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August 22, 2013

RECEIVED
8/23/13

VIA MESSENGER

Clerk to the
Honorable Christopher Foley, Branch 14
Milwaukee County Circuit Court
901 North Ninth Street, Room 403
Milwaukee, WI 53233

Re: *Jerusalem Empowered African Methodist Episcopal Church v.
City of Milwaukee*
Case No. 12-CV-008079

Dear Clerk:

Enclosed for filing is Defendant's Summary Judgment Reply Brief. I would appreciate your please returning a conformed copy of each to our waiting representative. Thank you.

Very truly yours,

A handwritten signature in cursive script that reads "Christine M. Quinn".

CHRISTINE M. QUINN
Assistant City Attorney

CMQ/cdr

Enclosure

c: Attorney Thomas Kamenick (w/encs.)

1056-2012-1862/195086

OFFICE OF THE CITY ATTORNEY

JERUSALEM EMPOWERED AFRICAN
METHODIST EPISCOPAL CHURCH,

Plaintiff,

v.

Case No. 12CV008079

CITY OF MILWAUKEE,

Defendant.

**DEFENDANT CITY OF MILWAUKEE'S REPLY BRIEF IN OPPOSITION TO
PLAINTIFF'S MOTION FOR SUMMARY JUDGEMENT**

INTRODUCTION

Plaintiff is a church which owns a parcel of land. A portion of the land is tax-exempt, which is occupied by a church building and parking lot. Another portion of the land is essentially a two-acre open field. This open land is the portion of the property which the City of Milwaukee denied tax exempt status.

On February 7, 2013, 2012, the court dismissed the statutory claims raised in the Plaintiff's brief, leaving only the two alleged Constitutional violations. The Plaintiff alleges that 74.35, as applied, deprives them of their Due Process rights. Also, the plaintiff alleges that 74.35, as applied, deprives them of Equal protection of laws. Both of these arguments fail, as 74.35 comports with both the Due Process and Equal Protection clauses of the Fourteenth Amendment.

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. Plaintiff simply has not met its burden on either the Due Process or Equal Protection claims. Therefore, the plaintiff's summary judgment motion should be denied, and the case dismissed.

I. THE STATUTORY CLAIMS MADE BY THE PLAINTIFF HAVE ALREADY BEEN RESOLVED IN FAVOR OF THE DEFENDANT, AND SO THE COURT MUST DISREGARD THE STATUTORY ARGUMENTS PRESENTED BY THE PLAINTIFFS.

On February 7, 2013, the court granted a portion of the City of Milwaukee's Motion to Dismiss, dismissing the statutory claims brought by the Plaintiff. (See Exhibit A, p. 4, lines 3-7.) The Plaintiff clearly never paid their tax, and only asserts that the tax should not have been levied. (Exhibit A, p. 5.) Therefore, because payment of a disputed property tax must be made prior to bringing a claim, pursuant to Wis. Stat. §74.35(5)(c), they may not litigate the validity of the denial of the property tax exemption here.

In the Plaintiff's Brief filed in support of summary judgment, a lengthy analysis is presented which asserts that the plaintiff ought to be entitled to an exemption for the two acre vacant portion of their land. (Plaintiff's Brief, pp. 6-10.) However, given the court's prior ruling, that only the challenges to the Constitutionality of Wis. Stat. §74.35 may be litigated by the plaintiff in this case. (Exhibit A, p. 8, lines 16-18.) Had the plaintiff timely paid their taxes, including entering into an installment plan pursuant to Wis. Stat. § 74.12, the parties could litigate this issue fully to the court. But, having failed to pay, the plaintiff is foreclosed from litigating the merits of the case.

II. PLAINTIFF HAS NOT SUFFERED AN “AS-APPLIED” DENIAL OF DUE PROCESS AS THEY ARE IN THE MIDST OF HAVING THEIR “DAY IN COURT” BY VIRTUE OF THE SUMMARY JUDGMENT PROCEEDINGS.

Plaintiff next argues that they are entitled to “their day in court”, pursuant to their Fourteenth Amendment Due Process rights. (Plaintiff’s Brief, pp. 10-13.) Strangely, plaintiff is in the position of *having* their “day in court”, in the form of a summary judgment motion, and yet complaining that they are not “having their day in court” at the same time! The Due Process arguments of the plaintiff must fail; they are not being denied their due process rights.

