

STATE OF MICHIGAN
DEPARTMENT OF ENERGY, LABOR AND ECONOMIC GROWTH
MICHIGAN TAX TRIBUNAL

Kalamazoo Institute of Arts,
Petitioner,

v

MTT Docket No. 333648

City of Kalamazoo,
Respondent.

Tribunal Judge Presiding
Steven H. Lasher

ORDER DENYING PETITIONER'S MOTION FOR SUMMARY DISPOSITION PURSUANT
TO MCR 2.116(C)(10)

ORDER GRANTING SUMMARY DISPOSITION IN FAVOR OF RESPONDENT
PURSUANT TO MCR 2.116(D)(2)

I. PROCEDURAL HISTORY

Petitioner, Kalamazoo Institute of Arts, is a Michigan non-profit corporation. The parcel at issue is improved real property that was acquired by Petitioner on or about August 31, 2006.

Petitioner appeared at the 2007 March Board of Review to request an exemption, pursuant to MCL 211.7o, from the tax assessment levied by Respondent, City of Kalamazoo. Respondent's Board of Review denied the request by notice issued on or about March 28, 2007. Petitioner filed the instant appeal on May 24, 2007.

On June 12, 2007, Respondent filed an answer to the petition.

On May 21, 2010, Petitioner filed a Motion for Summary Disposition, supporting brief, and five supporting affidavits. Petitioner moves pursuant to MCR 2.116(C)(10) and states that there is no genuine issue of material fact and Petitioner is entitled to judgment as a matter of law.

On June 11, 2010, Respondent filed its Response and Brief in Opposition to Petitioner's Motion for Summary Disposition with two supporting affidavits.

II. PETITIONER'S CONTENTIONS

Petitioner contends that it qualifies for the exemption at issue under both MCL 211.7o(3) and MCL 211.7o(1). First, Petitioner contends that “[u]nder MCL 211.7o(3), real property is entitled to be tax-exempt where it is owned by a non-profit charitable institution, loaned or made available to another non-profit charitable institution, and occupied by the tenant non-profit for purposes for which the tenant non-profit was organized.” Citing the four-part test adopted by the Michigan Court of Appeals in *McLaren Regional Medical Center v City of Owosso*, 275 Mich App 401; 738 NW2d 777 (2007), Petitioner contends that “(1) it is a ‘non-profit charitable institution’; (2) that New Year’s Fest of Kalamazoo, Inc. as a tenant/occupant of the subject property is also a ‘non-profit charitable institution’; (3) the tenant’s occupation of the property was solely for the purposes for which it was organized or established; and (4) the property would be exempt if the owner occupied it solely for the purposes for which it was organized or established.” Petitioner states that “both KIA’s ownership, and the tenancy by New Year’s Fest of Kalamazoo, Inc., meet the *McLaren* test” as both non-profit corporations “are charitable institutions qualified under Section 501(c)(3) of the Internal Revenue Code,” and the subject property was made available to and used by New Year’s Fest of Kalamazoo, Inc. “solely for the purposes for which that non-profit charitable institution ... was organized.”

Petitioner further contends that, independent of its qualification for the exemption under MCL 211.7o(3) cited above, Petitioner also qualifies based on its own use under MCL 211.7o(1). Petitioner asserts that “[u]nder Michigan law, vacant property is not necessarily ‘unoccupied’ for purposes of determining tax-exempt status.” Specifically, Petitioner cites *Kalamazoo Nature Center v Cooper Township*, 104 Mich App 657; 305 NW2d 283 (1981), which stated:

While we agree with the Tax Tribunal that the granting of a tax exemption requires that the lands be used for the purposes for which the exemption is sought and further agree that in most instances physical use of the property is demanded, we cannot agree that in the case before us physical use is a condition precedent to exemption Nothing in the statute requires physical use. (Emphasis omitted)

Petitioner argues that, although “KIA had not yet physically occupied the former church building,” occupation was not necessary so long as the subject property was not “occupied for a use inconsistent with charitable, benevolent, educational or religious purposes.” Petitioner states that “[c]learly the arts and educational programs of the KIA, which the KIA intends for the property at 414 West South Street, are not inconsistent with permitted non-profit uses.”

