

JERUSALEM EMPOWERED AFRICAN
METHODIST EPISCOPAL CHURCH,

Plaintiff,

v.

Case No. 12CV008079

CITY OF MILWAUKEE,

Defendant.

DEFENDANT’S BRIEF IN SUPPORT OF MOTION TO DISMISS

Because the Plaintiff, Jerusalem Empowered African Methodist Church (“JEAMEC”) served the Attorney General’s Office regarding their Constitutional Claims after the Defendant filed its Motion To Dismiss, the Defendant now responds to the Plaintiff’s Constitutional Claims, and further addresses the Plaintiff’s “waiver” arguments.

I. PLAINTIFF’S CONSTITUTIONAL ARGUMENTS ARE UNDEVELOPED AND FAIL TO PROVE WIS. STAT 74.35 UNCONSTITUTIONAL IN ANY FASHION.

A. Plaintiff fails to prove Wis. Stat. §74.35(2m) denies them their Due Process rights beyond a reasonable doubt.

In challenging the constitutionality of a statute – as applied or facially – there is a strong presumption that the law is Constitutional. *State v. Zarnke*, 224 Wis.2d 116, 141-142, ¶ 50, 589 N.W.2d 370. In seeking to overcome this strong presumption, the party

seeking to show the law is unconstitutional must prove so beyond a reasonable doubt.

State v. Zarnke, 224 Wis.2d 116, 141-142, ¶ 50, 589 N.W.2d 370.

JEAMEC does not prove that Wis. Stat. §74.35 deprives them of their constitutional rights to due process pursuant to the Fourteenth Amendment. In its brief, JEAMEC does not cite a single authority to assert that they have been denied due process. Instead, they discuss the due process which they have already received with the City of Milwaukee: they filed a notice of claim with the City Clerk, they cite actions taken by the City of Milwaukee's Common Council in relation to their claim, and argue that the city "waived" the requirement that they pay their taxes prior to bringing suit in the circuit court because the city allowed them to file their notice of claim. (Plaintiff's Brief, p. 10.) JEAMEC admits that the city "continue[d] with its ordinary procedures" regarding exemption claims made, despite their failing to pay their tax. (Plaintiff's Brief, p. 10.)

If anything, Plaintiff's brief, while giving an overview of some – but not all - of the administrative review received through the City of Milwaukee's Board of Assessors and Common Council meetings – demonstrates that Plaintiff has received a considerable amount of due process.

Mathews v. Eldridge is the seminal case on the quantity of due process required for a deprivation of property. 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). "Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances...[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424

U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18, (U.S. 1976). (Internal citations omitted.)

Plaintiff makes bold statements in its complaint that it is being denied due process of law but fails to demonstrate any actual deprivation of due process of law. (Complaint, pp. 5-7.)

Plaintiff cites *Boddie v. Connecticut* as authority for their assertion that 74.35(5)(c) unconstitutionally deprives them of their right to due process. 401 U.S. 371, 381-383 (1971) (Complaint, P. 37.) However, *Boddie* relates to the payment of filing fees to access a divorce proceeding. This case is distinguishable for two reasons. First, JEAMEC paid their filing fee to the circuit court at the initiation of this suit, unlike the indigent individuals in *Boddie v. Connecticut*. The Milwaukee County Circuit Court has a process to seek waiver of filing fees for indigent persons, found in Local Rule 1.16. JEAMEC did not seek a waiver of the court's filing fee due to an inability to pay.

Second, *Boddie v. Connecticut* is inapplicable here as it relates to a requirement to pay the *court* a fee. 401 U.S. 371, 381-383 (1971). Here, the Plaintiff is expected to pay their taxes to the Defendant prior to bringing suit for return of their taxes, as the purpose of Wis. Stat. 74.35(5)(c) is to seek a tax refund.

JEAMEC has failed to show any deprivation of Due Process in its complaint and brief, and failed to prove Wis. Stat. §74.35 unconstitutional as applied to them, and this claim properly ought to be disregarded by the court.

B. Plaintiff fails to show a denial of Equal Protection because the procedures for challenging denial of a property tax exemption differ from challenging an excessive assessment of property tax.

As in a due process challenge to the constitutionality of a statute, in making an equal protection argument, the presumption is strongly in favor of constitutionality. *State v. Zarnke*, 224 Wis.2d 116, 141-142, ¶ 50, 589 N.W.2d 370. The burden remains on the movant to demonstrate the law's unconstitutionality beyond a reasonable doubt. *Id.* JEAMEC has failed to meet its burden of proof in its argument that they are denied equal protection due to the differences in these two statutes.

Wisconsin law provides three potential options for a taxpayer who claims their assessment is *excessive*: a certiorari review in the circuit court per Wis. Stat. §70.47(13), a *de novo* review in the circuit court per Wis. Stat. §74.37, or an appeal to the state Department of Revenue. The relevant distinction between the certiorari action and the *de novo* action before the circuit court is that in a certiorari review, the taxpayer is not required to pay their taxes, whereas in a *de novo* review per Wis. Stat. §74.37, the taxes must be timely paid.

In contrast, tax exemption cases only have Wis. Stat. §74.35, with a single procedure, wherein taxes must timely be paid (under protest, presumably) prior to an entity bringing the case before the circuit court.

JEAMEC's claim that this procedural distinction between taxpayers seeking a refund on excessive taxes and entities claiming their property ought to be fully tax exempt denies them equal protection of the law. Their argument fails.