The defendant does not disagree with the plaintiff that meaningful access to the courts is a fundamental right. *Lewis v. Casey*, 518 U.S. 343 (1996). However, there is a giant difference between the deprivation of meaningful access to the courts, and the plaintiff’s present situation.

The plaintiff relies heavily on *Boddie v. Connecticut* and claims it is being denied access to the courts. 401 U.S. 371 (1971). However, the facts in *Boddie* are so obviously distinguishable that it simply cannot apply in this context. In *Boddie*, the litigants were literally unable to get into court – no filed cases, no hearings before a court, no suit and no decision of any kind was able to be obtained by the plaintiffs, who wanted to file divorces but were unable to afford the filing fees to the court. *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). The plaintiff here has paid that fee to the court, and we are in the midst of the court case – completely the opposite posture that the litigants in *Boddie* were in. 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, which is distinguishable from a

requirement to pay a fee to the *court* to initiate a court case.

The Due Process Clause of the Fourteenth Amendment does not guarantee an aggrieved party the right to *win*, only the opportunity to *present their case*, and have a judgment upon the merits. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982). The Constitution requires that no person “be denied the opportunity to *present* to the judiciary allegations concerning violations of fundamental constitutional rights.” *Wolff v. McDonnell*, 418 U.S. 539, 579, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974)(emphasis added). Here, the plaintiff is in the midst of presenting their arguments to the court; the courthouse doors are not shut to them simply because they can not have a winning case due to Wis. Stat. §74.35(5)(c), due to their failure to pay the levied taxes.

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.)

In concert with a litigant’s Due Process right to bring suit in court is the right of all parties to have the opportunity for a fair hearing by the court. In other words, the right to bring a suit exists with the equal and opposing right of the opponent to defend. *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 148, 28 S.Ct. 34, 52 L.Ed. 143, 6 Ohio L. Rep. 498 (1907)

The government’s right to collect taxes in a manner not interrupted by litigation is well recognized. If the government is unable to collect taxes in the regular course of

business due to litigants bringing suit without paying taxes, the government's financial security could be threatened in two ways – by unpredictable revenue shortfalls from litigation, and by making the collection of valid taxes more difficult.¹ *See McKesson Corp. v. Div. of Alcoholic Bevs. & Tobacco*, 496 U.S. 18, 37, 110 S. Ct. 2238, 110 L. Ed. 2d 17. (1990).

In *Phillips v. Commissioner*, 283 U.S. 589, 595-596 (1931), Mr. Justice Brandeis said for the Court:

Where . . . adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained. Property rights must yield provisionally to governmental need. Thus, while protection of life and liberty from administrative action alleged to be illegal, may be obtained promptly by the writ of habeas corpus, the statutory prohibition of any 'suit for the purpose of restraining the assessment or collection of any tax' postpones redress for the alleged invasion of property rights (citations omitted)

Therefore, the plaintiff is not being denied their Due Process rights in an “as-applied” fashion. Their Due Process argument simply must fail, given the procedural framework and contexts in which it was made.

III. PLAINTIFF DOES NOT SUFFER FROM AN “AS-APPLIED” DEPRIVATION OF EQUAL PROTECTION BECAUSE §74.35 SURVIVES RATIONAL REVIEW.

The essence of the plaintiff's Equal Protection claim is based upon the various statutory schema available to taxpayers who allege *excessive* assessment, versus taxpayers who claim their property is exempt and thus taxation is *unlawful*. A taxpayer who believes

¹ Indeed, if a property owner who was unable to afford their property taxes could file suit, claiming exemption and maintain the suit without paying taxes first, a potential avalanche of cash-poor property owners could do so in order to attempt to avoid or delay the payment of validly imposed taxes. This could cause total chaos to the municipal budget for any municipality if §74.35(5)(c) did not require payment of taxes up-front.

their assessment is *excessive* has three procedural options to appeal the taxing authority's Board of Review: (1) a *de novo* trial to the court pursuant to § 74.37, Wis. Stat., (2) a *certiorari* review of the Board of Review record pursuant to Wis. Stat. § 70.47(13), or (3) a *certiorari* review by the Wisconsin Department of Revenue, pursuant to Wis. Stat. § 70.85. In both of the *certiorari* review options available for excessive assessment actions, the tax need not be paid up front, but it must be paid before bringing suit in a § 74.37, Wis. Stat., action.