Petitioner further contends that “KIA is, and on December 31, 2006, was, a non-profit corporation...owned the subject property...had constructive possession of the subject property...” and worked with “experts for (i) structural review, (ii) parapet wall and other repairs, and (iii) space planning and studies for re-use of the former church building...in furtherance of its mission.” Petitioner further asserts that neither Petitioner nor any licensee “has . . . occupied or used the subject property in any manner inconsistent with charitable, educational, scientific, or religious purposes” Based on these factors, Petitioner argues that the subject property qualifies for exemption pursuant to MCL 211.7o(1).

III. RESPONDENT’S CONTENTIONS

Respondent contends that granting Summary Disposition in favor of Petitioner would be inappropriate given the limited development of the facts of this case. Respondent further contends that in the event the Tribunal does not agree, Petitioner is not entitled to judgment as a matter of law as Petitioner does not meet the requirements of MCL 211.7o.

Respondent, via its Response to Petitioner's Motion for Summary Disposition, concedes that,

. . . for the most part the significant and relevant facts regarding Petitioner's purchase of the property in question, its existence as a non-profit organization, its hiring of experts and consultants, the non-profit status of New Year's Fest of Kalamazoo, Inc., and the use of the former church building for a maximum of 6 hours, as one of many venues to host entertainers during the City's New Year's Eve Fest, on December 31, 2006 are not in dispute.

However, Respondent disputes whether either of Petitioner's two contended uses meets the requirements of MCL 211.7o. Respondent contends that Petitioner did not occupy or use the subject property consistent with MCL 211.7o as of tax day. Respondent further asserts that its tenant New Year's Fest of Kalamazoo, Inc.'s limited use is also insufficient to meet the requirements of MCL 211.7o.

Respondent contends that "Petitioner was not using and occupying the subject property consistent with its charitable or educational purposes" as of December 31, 2006. Respondent asserts that "Petitioner's hiring of consultants and experts to explore options for future use of the former church building does not equate to occupying the property in accordance with such stated purpose." Respondent contends that actual use consistent with the organization's stated and qualifying purpose is required to receive the exemption.

Respondent distinguishes between Petitioner's cited case law and the facts of the instant case. Specifically, Respondent notes that the determinations in *Kalamazoo Nature Center v Cooper Township*, 104 Mich App 657 (1981) and *Chauncey and Marion Deering McCormick Foundation v Wawatam Township*, 196 Mich App 179 (1992) turned on use of "significant acres of land, which was mostly inaccessible to such organizations' patrons." Given the purposes of the groups and the nature of the underlying property, use of a smaller portion of a large parcel was found to be sufficient. Respondent distinguishes the facts of the instant case from the cases cited by Petitioner because in this case, Respondent contends that Petitioner had access to all of the subject property but did not use or occupy any portion of the property in furtherance of its stated purpose as of December 31, 2006.

Respondent further contends that Petitioner's alternative position, that use by a third party non-profit group on New Year's Eve qualified Petitioner for the exemption, also falls short of the requirements of MCL 211.7o. Respondent states that in *Liberty Hill Housing Corporation v City of Livonia*, 480 Mich 44 (2008), the "Supreme Court clearly held that the tax-exemption under MCL 211.7o requires both use and occupancy by the charitable organization claiming the tax-exemption." Respondent contends that Petitioner's claim through a third party does not comply with the Court's holding.

However, if leasing the subject property to another non-profit organization or allowing its use by that non-profit organization does qualify Petitioner for the exemption, Respondent contends that use by ". . . 2 entertainers who performed for a maximum total of 6 hours" still fails to meet the requirements of MCL 211.7o(3). Respondent asserts that the limited use for one evening, on tax day, is not sufficient occupation of the subject property as is required by MCL 211.7o.

