

STATE OF MICHIGAN
DEPARTMENT OF LICENSING & REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
MICHIGAN TAX TRIBUNAL

Leslie K. Huggins,
Petitioner,

MTT Docket Nos. 448835,
448836, and 448837

v

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Steven H. Lasher

ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY
DISPOSITION

FINAL OPINION AND JUDGMENT

INTRODUCTION

Petitioner is appealing Assessment Nos. Q154436, Q142274, and Q353643¹ issued by Respondent to Petitioner as a responsible corporate officer of O'Hara Corporation ("O'Hara"). Petitioner contends that she is not liable for the taxes as a responsible corporate officer because she was never an officer of the corporation. Petitioner further contends that she should not be held liable as a responsible officer under MCL 205.27a(5) because, although her title was Vice President of Accounting, her position held no authority and she never had control of, supervision over, or responsibility for, the filing of the tax returns, or the payment

¹ Assessment Q154436 was issued for O'Hara Corporation's failure to pay Sales Tax for the period ending April 2007. Assessment Q142274 was issued for O'Hara Corporation's failure to pay Use Tax for the period ending April 2007. Assessment Q353643 was issued for O'Hara Corporation's failure to pay Single Business Tax for the period ending December 2005.

of the taxes at issue.

On July 2, 2013, Petitioner filed her motion for summary disposition under MCR 2.116(C)(10). Respondent filed its response to this Motion on July 22, 2013. The Tribunal agrees with Petitioner that she is not a responsible officer pursuant to MCL 205.27a(5) and therefore grants summary disposition in her favor as well as cancels the assessments issued to Petitioner.

BACKGROUND

Petitioner was employed by O'Hara from April 2001 through September 2007. During the course of her employment at O'Hara, Petitioner was given the title of "Vice-President of Accounting." The company was in the construction industry specializing as mechanical and HVAC contractors. From 2001 through 2008 the officers of O'Hara were: Shawn M. O'Hara, President and Secretary; Patricia O'Hara, Treasurer; and James Dembinski, Vice-President. (Petitioner's Brief in Support of her Motion for Summary Disposition, Exhibit C, Corporate Information Updates, 2001-2008). Petitioner tendered her letter of resignation on August 31, 2007. O'Hara subsequently ceased operations in 2008.

PETITIONER'S CONTENTIONS

Petitioner contends that even though she held the title of "Vice-President of Accounting" and signed the corporate tax returns she was not an officer of the corporation and her title did not give her authority as an officer. In support of her contentions, Petitioner states that (i) her title of Vice-President of O'Hara "was purely nominal or titular, as her actual duties did not arise to the level of control and independence normally afforded to an officer of a company" (Petitioner's Motion for Summary Disposition, p.3), (ii) her job duties included "managing accounts payable, the corporation's banking, and maintain the company's vehicle fleet" and did not include "filing of the corporation's tax returns, payment of the corporation's taxes or making any of its financial decisions (including the ability to

guarantee or co-sign on corporate loans, open or close corporate bank accounts, or hire or fire employees)” (*Id.*), (iii) in 2003, O’Hara hired Godfrey, Hammel, Danneels & Company, P.C. (“GHDC”) to prepare tax returns for O’Hara, (iv) Petitioner was requested to transcribe amounts provided by GHDC onto annual tax returns, (v) Petitioner admits to signing her name on “various tax filings or other communications with the State of Michigan” but that she only “signed the tax return at the direction of the named officers . . . as a matter of convenience for her employer” (*Id.* at 4), (vi) Petitioner also admits that her signature appears on monthly vouchers and one letter submitted to Respondent, (vii) in order to establish its prima facie case, the signature must be the signature of an officer of the corporation and that Petitioner was never a corporate officer, (viii) Petitioner was never elected, pursuant to the by-laws, to become an officer and “Petitioner did not substantively function as an officer either” (*Id.* at 10), (ix) Petitioner submitted the affidavit of James Dembinski, the former Vice-President of O’Hara, who stated that Petitioner was not authorized to sign checks or use the corporate bank signature card and that when she “signed tax returns, other related tax forms or correspondence with the Michigan Department of Treasury, it was at the direction of Shawn O’Hara,” and “to the best of [his] knowledge, the only officer with the authority over the filing of O’Hara Corporation’s tax returns or other tax filings was Shawn O’Hara” (Affidavit of James Dembinski, p. 1-2), (x) Petitioner also submitted an affidavit of Keith C. Fowler, former Service Manager at O’Hara, who stated that he was given the title of “Vice-President of Service” but was not at any time an officer of the corporation, and that the title did not change his job duties or his pay rate, and that Petitioner “was not an Officer of O’Hara Corporation” during his time with the company (Affidavit of Keith C. Fowler, p. 2), (xi) Petitioner also submitted an affidavit of Mary M. Pieniazek, a former project assistant at O’Hara, who stated that Petitioner “held the title of Vice-