Plaintiff claims that because taxpayers challenging an *excessive* assessment have procedural options which don't require prepayment of the disputed tax, but taxpayers challenging the denial of *exemption* from tax do require prepayment that this is an "as-applied" violation of their Equal Protection rights under the Fourteenth Amendment, as they lack the money to pay the disputed tax. The differences in procedure do not amount to a violation of the Equal Protection Clause, as-applied or otherwise. The differing schema for different forms of tax disputes survives rational review, which is all that is required to defeat the plaintiff's claim.

"The first step in an equal protection challenge is determining which level of scrutiny applies to court review of the challenge." *Bhandari v. Nilsestuen*, 2012 WI App 73, 342 Wis. 2d 248, 816 N.W.2d 350 (Wis. Ct. App. 2012). "State tax classifications require only a *rational basis* to satisfy the Equal Protection Clause. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 311, 117 S. Ct. 811, 136 L. Ed. 2d 761 (1997). "[I]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification." *Id.* To survive an equal protection challenge, a classification made by the legislature that does not concern a suspect class or implicate a fundamental right must bear a rational relationship to a legitimate

government interest.” *Northwest Airlines, Inc. v. Wis. Dep't of Revenue*, 2006 WI 88, P54, 293 Wis. 2d 202, 717 N.W.2d 280, (2006)(Internal citations omitted, emphasis added.)

Here, the rational relationship can easily be shown, to distinguish the procedural differences between excessive assessment and exemption cases. The procedures in which a taxpayer may challenge the assessment as excessive, but do not require up-front payment of taxation are limited to *certiorari* review of the Board of Review record. Wis. Stats. §§ 70.47(13) and 70.85. As a review of the record, these types of appeals necessarily are of a more limited nature than a *de novo* case before the circuit court. However, when a taxpayer asserts that the property is *exempt*, there is no proceeding before the Board of Review and no administrative tribunal record for a circuit court to challenge. Thus, the requirement that Wis. Stat. § 74.35 be the “exclusive procedure” for challenging a claim of property exemption² survives rational review.

CONCLUSION

To guide the court’s analysis of these constitutional arguments, the Wisconsin Supreme Court handily summed up the analysis of a property tax challenge:

All legislative acts are presumed constitutional and every presumption must be indulged to uphold the law if at all possible. *Gottlieb v. City of Milwaukee*, 33 Wis. 2d 408, 415, 147 N.W.2d 633 (1967) (citations omitted). The party challenging the constitutionality of a statute has the burden to prove that the statute is unconstitutional beyond a reasonable doubt. *State v. Carpenter*, 197 Wis. 2d 252, 263, 541 N.W.2d 105 (1995). Constitutional challenges to a statute must overcome a strong presumption of constitutionality. *State v. Thiel*, 188 Wis. 2d 695, 706, 524 N.W.2d 641 (1994). We must not construe a statute to violate the constitution if it can possibly be construed consistent with the constitution. *Demmith v. Wisconsin Judicial Conference*, 166 Wis. 2d 649, 664 N.13, 480 N.W.2d 502 (1992). When the statute concerns a tax measure, the

² Wis. Stat. 74.35(2m) is the exclusive procedure for most sorts of exemptions listed in Wis Stat. § 70.11, the few exceptions listed therein do not apply here.

presumption of constitutionality is the strongest. *Treiber v. Knoll*, 135 Wis. 2d 58, 66, 398 N.W.2d 756 (1987).

Norquist v. Zeuske, 211 Wis. 2d 241, 250-251, 564 N.W.2d 748 (1997).

Therefore, the plaintiff's motion for summary judgment must be dismissed, as their statutory claims were previously denied, and their alleged, as-applied Due Process and Equal Protection Constitutional violations do not exist.

Dated at Milwaukee, Wisconsin this 22nd day of August, 2013.