“Taxation is the rule and exemption is the exception.” *Dominican Nuns v. City of LaCrosse*, 142 Wis. 2d 577, 579, 419 N.W.2d 270 (Ct. App. 1997). “Tax exemptions are matters of legislative grace and there must be clear evidence that such grace was intended before [courts] will so find in a given case. *Id.*”

In its complaint, JEAMEC cites no authority to prove that Wis. Stat. §74.35(5)(c), by requiring timely payment of taxes unconstitutionally deprives them of equal protection of law. Undeveloped arguments certainly do not prove, beyond a reasonable doubt, that a law is unconstitutional, nor should they be considered by the court. *Veseley v. Security First Nat’l Bank of Sheboygan Trust Dep’t*, 128 Wis. 2d 246, 255, n.5, 381 N.W.2d 593 (Ct. App. 1985).

C. The requirement to pay taxes prior to bringing suit under §74.35(5)(c), Wis. Stat. does not violate Article I, §9 of the Wisconsin Constitution.

JEAMEC does not develop its assertion that the required timely payment of taxes prior to bringing an exemption case before the circuit court, Wis. Stat. §74.35(5)(c), somehow violates Article I, §9 of the Wisconsin Constitution. “It is possible to mine the pronouncements of Wisconsin courts for evidence that art. I, § 9 creates rights, or that it authorizes courts to fashion rights. In its recent interpretation of the provision, however, this court has stated that art. I, § 9 confers no legal rights. Rather, art. I, § 9 applies only when a prospective litigant seeks a remedy for an already existing right.” *Aicher v. Wisconsin Patients Compensation Fund*, 2000 WI 98, ¶ 43, 237 Wis. 2d 99, 122, 613 N.W.2d 849. (Internal citations omitted.)

Again, as in a challenge to the United States Constitution, a challenge to a statute's constitutionality under the Wisconsin Constitution must be proved unconstitutional beyond a reasonable doubt by the movant, and the statute has a strong presumption of constitutionality. *State v. Zarnke*, 224 Wis.2d 116, 141-142, ¶ 50, 589 N.W.2d 370.

Here, a prospective litigant who believes their property ought to be exempt from property taxation has an already existing right under Wis. Stat. §74.35. However, to exercise that right, the potential litigant must comply with the procedure under that statute. *TOPS Club, Inc. v. City of Milwaukee*, 260 Wis. 2d 563, 659 N.W.2d 484 (Ct. App. 2003). By requiring all prospective litigants to comply with the statutory procedure is not a violation of Article I, §9 of the Wisconsin Constitution.

II. THE DEFENDANT DID NOT AND CANNOT WAIVE THE REQUIREMENT OF §74.35(5)(C), STATS. OF TIMELY PAYMENT OF TAXES.

The plain language of §74.35(5)(c) states “[n]o claim may be filed or maintained under this section unless the tax for which the claim is filed, or any authorized installment payment of the tax, is timely paid under s. 74.11, 74.12 or 74.87.”

Elsewhere in §74.35, Stats., the statute notes that this is the “exclusive procedure” for resolving a claim that property is exempt. Wis. Stat. §74.35(2m), *See also, TOPS Club, Inc., v. City of Milwaukee*, 260 Wis. 2d 563, 659 N.W.2d 484 (Ct. App. 2003).\

JEAMEC freely admits throughout their complaint and brief that they have not paid taxes for 2010 or 2011, the two years in question in this case. They assert that because the city accepted it's Notice of Claim when filed upon the city clerk, despite having not paid the taxes due at the time, that somehow the City of Milwaukee then

waived the requirement under §74.35(5)(c). Plaintiff’s Brief, p. 8-13. While that section of the Plaintiff’s brief pedantically discusses the words “claim” and “action”, it does not assert any actual authority that §74.35(5)(c) does not apply to them.

One purpose of the notice of claim requirement is to allow the municipality to investigate and evaluate a claim. *Bostco LLC v. Milwaukee Metro. Sewerage Dist.*, 2011 WI App 76, ¶87, 334 Wis. 2d 620, 800 N.W.2d 518 (Ct. App. 2011.) (Internal citations omitted.) By arguing that the City of Milwaukee waived the requirement that taxes be paid by simply allowing JEAMEC to serve a Notice of Claim upon the City Clerk is simply nonsensical: how can the defendant be expected to have already investigated the claim when it is being served upon them? And, the Plaintiff cannot be asserting that the City of Milwaukee should have refused to accept a notice of claim served upon it, as a refusal to accept service of a claim could not possibly comport with *Matthews v. Eldridge*! 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18, (U.S. 1976). JEAMEC’s argument that the city “waived” the requirement of payment of taxes first should be wholly disregarded.

III. THE CIRCUIT COURT LACKS COMPETENCY TO HEAR THIS CASE DUE TO PLAINTIFF’S FAILURE TO TIMELY PAY THEIR TAXES AS THE DEFENANT OBJECTS.

Unlike subject matter jurisdiction, a court’s competency to hear a case, based upon statutory requirements, may be waived by the parties. *State v. Michael S.*, 282 Wis. 2d 1, 31-32, 698 N.W.2d 673 (2005), *Town of Waukesha v. Hiekkanen*, 307 Wis. 2d 446, 745 N.W.2d 89 (Ct App. 2007).

The Defendant, City of Milwaukee, does not waive the competency of the court in this case. Thus, JEAMEC's failing to comply with the condition of timely payment of taxes per Wis. Stat. §74.35(5)(c) deprives the circuit court of competency to hear this matter, and it should be dismissed.

Dated at Milwaukee, Wisconsin this 12th day of November, 2012.

GRANT F. LANGLEY
City Attorney

ADDRESS:

800 City Hall
200 East Wells Street
Milwaukee, WI 53202
Telephone: (414) 286-2601
Fax: (414) 286-8550
cquinn@milwaukee.gov

CHRISTINE M. QUINN
State Bar No. 1037777
Assistant City Attorney
Attorney for Defendant

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