President of Accounting, but was not an officer of O’Hara Corporation,” that Petitioner never signed a check for payment and “to [her] knowledge, only Shawn O’Hara and James Dembinski were authorized to sign on corporate checks,” and that Petitioner “did not have control over any [of] the financial decisions of the corporation.” (Affidavit of Mary M. Pieniazak, p. 1-2), (xii) Petitioner submitted the affidavit of Michelle K. Hohendorf, a former accounts payable clerk for O’Hara, who stated that Petitioner was not an officer of the corporation despite her title and that Petitioner “never signed a corporate check on any corporate billing” (Affidavit of Michelle K. Hohendorf, p. 2), (xiii) Petitioner also submitted the affidavit of Joseph J. Fabrizio, who was an attorney for O’Hara Corporation and Shawn O’Hara during the tax years at issue, who stated that “[t]o the best of [his] knowledge, information and belief, [Petitioner] was just an employee of O’Hara Corporation and she did not have any authority or control over the financial affairs and obligations of the corporation” and she “was not authorized to sign checks for the payment of corporate obligations.” (Affidavit of Joseph J. Fabrizio, p. 2).

RESPONDENT’S CONTENTIONS

Respondent requests that the Tribunal deny Petitioner’s Motion for Summary Disposition. Respondent provided the Tribunal with corporate tax returns for tax years 2003, 2005, and 2006 which show Petitioner’s signature as either “Vice President” or “Agent.” In support of its Motion Respondent contends that (i) Respondent determined that Petitioner was a responsible corporate officer based upon the documents in its possession including: (a) 2003 Sales, Use and Withholding tax annual return for O’Hara signed by Petitioner as Vice President; (b) 2005 Sales, Use and Withholding tax annual return for O’Hara signed by Petitioner as Vice President; (c) 2006 Sales, Use and Withholding tax annual return

for O'Hara signed by Petitioner as Vice President;² (d) various other returns; and (e) a letter, dated October 31, 2006, from Petitioner as Vice President regarding O'Hara's tax liability;³ (ii) the documents submitted support Respondent's contention that Petitioner was a corporate officer because by she signing numerous documents as Vice President, she "held herself out as a corporate officer . . . and someone who had authority to file these documents" and that the "letter sent to the Michigan Department of Treasury was official correspondence from O'Hara Corp and this letter recognized the Petitioner as someone who was an officer and someone who had authority to speak on behalf of the corporation" (Respondent's Brief in Support of its Response to Petitioner's Motion for Summary Disposition, p. 5), (iii) the documents submitted are sufficient to meet Respondent's prima facie case under MCL 205.27a(5), and (vi) Petitioner must rebut the prima facie case by presenting "proof that she did not have control or supervision of, or the responsibility for, making the returns or payments" and Respondent "does not believe that Petitioner will be able to make such a showing" (*Id.* at 7-8).

APPLICABLE LAW

There is no specific Tribunal rule governing motions for summary disposition. Therefore, the Tribunal is bound to follow the Michigan Rules of Court in rendering a decision on such motions. TTR 215.