GRANT F. LANGLEY
City Attorney



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1056-2012-1862/195085

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY
HON. CHRISTOPHER R. FOLEY
CIVIL DIVISION
BRANCH #14

* * * * *

JERUSALEM EMPOWERED AFRICAN
METHODIST EPISCOPAL CHURCH,

Plaintiff,

vs.

Case No. 12 CV 008079,

CITY OF MILWAUKEE,

Defendant.

* * * * *

MOTION HEARING
EXCERPT OF PROCEEDINGS
JUDGE'S FINDINGS

COPY

The following proceedings were had upon
the above-entitled matter before the HONORABLE
CHRISTOPHER R. FOLEY, Circuit Court Judge, Civil
Division, Branch #14, Milwaukee, Milwaukee County,
State of Wisconsin, on the 7th day of February,
2013.

June K. Teegarden, Court Reporter.



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APPEARANCES:

THOMAS C. KAMENICK,
and
C.J. SZAFIR,
Attorneys-at-Law,
Wisconsin Institute for Law and Liberty,
1139 East Knapp Street,
Milwaukee, Wisconsin 53202-2828,
appeared on behalf of the Plaintiff.

CHRISTINE M. QUINN,
Assistant City Attorney,
Office of the City Attorney,
Milwaukee City Hall,
Suite # 800,
200 East Wells Street,
Milwaukee, Wisconsin 53202-3551,
appeared on behalf of the Defendant.

P R O C E E D I N G S

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2 WHEREUPON, the following proceedings
3 were had in open court:

4 THE CLERK: This is Case Number 12 CV
5 8079, Jerusalem Empowered African Methodist
6 Episcopal Church, versus City of Milwaukee.

7 Appearances.

8 MR. KAMENICK: Attorney Tom Kamenick
9 for the Plaintiffs, your Honor. And with me is
10 Attorney C.J. Szafir.

11 MS. QUINN: Good morning, your Honor.

12 Assistant City Attorney Christine
13 Quinn appears on behalf of the City of Milwaukee
14 as Defendants.

15 THE COURT: All right. Good morning
16 everybody.

17 We're here on the City's motions to
18 dismiss the Church's claims in this matter.

19 The City asserts in their motions
20 that given the fact that the disputed tax was not
21 paid by the Church that they can't state a valid
22 claim under 74.35.

23 They also assert that the
24 Constitutional claims made by the Church are
25 deficient...

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* * *

All right.

Okay. Well, here is where I'm at.

I think that the City's motion to dismiss the statutory claims -- claim as failing to state a claim upon which relief may be granted has to, in fact, be granted.

While I understand the Church's argument that 74.35 conditions only the filing of a claim as opposed to the filing of an action after disallowance of a claim on tax prepayment; I understand that argument.

The relief sought and the limits of relief that a Court can grant under this statute is a recovery of the amount of the claim not allowed.

You can't have a claim without payment. Hence, you can't have -- you can't recover a disallowed claim without payment.

Adding to that, sort of, I guess, common sense understanding of the language of the statute, I guess adding to that common sense understanding of the statute, the statute accords protection only to taxpayers aggrieved by the levee and collection of unlawful taxes.

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The Church here claims only to be aggrieved by the levying of taxes, not by the collection of those taxes.

The Wauwatosia Avenue Church case says that the purpose of this statute is the return of tax money paid.

The Church acknowledges it has not paid those taxes, hence, you can't return taxes that have not been paid. And it's my conclusion on that basis that the Church has not stated a claim under the statute and cannot do so.

The waiver claim is a lot more dicey proposition to me because I think that the Appellate Court decisions on what constitutes waiver of a precondition to the exercise of a Court's jurisdiction and their analysis of what can and can't be waived as preconditions on the Court's exercise of jurisdiction is an absolute crapshoot.

They're all over the place. You look at the juvenile cases which some of you know I have some level of expertise in. I would openly acknowledge to you that I have no level of expertise nor desire to have any on tax assessment. But that being said in the juvenile

1 cases before the statute was amended if you blew
2 the time limits, you blew the time limits. And
3 if the State didn't object, too bad, so sad. You
4 can't waive it.