IV. FINDINGS OF FACT

Based on a review of the Motions, Affidavits, and case file, the Tribunal finds the following:

1. The Kalamazoo Institute of Arts (Petitioner) is a Michigan nonprofit corporation incorporated on June 19, 1924.
2. The subject property is located at 314 Park Street in Kalamazoo, Michigan.
3. Petitioner purchased the subject property on August 31, 2006 from the grantor-seller First Church of Christ, Scientist, an exempt organization under section 501(c)(3) of the IRC.
4. Article III of Petitioner's articles of incorporation provides the following purpose:
To further the development of interest and education in and of regard and appreciation for the various arts, to establish and maintain museums, and to acquire, by purchase, gift or otherwise, hold and own property incident to such purposes.
5. Petitioner, after acquiring the subject property but prior to December 31, 2006, consulted with or received services from various professionals to plan and begin needed and desired repairs.

6. Petitioner's renovations or repairs to the subject property were not completed prior to December 31, 2006.
7. The subject property was not occupied by Petitioner for its stated purpose as of December 31, 2006.
8. Petitioner loaned or leased the subject property to New Year's Fest of Kalamazoo, Inc., also an IRC 501(c)(3) organization, for an event held December 31, 2006.
9. New Year's Fest of Kalamazoo, Inc. used the subject property for an event held on December 31, 2006.
10. The subject property was granted an exemption pursuant to MCL 211.7o for the 2008 tax year.

V. APPLICABLE LAW

Petitioner moves for summary disposition pursuant to MCR 2.116(C)(10), which provides the following grounds upon which a summary disposition motion may be based: "Except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." There is no specific tribunal rule governing motions for summary disposition. As such, the Tribunal is bound to follow the Michigan Rules of Court in rendering a decision on such a motion. TTR 111(4).

The Michigan Supreme Court, in *Quinto v Cross and Peters Co*, 451 Mich 358; 547 NW2d 314 (1996), provided the following explanation of MCR 2.116(C)(10).

MCR 2.116 is modeled in part on Rule 56(e) of the Federal Rules of Civil Procedure...[T]he initial burden of production is on the moving party, and the moving party may satisfy the burden in one of two ways.

First, the moving party may submit affirmative evidence that negates an essential element of the nonmoving party's claim. Second, the moving party may demonstrate to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. If the nonmoving party cannot muster sufficient evidence to make out its claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law.

In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).

In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id.* at 361-363. (Citations omitted.)

“In Michigan, exemptions from taxation are to be strictly construed in favor of the taxing unit.” *Ladies Literary Club v Grand Rapids*, 409 Mich 748; 298 NW2d 422 (1980). Therefore, it is Petitioner’s burden to establish facts and evidence to support its position that the requirements for an exemption have been met.

MCL 211.2 states, in pertinent part, “[t]he taxable status of persons and real and personal property for a tax year shall be determined as of each December 31 of the immediately preceding year, which is considered the tax day.” Petitioner’s exemption claim is based on the taxable status of real property, and thus, must be evaluated as of December 31, 2006 for tax year 2007.

The exemption at issue is found in MCL 211.7o, which states in pertinent part: “[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 it was incorporated is exempt from the collection of taxes under this act.”

In *Wexford Medical Group v City of Cadillac*, 474 Mich 192; 713 NW2d 734 (2006), the Supreme Court changed the test for a charitable exemption previously affirmed in *Ladies Literary Club, supra*. The Court restated the test in three parts, and required that:

- (1) the real estate 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 building and other property thereon are occupied by the claimant solely for the purpose for which it was incorporated.

VI. ANALYSIS AND CONCLUSIONS OF LAW

The Tribunal has carefully considered Petitioner's motion and Respondent's Response under MCR 2.116(C)(10). Petitioner's Motion for Summary Disposition is not supported by the facts or applicable statutory and case law. Petitioner did not, on its own or through New Year's Fest of Kalamazoo, Inc., occupy the subject property as of December 31, 2006 as required by MCL 211.7o. As occupation is a required element of the exemption, the Tribunal finds it appropriate to grant summary disposition in favor of Respondent pursuant to MCR 2.116(I)(2).

To determine whether Petitioner qualifies for the requested exemption the Tribunal must apply the three part test set out in *Wexford, supra*. The parties agree Petitioner is a nonprofit charitable institution, and thus, meets the second prong of the *Wexford* test. This finding is further supported by the fact that Petitioner was granted the exemption for the 2008 tax year. Therefore, the Tribunal need only consider the first and third prongs of the *Wexford* test.

