2019 IL App (2d) 180076
No. 2-18-0076
Order filed March 15, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

GREG PETERSON, as Executor of the Estate of Abner Peterson, Plaintiff-Appellee, v. LISA MADIGAN[1], as Attorney General of the State of Illinois; MICHAEL FRERICHS, as Treasurer of the State of Illinois; and SUSANA A. MENDOZA, as Comptroller of the State of Illinois, Defendants-Appellants.	)	Appeal from the Circuit Court of Kendall County. No. 16-TX-46 Honorable Robert P. Pilmer, Judge, Presiding

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JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Hutchinson and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: The plaintiff's complaint is barred by sovereign immunity.

[1] While this appeal was pending, Kwame Raoul was elected to replace Lisa Madigan as the Illinois Attorney General. We have therefore granted Attorney General Raoul's motion that he be substituted for former Attorney General Madigan as the party in this case.

¶ 2 The plaintiff, Greg Peterson, as executor of the estate of Abner Peterson, filed a complaint in the circuit court of Kendall County against the defendants, the Attorney General, the Treasurer, and the Comptroller of the State of Illinois (the State defendants), seeking a refund of $367,900 that he had paid in estate taxes after he had received an assessment letter from the Attorney General. Following cross-motions for summary judgment, the trial court entered summary judgment in favor of the plaintiff. The trial court explained that because the assessment letter that the Attorney General had sent the plaintiff was not timely, it had no authority to impose that tax liability upon the plaintiff. The State defendants appeal from that order. We reverse.

¶ 3 I. BACKGROUND

¶ 4 On March 27, 2011, Abner Peterson died, leaving an estate valued at more than $4 million. On December 21, 2011, the plaintiff filed an Illinois Form 700 and Generation-Skipping Transfer Tax Return to comply with Illinois' estate tax laws. On December 23, 2011, the estate filed a Federal Form 706 Estate Tax return with the Internal Revenue Service for taxes due under the Internal Revenue Code.

¶ 5 On January 5, 2012, the Attorney General sent the plaintiff a letter stating that certificate of discharge for Illinois estate tax purposes would not be issued until several issues related to the estate's valuation were resolved.

¶ 6 On November 18, 2015, the Attorney General sent a letter to the plaintiff adjusting the taxable estate to $4,140,706, and issuing an assessment of estate tax in the amount of $267,240, interest in the amount of $100,660, and a late payment penalty of $64,138, for a total liability of $432,038. The letter stated that "[i]nterest will continue to accrue at a daily rate of $74.23 until tax is paid in full. Late payment penalty accrues at a rate of $1,336.00 per month, with a

maximum penalty of $66,810." The letter gave the estate 16 days, until December 4, 2015, to pay the entire liability. The letter further stated that if the tax liability was not paid, a complaint would be filed against the plaintiff. On November 24, 2015, the plaintiff paid the entire liability of $428,038 to the State Treasurer.

¶ 7 On March 30, 2016, the plaintiff submitted a request for internal review to the Attorney General. The request sought a complete or partial reduction of the tax liability, interest, and late payment penalty that was assessed. On April 22, 2016, the Attorney General abated the entire late payment penalty of $64,138, and reduced the original assessed interest by $445.38. The State Treasurer subsequently refunded that money to the plaintiff.

¶ 8 On July 29, 2016, the plaintiff filed a complaint in the circuit court of Kendall County for a refund of the estate tax and interest paid and not refunded pursuant to the Attorney General's final determination. The complaint alleged that the entire assessment was barred by a 3-year statute of limitations under section 10(d) of the Illinois Estate and Generation-Skipping Transfer Tax Act (Estate Tax Act) (35 ILCS 405/10(d) (West 2016)). Alternatively, the complaint requested that the interest should be partially abated because the Attorney General took an unreasonably long time to make the assessment, which delay resulted in over $100,000 in interest accruing.

¶ 9 On October 13, 2016, the Attorney General filed a motion to dismiss the plaintiff's complaint pursuant to sections 2-615 and 2-619 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-615, 619 (West 2016)). The Attorney General argued that (1) the plaintiff's claim was barred by the voluntary payment doctrine because he did not pay pursuant to the State Officers and Employees Money Disposition Act (Protest Moneys Act) (30 ILCS 230/1 *et seq.* (West 2016)); (2) Illinois does not recognize a suit to contest the assessment of Illinois Estate Tax as an

independent cause of action; and (3) the plaintiff's claim was in substance one for equitable relief and was barred because he had an adequate remedy at law under the Protest Moneys Act, which he did not use. Both the Treasurer and the Comptroller filed motions to dismiss pursuant to section 2-615, asserting that they were not proper parties because they had no authority to determine the Illinois Estate Tax.

¶ 10 On January 17, 2017, the trial court denied the motions to dismiss. On February 16, 2017, the Attorney General, the Treasurer and the Comptroller filed their answer and affirmative defenses, raising the defense of sovereign immunity.

¶ 11 On August 3, 2017, the State defendants filed a motion for summary judgment asserting that the plaintiff's claims failed as a matter of law because (1) the assessment was not time barred and (2) the Estate Tax Act mandated the accrual of interest and no statutory authority existed for the abatement of such.

¶ 12 On September 1, 2017, the plaintiff filed a cross-motion for summary judgment, asserting that he was entitled to summary judgment because the Attorney General's assessment was time barred by the statute of limitations.