Petitioner moves for summary disposition pursuant to MCR 2.116(C)(10), which provides the following ground 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

² Contrary to Respondent's contentions, the 2006 return is signed by Petitioner as "Agent" for O'Hara.

³ Respondent failed to attach this document as its Exhibit 8 as indicated. However, the letter was submitted by Petitioner as Exhibit L to her Motion for Summary Disposition.

as a matter of law.” 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 the event, however, it is determined that an asserted claim can be supported by evidence at trial, a motion under subsection (C)(10) will be denied. *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 436 (1991).

CONCLUSIONS OF LAW

The Tribunal has carefully considered Petitioner's Motion under MCR 2.116(C)(10) and finds that granting Petitioner's Motion is appropriate, based on the pleadings and other documentary evidence filed with the Tribunal. Petitioner has proven through affidavits, pleadings, and documentary evidence that there are no genuine issues of material fact remaining as fully discussed below.

Michigan's corporate officer liability statute, MCL 205.27a, states in subsection (5):

If a corporation, limited liability company, limited liability partnership, partnership, or limited partnership liable for taxes administered under this act fails for any reason to file the required returns or to pay the tax due, any of its officers, members, managers, or partners who the department determines, based on either an audit or an investigation, have control or supervision of, or responsibility for, making the returns or payments is personally liable for the failure. The signature of any corporate officers, members, managers, or partners on returns or negotiable instruments submitted in payment of taxes is prima facie evidence of their responsibility for making the returns and payments. The dissolution of a corporation, limited liability company, limited liability partnership, partnership, or limited partnership does not discharge an officer's, member's, manager's, or partner's liability for a prior failure of the corporation, limited liability company, limited liability partnership, partnership, or limited partnership to make a return or remit the tax due. The sum due for a liability may be assessed and collected under the related sections of this act.

The Michigan Supreme Court in *Livingstone v Department of Treasury*, 434 Mich 771, 783-784; 456 NW2d 684 (1990), set forth the following standard for imposing

personal liability upon corporate officers:

In order to hold a person personally liable for a corporation's tax liability, the Department of Treasury must first show that the person is an officer of the corporation. Then it must show either (1) that this officer has control over the making of the corporation's tax returns and payments of taxes; or (2) that this officer supervises the making of the corporation's tax returns and payments of taxes; or (3) that this officer is charged with the responsibility for making the corporation's returns and payments of taxes to the state.⁴

Although MCL 205.27a(5) provides that a corporate officer's signature on either a return, or a negotiable instrument, is prima facie evidence of the officer's responsibility to make returns, *Sobol v Michigan Dept of Treasury*, 9 MTT 321, May 19, 1995, the establishment of the prima facie case then creates a rebuttable presumption. "Prima facie evidence" is evidence which is sufficient to establish a given fact, or the chain of facts constituting a party's claim or defense, which if not contradicted will remain sufficient. It is an inference or presumption of law of a fact in the absence of proof to overcome it. *Department of Environmental Quality v Worth Township*, 289 Mich App 414 (2010); 795 NW2d 13 (2011). It is a rule which does not preclude evidence, but merely declares that certain conduct shall suffice as evidence until the opponent produces contrary evidence.

To hold a person personally liable for an entity's tax liability, Respondent must first show that the person is an officer of the corporation. Here, the record indicates that Petitioner may not have been an officer of the corporation despite her title of "Vice-President of Accounting." Petitioner submitted the affidavit of Keith

⁴ MCL 205.27(a)(5) was revised by the Michigan legislature in 2003 to update the statute to expand the "corporate officer liability" statute to include members, managers, or partners of new forms of business entities, such as limited liability partnerships and limited liability companies. (Michigan House Fiscal Agency Legislative Analysis, July 10, 2003). Therefore, the term "officer" as used in this Opinion will include members or managers of limited liability companies.