The Michigan Supreme Court in *Liberty Hill Housing Corp v City of Livonia*, 480 Mich 44; 746 NW2d 282, further clarified *Wexford* and distinguished between the first and third prongs of *Wexford's* three part test. In *Liberty Hill*, the petitioner, a charitable nonprofit corporation, owned housing facilities that it made available to disabled and low income individuals at discounted rental rates. The Court determined that, because the petitioner owned but did not itself occupy the housing facilities, the petitioner did not qualify for an exemption pursuant to MCL 211.7o. Specifically, the Court held that:

- (1) to occupy property, for purposes of property tax exemption, charitable institution has to at a minimum have a regular physical presence on the property . . . ;
- (2) nonprofit corporation did not occupy the property and, thus, was not entitled to property tax exemption.” *Id at 1.*

In determining that the petitioner did not occupy the subject property, the *Liberty Hill* Court found the term “reside,” as taken from a dictionary definition, to be instructive. The Court held that “[r]eside’ means ‘1. to dwell permanently or for a considerable time; live. 2. . . . to be present habitually’” The Court further distinguished the facts of *Liberty Hill* from prior cases in stating that “[h]ere . . . the petitioners were not present on the properties.” The Court held that the occupation requirement cannot be met merely through a use consistent with the stated purpose. *Id at 58, 59.* In so finding, the Court distinguished between the owner’s physical presence, the requirement under the first prong of *Wexford*, and the requirement under the third prong that the owner’s physical presence be in furtherance of the stated purpose, primarily through a use analysis.

In light of *Wexford* and *Liberty Hill*, the Tribunal must first determine if Petitioner owned and occupied the subject property as of December 31, 2006. As stated by the Court in *Liberty Hill*, “[b]ecause [MCL 211.o] uses the conjunctive term ‘owned and occupied,’ . . . the Legislature must have intended different meanings for the words ‘owned’ and ‘occupied’ Otherwise, the word ‘occupied would be mere surplusage.” *Liberty Hill Housing Corp v City of Livonia*, 480 Mich 44 at 57; 746 NW2d 282. Respondent has not questioned, and in fact concedes in its Answer, that Petitioner owned the subject property as of December 31, 2006. Respondent contends that Petitioner did not occupy the subject property as of tax day.

In its attempt to show occupation, Petitioner first argues, essentially, a lack of physical presence by any group or individual. Specifically, Petitioner appears to argue that dominion over the property and intended future physical occupation are sufficient under MCL 211.7o, so long as no occupation inconsistent with Petitioner’s stated purpose existed. In the alternative, Petitioner contends that leasing or loaning the subject property to third party nonprofit, New Year’s Fest of

Kalamazoo, Inc., and use for a single event by that group on December 31, 2006, is sufficient occupation to qualify for the exemption. The Tribunal finds that neither Petitioner nor third party New Year's Fest of Kalamazoo, Inc. occupied the subject property on December 31, 2006 as required by MCL 211.7o.

Petitioner contends that consultation with construction and design firms is sufficient "constructive" occupation to meet the requirements of MCL 211.7o. Petitioner relies on preparation and intention but fails to show any physical presence or occupation as of December 31, 2006. Petitioner did not, and in fact admits it could not, occupy the subject property for its stated purpose as of December 31, 2006 as the subject property was not yet suited to Petitioner's purpose. Petitioner further urges a reading that replaces "occupied" with dominion over the property, or "constructive" occupation. As noted by the Court in *Liberty Hill*, Petitioner's reading essentially reads any occupation requirement out of the *Wexford* test and creates redundancy in the statute as ownership and dominion are essentially synonyms. Further, planning and preparation without physical presence are not sufficient because, as stated by the Court in *Liberty Hill*, "to occupy property under MCL 211.7o(1), the charitable institution must at a minimum have a regular physical presence on the property." *Id* at 58. Such a finding is also supported by MCL 211.53d, which Petitioner does not raise, but provides in pertinent part:

2) For taxes levied after December 31, 1997, the assessment roll for each tax year shall be corrected to reflect that improvements to real property assessed on that tax roll as partially completed new construction and the land on which the improvements are located are exempt from the collection of taxes under this act if the improvements and the land on which the improvements are located are determined to be exempt from taxes collected under this act on tax day in the year construction of the improvements was completed and the property was put to use.

