the one hand, and *proof* of the matter asserted on the other hand. The General Assembly has required in R.C. 5715.19(A)(2) that an allegation be made. What is more, the act of filing a complaint is specifically made conditional upon the allegation requirement. R.C. 5715.19(A)(2) states: "No person, board, or officer shall file a complaint *** *unless the person, board, or officer alleges* ***." (Emphasis added.) Undeniably, a complainant may be required to establish the truth of his or her allegation at a later time. Nonetheless, it is the allegation - - - not

⁴ Black's Law Dictionary (7th Ed. 1999) 74.

the proof - - - that the General Assembly makes expressly conditional upon the filing of a valid complaint.

In *Gammarino v. Hamilton Cty. Bd. of Revision* (1994), 71 Ohio St.3d 388, the Supreme Court observed:

“R.C. 5715.19(A)(2) clearly provides that only one complaint can be filed during each interim period absent a showing of a change in circumstances as described in R.C. 5715.19(A)(2)(a) through (d). Gammarino never disputed that he had filed two complaints within the same interim period, and *in his second complaint, he failed to assert* the applicability of any of the circumstances enumerated in R.C. 5715.19(A)(2)(a) through (d).

“Therefore, the BTA erred in failing to grant the auditor’s motion to dismiss Gammarino’s appeal on the basis that a complaint for the first year of the same triennium had already been filed.” *Id.* at 289 – 390. (Emphasis added.)

Further, the Supreme Court held in *Columbia Toledo Corp. v. Lucas Cty. Bd. of Revision* (1996), 76 Ohio St.3d 361:

“R.C. 5715.19(A)(2) provides that no second complaint shall be filed in the same interim period by the same person, board or officer for the same property ‘*unless certain allegations are made.*’ The complaint in question was the second complaint filed in the same interim period on the same property. In *Gammarino v. Hamilton Cty. Bd. of Revision* (1994), 71 Ohio St.3d 388, 390, 643 N.E.2d 1143, 1144, we held that the BTA should have granted the auditor’s motion to dismiss because *in his second complaint Gammarino had ‘failed to assert the applicability of any of the circumstances enumerated in R.C. 5715.19(A)(2)(a) through (d).’*

“***

“The statute clearly places the burden on the taxpayer to allege one of the enumerated circumstances *in order to file*

a second complaint in the same triennium period.”
Id. at 362 – 363. (Emphasis added.)

Moreover, the Hamilton County Court of Appeals held in the syllabus to *F&R Ltd. Part. v. Hamilton Cty. Bd. of Revision* (Sept. 25, 1998), Hamilton App. Nos. C-970888, C-970940, unreported:

“Where a taxpayer failed to specifically allege one of the four statutory exceptions set forth in R.C. 5715.19(A)(2) in its second complaint challenging the valuation of property within a three-year interim period, the board of revision was without subject-matter jurisdiction to entertain the complaint.”

And the court further noted in the body of its opinion:

“In the case sub judice, F&R did not allege a specific statutory exception *on the face of its second complaint*. *** Therefore, the BOR was without jurisdiction to entertain F&R’s complaint challenging the valuation of the Tower for the 1994 tax year.” Id. at 7. (Emphasis added.)

We, too, have consistently construed R.C. 5715.19(A)(2) in the same manner. In *Euclid City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (Feb. 6, 2004), BTA Nos. 2003-M-1048, 1049, unreported, we stated:

“Nowhere on the face of the complaint did the property owner allege a statutory reason for the second filing within a triennial. *** *The face of the complaint* must specifically reveal the reasons justifying a second filing.” Id. at 7. (Emphasis added.)

In *W9/GLM Real Estate Ltd. Part. v. Portage Cty. Bd. of Revision* (Aug. 8, 2003), BTA No. 2002-M-2136, unreported, we held:

“As *the face of the complaint* fails to identify any of the four circumstances found in R.C. 5715.19(A)(2)(a) through (d), W9/GLM did not allege circumstances required to excuse an earlier filing. Therefore, the

complaint filed by W9/GLM did not vest jurisdiction.”
Id. at 8. (Emphasis added.)

We observed in *Kogelman v. Cuyahoga Cty. Bd. of Revision*
(Oct. 19, 2001), BTA No. 2000-N-1895, unreported:

“The instant complaint is the second complaint filed in the same interim period. In order to satisfy R.C. 5715.19(A)(2), circumstances must be set forth clearly *on the face of the complaint* which permit the filing of a second complaint in the same interim period.”
Id. at 3 – 4. (Emphasis added.)

Likewise, in *Kane v. Hamilton Cty. Bd. of Revision* (Jan. 29, 1999),
BTA No. 1998-M-937, unreported, we stated:

“The second complaint filed on behalf of the appellant failed to allege any reason for the second filing. In fact, question 14 *on the face of the complaint*, which solicits such statutory circumstances, is left blank. Therefore, the BOR was correct when it refused to consider value ***.”
Id. at 5 – 6. (Emphasis added.)