5 There are other instances in which
6 they've said: No, that's not a precondition on
7 the exercise of jurisdiction. So where they're
8 going to come down on this I don't know.

9 Where do I come down?

10 It's based on the Brandt case. The
11 Brandt case says: That if the statute
12 establishes a threshold requirement to the
13 Court's exercise on jurisdiction then it can't be
14 waived.

15 I will acknowledge for the Church's
16 benefit that do I think this should be waiver?

17 That the City said and I -- I quibble
18 a little bit with Miss Quinn's recitation of what
19 happened. Not only did they accept it, they
20 scheduled it for a hearing and said: You have no
21 valid claim here and we're going to disallow it
22 even though you didn't pay the money. To me does
23 that indicate this should be a waiver?

24 Yes, it does.

25 Can it be under my assessment of the

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Brandt case?

No, it can't.

But I'll acknowledge if they say I'm wrong on that I won't be surprised because I don't think there is any consistent and comprehensible, at least for those with the limits of my intellect, waiver determining what is waiveable and what isn't waiveable when it comes to the exercise of the Court's jurisdiction.

That said the motion to dismiss the Constitutional claims is denied.

They don't have to prove to me at this point beyond a reasonable doubt that there is no valid Constitutional claim here. And if you ask me as I think is the pertinent question: Have they pled facts and circumstances upon which a court could validly decide that they had been denied due process, they have been denied equal protection, or they have been denied a right to remedy?

I think that; yes, they have stated a valid claim. Whether it's valid or not ultimately I don't have any idea at this point, but I do think that they've stated a valid claim.

1 I would acknowledge to you that I
2 don't even remember the reference to the McKesson
3 case. I'll take a look at it. If it changes my
4 mind at all I'll let you know, but I'm not
5 anticipating that. I'll read it shortly after
6 you leave so. And I don't know where that leaves
7 us scheduling wise. What we going to do now?

8 MR. KAMENICK: I think the City will
9 have to file an answer now.

10 THE COURT: Oh, that's right. They
11 haven't filed an answer.

12 MS. QUINN: Just to be clear, Judge,
13 you're granting my motion to dismiss on the
14 Failure to State a Claim basis, but denying as on
15 the Constitutional?

16 THE COURT: Statutory claims are
17 dismissed for a Failure to State a Claim upon
18 which relief can be granted.

19 I had in my notes somewhere what
20 those -- what the Statutory claims were versus
21 what the Constitutional claims were, but I don't
22 have those notes with me. So you'll either have
23 to tell me or we'll have to jointly figure it
24 out.

25 The Constitutional claims are not

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dismissed.

So all right. And the City will file an answer and then we'll do some sort of scheduling conference, although we'll go right back as I anticipated probably into a motion mood again, I'll assume.

MS. QUINN: That would be my expectations. That is twenty days to file an answer?

THE COURT: Fine.

Anything else this morning?

MR. KAMENICK: No, your Honor.

MS. QUINN: Not from the City.

THE COURT: Okay. Thanks. It was interesting. I take my boring stuff back. It wasn't boring. It was quite fascinating actually.

But I actually last week I had another tax assessment claim that I found that interesting, too. So I am thinking about going to see a therapist.

So okay. Thank you, everybody.

MR. KAMENICK: Thank you, your Honor.

(Proceedings concluded for the day.)

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STATE OF WISCONSIN)
(SS:
MILWAUKEE COUNTY)

I, June K. Teegarden, do hereby
certify that I am the Official Court Reporter
for the Honorable Christopher R. Foley, Circuit
Court Judge, Branch #14, Juvenile Division,
Milwaukee, Milwaukee County, State of Wisconsin;
that as such Court Reporter, I made full and
correct stenographic notes of the excerpted
portion requested the above-entitled action, and
that the transcript annexed hereto is a true and
correct transcript of the hearing at said time.

I further certify that said excerpted
transcript was requested by Assistant City
Attorney Christine Quinn, by written request
dated February 13, 2013; and by Attorney Thomas
Kamenick, by written request dated February 14
2013, received by me February 18, and 19, 2013,
respectively, with said request being completed
by me on February 21, 2013.


June K. Teegarden, R.P.R., C.P.