C. Fowler who indicated that he, like Petitioner, was given a title of “Vice-President” but that this title “did not reflect [his] actual role within the company.” (Affidavit of Keith C. Fowler, p. 2). In addition, Mr. Fowler states that when he received the title his “job duties did not change, nor did [his] pay rate change.” *Id.* The many other affidavits submitted also support Petitioner’s contentions that despite her title, she was never an officer of the corporation. Petitioner also submitted corporate documents including the Articles of Incorporation and the Corporate Information updates from 2001 through 2008. These documents do not identify Petitioner as an officer and the only Vice-President indicated on the documents is James Dembinski. Thus, it does not appear that Petitioner was an officer of O’Hara at any point in time during the relevant tax years.

Assuming arguendo that Petitioner was an officer based upon her title of “Vice-President of Accounting,” the Tribunal still finds that Petitioner is not a liable corporate officer. More specifically, the statute's signature mechanism provides for establishing a prima facie case of derivative officer liability. Here, Respondent may have met its initial burden of establishing a prima facie case if Petitioner was, in fact, a corporate officer by producing Petitioner's signature on a return. See *Dore v Department of Treasury*, unpublished opinion per curiam of the Court of Appeals, decided June 10, 2003 (Docket No. 238344). Once the Department of Treasury’s prima facie case is established, the burden of proof shifts to Petitioner to rebut the presumption that she is responsible for the corporation’s failure to pay and to show that she is not a corporate officer, or that she was a corporate officer without control over or responsibility for making returns or tax payments. See *Drake v Michigan Dept of Treasury*, MTT Docket No 204601 (1995). Petitioner must produce evidence sufficient to convince the Tribunal that the nonexistence of the presumed fact is more probable than its existence. *Widmayer v Leonard*, 422 Mich 280, 287 (1985). Competent, material, and

substantial evidence that Petitioner had tax specific duties must be weighed against the rebutting evidence.

In this case, Petitioner has provided ample evidence including several affidavits of individuals who had varying involvement with O'Hara to rebut the prima facie case. The affidavits and evidence submitted indicate that, even if Petitioner was an officer, Petitioner did not have the requisite control of, supervision over, or responsibility for, the filing of the tax returns, or the payment of the taxes at issue.

Petitioner states that Shawn O'Hara hired the accounting firm, Godfrey, Hammel, Danneels & Company, P.C., to provide her "with the relevant numbers to transcribe onto the returns" and that she "did not alter or examine the numbers provided to [her by] Godfrey, Hammel, Danneels & Company, P.C." when she transcribed the numbers onto the tax forms. (Affidavit of Leslie K. Huggins, p. 2-3). Although Petitioner admits to signing many tax returns, she states that she signed returns at the direction of Shawn O'Hara as a matter of convenience." (*Id.* at 3). This is supported by the affidavit of James Dembinski, the former Vice-President of O'Hara. Mr. Dembinski states that Petitioner was not authorized to sign checks on the corporation's behalf and was not listed on the bank signature card for O'Hara. In addition, he states that Petitioner did not have "authority, control over, or an interest in the financial affairs of the corporation" and that "the only officer with the authority over the filing of [the] tax returns . . . was Shawn O'Hara." (Affidavit of James Dembinski, p. 2). This is also supported by the Affidavit of Joseph J. Fabrizio, the former attorney for O'Hara, who states that Petitioner was merely an employee of the company and she did not have any authority or control over the financial decisions of O'Hara. Specifically, he confirms that Shawn O'Hara was always the financial decision maker for O'Hara Corporation. Thus, Petitioner did not have the authority to make tax specific

decisions and did not, therefore, have control of, supervision over, or responsibility for, the filing of the tax returns, or the payment of the taxes at issue.