And we found in *Cuyahoga Hgts. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (Apr. 18, 1997), BTA Nos. 1995-R-258, 259, unreported:

“A second complaint in the same triennial period that does not allege one of the conditions outlined in R.C. 5715.19(A)(2) is jurisdictionally defective. *Gammarino v. Hamilton Cty. Bd. of Revision* (1994), 71 Ohio St.3d 388; see, also, *Young v. Cuyahoga Cty. Bd. of Revision* (Oct. 13, 1995), B.T.A. Case No. 95-J-134, unreported. The information satisfying R.C. 5715.19(A)(2) must be set forth clearly *on the face of the complaint*. *Columbia Toledo Corp. Lucas Cty. Bd. of Revision* (1996), 76 Ohio St.3d 361; see, also, *Tri-Columbus Associates v. Franklin Cty. Bd. of Revision* (June 30, 1995), B.T.A. Case No. 94-M-884, unreported. Absent a clear indication of the statutory basis *on its face*, the second complaint is treated as void ab initio. *Gupta v. Cuyahoga Cty. Bd. of Revision* (Apr. 21, 1995), B.T.A.

Case No. 93-M-1224, unreported; see, also, *Williams v. Cuyahoga Cty. Bd. of Revision* (Jan. 12, 1996), B.T.A. Case No. 95-N-125, unreported.” Id. at 5 – 6. (Emphasis added.)

At the hearing we conducted upon the motion, the property owner expressed reliance upon the Supreme Court’s decision in *Cleveland Elec. Illum. Co.*⁵ But *Cleveland Elec. Illum. Co.* deals with questions seven and eight of the DTE – 1 complaint form, which the majority determined merely sought opinion or argument. The majority opinion also found substantial compliance in certain instances. In contrast, specific verifiable factual information is sought in the portions of the DTE – 1 complaint form now before us. Moreover, ARFO Eastwind LLC offered no response, whatsoever, to the information solicited. Thus, we find no question of “substantial compliance” in the matter sub judice. With regard to the somewhat amorphous “core of procedural efficiency” standard employed to determine whether a deficiency is jurisdictional in nature, we would observe that the information concerning the four circumstances set forth in R.C. 5715.19(A)(2) is solicited for the purpose of demonstrating the propriety of a second complaint filed within the same triennium. It would appear that failure to respond to this inquiry may adversely affect core procedural efficiency requirements by placing opposing parties in the untenable position of expending time, money and effort preparing for a hearing on the merits,

⁵ H.R. at 22. *Cleveland Elec. Illum. Co. v. Lake Cty. Bd. of Revision*, consolidated (1996), 76 Ohio St.3d 1474, reversed 80 Ohio St.3d 591, 1998 Ohio 179, argument before full court granted (2001), 93 Ohio St.3d 1461, consolidated (2002), 94 Ohio St.3d 1503, affirmed in part, reversed in part, and remanded 96 Ohio St.3d 165, 2002-Ohio-4033, motion for reconsideration denied 96 Ohio St.3d 1527, 2002-Ohio-5303, motion for reconsideration denied 97 Ohio St.3d 1427, 2002-Ohio-5876, remanded 100 Ohio St.3d 1474, 2003-Ohio-5917. We presume ARFO Eastwind LLC’s reference at our merit

only to find out subsequently that a complainant is unable to satisfy the conditions imposed by the General Assembly in the first instance.

Upon careful review of the provisions of R.C. 5715.19(A)(2) and the foregoing authorities, we find that the General Assembly has adequately manifested its intention that the allegation requirement in R.C. 5715.19(A)(2) is intended to be a precondition to the filing of a valid complaint, and is thus intended to be made contemporaneously with the filing of the complaint. Subsequent proof of the matter asserted at a merit hearing is insufficient to satisfy this requirement. Indeed, the appellees' proposed construction would require us to accept the proposition that a complaint that fails to satisfy the express requirements of the statute on the day it is filed may nonetheless be resurrected by an antedated act, thus relegating the validity of the complaint to a state of ambiguity during the interim time period. From the time of filing until the merit hearing the complaint would remain filed without any allegation regarding the four circumstances set forth in subsections (a) through (d), thus violating the express provisions of R.C. 5715.19(A)(2). While we find dismissal harsh under the facts of this case, we believe the General Assembly is the appropriate body to address the matter.⁶ As the Supreme Court reaffirmed in *Cleveland Elec. Illum. Co. v. Lake Cty. Bd. of Revision*, 96 Ohio St.3d 165, 2002-Ohio-4033:

“In the filing of appeals, we have held that ‘where a statute confers the right of appeal, adherence to the

Footnote contd.

hearing is to the court's opinion in *Cleveland Elec. Illum. Co. v. Lake Cty. Bd. of Revision*, 80 Ohio St.3d 591, 1998-Ohio-179.

⁶ The parties do not appear to dispute that a decrease of at least fifteen per cent in the property's occupancy occurred. See R.C. 5715.19(A)(2)(d).

conditions thereby imposed is essential to the enjoyment of the right conferred.” Id. at 168.

For each of the foregoing reasons, we find that ARFO Eastwind LLC has failed to comply with the conditions imposed by the General Assembly in R.C. 5715.19(A)(2) for the filing of a valid complaint. Accordingly, this matter is remanded to the Franklin County Board of Revision with instructions to dismiss the underlying original complaint.

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