(4) As used in this section, "new construction" means that term as defined in section 34d(1)(b)(iii).

The changes to the subject property do not constitute "new construction" as defined by MCL 211.34d. However, MCL 211.53d is instructive as it provides a retroactive exemption from taxation, dating back to the date that the new construction began, upon completion and the

property being “put to use.” This narrowly drafted provision recognizes that, absent such a statute, even if construction is desired or required prior to physical occupancy, an otherwise exempt organization cannot claim the exemption prior to actual occupation and use. In essence, passage of MCL 211.53d was found to be necessary in a factually similar situation.

Petitioner also relies on *Kalamazoo Nature Center v Cooper Township*, 104 Mich App 657; 305 NW2d 283 (1981). The subject property in *Kalamazoo* was vacant real property owned by a nonprofit organization focused on conservation and environmental education. The facts of *Kalamazoo* are distinct from the instant case in that the parties agreed that the petitioner occupied, at least in part, the large parcel of land. In *Kalamazoo* the Court was asked to determine how many acres had to be occupied, or used, to qualify for the exemption. Not only are the facts of the case distinct from the instant case, *Kalamazoo* predated *Wexford* and *Liberty Hill*, and as a result, occupation and use, *Wexford*’s first and third prongs, were discussed largely without distinguishing between the two requirements.

Likewise, Petitioner’s claims with regard to New Year’s Fest of Kalamazoo, Inc’s occupation of the subject property also fail under *Wexford* and *Liberty Hill*’s analysis of MCL 211.7o. As stated by the Court in *Liberty Hill*, “a charitable institution must maintain a regular physical presence on the property” to claim the exemption. *Liberty Hill, supra*, at 62. Petitioner is correct in stating that a third party nonprofit charitable institution, although not the owner of the property, may qualify for the requested exemption. However, the *Liberty* Court also held that:

The dissent would hold that a charitable institution may occupy property by using it without maintaining a physical presence there. Such an interpretation leads to one of the following two unsatisfactory conclusions: (1) a charitable institution can occupy property without actually being physically present, or (2) a charitable institution need only use the property sporadically or perhaps even once to occupy it. Neither of these conclusions is consistent with the proper meaning of the term ‘occupy.’ Rather, a charitable institution must maintain a regular physical presence on the property to sufficiently occupy the property under MCL 211.7o.

In so holding, the *Liberty Hill* Court addressed, indirectly, both of Petitioner’s alternative claims in one summing paragraph as Petitioner itself did not physically occupy the subject property as

of tax day and third party New Year's Fest of Kalamazoo, Inc. made use of the property only once, on tax day. Because "a charitable institution," whether Petitioner or New Year's Fest of Kalamazoo, Inc, "must maintain a regular physical presence on the property to occupy the property under MCL 211.7o," Petitioner's exemption request, either through its own "constructive" occupation claim or alternatively through the limited use by New Year's Fest of Kalamazoo, Inc., must be denied.

Petitioner has failed to show that granting its Motion for Summary Disposition pursuant to MCR 2.116(C)(10) is appropriate. Further, the facts indicate that Petitioner did not meet the occupation requirement of MCL 211.7o as stated by the Court in *Wexford* and *Liberty Hill*. As a result, summary disposition in favor of Respondent's is appropriate under MCR 2.116(I)(2). Respondent properly denied Petitioner's exemption request pursuant to MCL 211.o for the 2007 tax year.

VII. JUDGMENT

IT IS ORDERED that Petitioner's Motion for Summary Disposition pursuant to MCR 2.116(C)(10) is DENIED.

IT IS FURTHER ORDERED that summary disposition in favor of Respondent pursuant to MCR 2.116(I)(2) is GRANTED.

This Final Opinion and Judgment resolves all pending claims in this matter and closes this case.

MICHIGAN TAX TRIBUNAL

Entered: March 11, 2011

By: Steven H. Lasher