The evidence on record also supports that not only did Petitioner lack authority but Petitioner also did not make any payments or other financial decisions. This is supported by the affidavit of Mary M. Pieniazek which states that Petitioner “never signed a corporate check for payment on any of the project invoices or any other corporate billings” and that Petitioner “did not have control over any financial decisions of the corporation.” (Affidavit of Mary M. Pieniazek, p. 2). This is echoed by the affidavit of Michelle K. Hohendorf who worked in the accounting department. Ms. Hohendorf indicates that “[a]ll of the corporate checks for payment of the corporate billings were signed by Shawn O’Hara or James Dembinski.” (Affidavit of Michelle K. Hohendorf, p. 2).

Respondent also relies upon a letter sent to the Department which is signed by Petitioner. This letter is regarding the tax period ending December 2004. However, Assessment Q154436 is for the period ending April 2007, Assessment Q142274 is for the period ending April 2007, and Assessment Q353643 is for the period ending December 2005. Thus, this letter is not reliable evidence for the years at issue. Furthermore, Petitioner has credibly explained that this letter was signed for the convenience of her employer, Shawn O’Hara. (See Affidavit of Leslie K. Huggins, p. 2). This is also supported by the affidavit of James Dembinski who states that “where [Petitioner] signed tax returns, other related tax forms or correspondence with [Respondent] it was at the direction of Shawn O’Hara.” (Affidavit of James Dembinski, p. 2).

Given the above, the Tribunal finds that, based on the evidence presented by Petitioner, including the Affidavits, although Petitioner held the title of “Vice-President of Accounting” this title was not representative of her position, and that Petitioner lacked any responsibility or control over the filing of tax returns or

payment of taxes. The Tribunal finds, therefore, that the following standards for imposing personal liability upon corporate officers have not been satisfied: (1) that this officer has control over the making of the corporation's tax returns and payments of taxes; or (2) that this officer supervises the making of the corporation's tax returns and payments of taxes; or (3) that this officer is charged with the responsibility for making the corporation's returns and payments of taxes to the state.

Petitioner did not have any control over the making of O'Hara's tax returns and was not responsible for the payment of the taxes. Petitioner clearly stated that she did not have the required check signing authority in order to make the payment of the taxes. As indicated above, Petitioner's Motion and brief in support are adequately and reliably supported by the affidavits submitted. Petitioner has reliably established that she was not responsible for the preparation of the tax returns other than the transcription of numbers provided to her by the accounting firm and that she signed them only as a convenience for the President of O'Hara, Shawn O'Hara. Petitioner also had no responsibility to make the returns and payments of taxes to Respondent. Petitioner's mere title does not justify a finding that Petitioner is a responsible corporate officer.

Respondent relies solely on its prima facie case and does not attempt to rebut the affidavits submitted by Petitioner. In response to Petitioner's Motion for Summary Disposition, Respondent simply sets forth its prima facie case (i.e., describes and relies upon the documents signed by Petitioner as President), stating that "[i]n order for Petitioner to defeat this prima facie case, she must present proof that she did not have control or supervision of, or the responsibility for, making the returns or payments. The Department of Treasury does not believe that Petitioner will be able to make such a showing." (Respondent's Brief in Support of its Response to Petitioner's Motion, p. 7-8).

As such, the Tribunal finds that Petitioner has reliably established that no genuine issues of material fact remain regarding her authority, or more appropriately lack of authority, in her role as Vice-President of Accounting for O'Hara. The Tribunal further finds that Petitioner was not a corporate officer during the tax years at issue. Even assuming arguendo that Petitioner was an officer, she was not responsible for the making of returns or payments nor did she have control or supervision of those who were responsible for making the returns and payments. Petitioner is not, therefore, a responsible corporate officer. As such, this Tribunal finds that cancellation of the subject assessment is proper and supported.

JUDGMENT

IT IS ORDERED that Petitioner's Motion for Summary Disposition shall be GRANTED.

IT IS FURTHER ORDERED THAT that Respondent's Final Assessment Nos. Q154436, Q142274, and Q353643, are CANCELLED.

This Order resolves all pending claims in this matter and closes this case.

By: August 06, 2013

Entered: August 06, 2013