¶ 13 On January 2, 2018, the trial court denied the State defendants' motion for summary judgment and granted the plaintiff's cross-motion for summary judgment. The trial court held that since there is a three-year limit to collect tax, to allow assessment after the expiration of the right to file suit to collect any unpaid taxes could lead to inconvenient, unjust or absurd results. The trial court therefore ordered all of the money that the plaintiff had paid be refunded to him.

¶ 14 On January 24, 2018, the State defendants filed a timely notice of appeal.

¶ 15 II. ANALYSIS

¶ 16 Relying on our supreme court's decision in *Parmar v. Madigan*, 2018 IL 122265, the State defendants argue that the trial court's summary judgment order should be reversed because the plaintiff's action is barred by the doctrine of sovereign immunity.

¶ 17 The purpose of a motion for summary judgment is to determine whether a genuine issue of material fact exists (*People ex rel. Barsanti v. Scarpelli*, 371 Ill. App. 3d 226, 231 (2007)), and such a motion should be granted only when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law" (735 ILCS 5/2-1005(c) (West 2016)). In determining the existence of a genuine issue of material fact, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent. *Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986). Summary judgment may be granted only where the facts are susceptible to a single reasonable inference. *Consolino v. Thompson*, 127 Ill. App. 3d 31, 33 (1984). An order granting summary judgment should be reversed if the evidence shows that a genuine issue of material fact exists or if the judgment is incorrect as a matter of law. *Clausen v. Carroll*, 291 Ill. App. 3d 530, 536 (1997). We review *de novo* the trial court's grant of a motion for summary judgment. *AUI Construction Group, LLC v. Vaessen*, 2016 IL App (2d) 160009, ¶ 16.

¶ 18 The State Lawsuit Immunity Act (745 ILCS 5/0.01 *et seq.* (West 2016)) provides that, except as provided in the Court of Claims Act (705 ILCS 505/1 *et seq.* (West 2016)) and several other specified statutes, "the State of Illinois shall not be made a defendant or party in any court." Pursuant to the Court of Claims Act, the Court of Claims "shall have exclusive jurisdiction to hear and determine * * * [a]ll claims against the State founded upon any law of the State of Illinois or upon any regulation adopted thereunder by an executive or administrative

officer or agency[.]" 705 ILCS 505/8(a) (West 2016). The State Lawsuit Immunity Act, however, does not bar an action that alleges the State officer's conduct violates statutory or constitutional law or is in excess of his or her authority because such conduct is not regarded as the conduct of the State. *Leetaru v. Board of Trustees of the University of Illinois*, 2015 IL 117485, ¶ ¶ 45-46. "Thus, a complaint seeking to prospectively enjoin such unlawful conduct may be brought in the circuit court without offending sovereign immunity principles." *Parmar*, 2018 IL 122265, ¶ 22. This exception to sovereign immunity has been called the "prospective injunctive relief exception," but it is most often referred to as the "officer suit exception." *Id.*

¶ 19 In *Parmar*, the plaintiff filed a complaint against the Attorney General and the Treasurer, "challenging the application and constitutionality of an amendment to the [Estate Tax Act] and seeking a refund of all moneys paid to the Treasurer pursuant to the Estate Tax Act." *Id.* ¶ 1. The supreme court determined that the officer suit exception to the sovereign immunity doctrine did not apply because, although the plaintiff alleged the defendants' conduct was unlawful because they acted pursuant to an unconstitutional statute, the plaintiff sought damages, including a refund of money, for a past wrong. *Id.* ¶ 26. The supreme court stated that the officer suit exception applies when a plaintiff seeks to "enjoin future conduct" that is alleged to be contrary to law, not to "a complaint seeking damages for a past wrong." *Id.*

¶ 20 The supreme court then considered whether the plaintiff could avoid the sovereign immunity doctrine by seeking a refund from the Estate Tax Refund Fund (35 ILCS 405/13(c) (West 2014)) rather than the State's General Revenue Fund. *Id.* ¶ 36. The supreme court found that the plaintiff could, if he complied with the procedures set forth in the Estate Tax Act to obtain a refund. *Id.* ¶ 42. Those procedures required the plaintiff to file an application for a refund with the State Treasurer within a certain time period. *Id.* ¶ 41. That application was to be

predicated on a reduction of the "state tax credit" as provided in section 7(b) of the Estate Tax Act (35 ILCS 405/7(b) (West 2014)) and was to be based on an overpayment of taxes with respect to a "taxable transfer" as provided in section 14 of the Estate Tax Act (35 ILCS 405/14 (West 2014)). *Id.* ¶ 43. The supreme court then determined that the plaintiff's claim for a refund, which he had filed in the circuit court rather than with the State Treasurer, did not comply with the statutory framework. *Id.* ¶ 42. Further, the plaintiff could not receive a refund under the Estate Tax Refund Fund because his claim was neither predicated on the reduction of the "state tax credit" nor involved the overpayment of taxes with respect to a "taxable transfer." *Id.* ¶ 43.

¶ 21 Here, the plaintiff filed a complaint against the State defendants seeking the return of taxes he claims he improperly paid. As in *Parmar*, this is an alleged past wrong for which plaintiff seeks the repayment of money. *Id.* ¶ 26. As in *Parmar*, the plaintiff's complaint is therefore barred by sovereign immunity. *Id.* ¶ 27.

¶ 22 Further, the plaintiff can find no refuge in the Estate Tax Refund Fund. The plaintiff did not comply with the statutory framework set forth in the Estate Tax Act as he did not file a timely application for a refund with the State Treasurer. See *id.* ¶ 42. Further, since the plaintiff is seeking the return of all the taxes he paid, the plaintiff's claim does not fall within the limited refund provisions of the Estate Tax Act. See *id.* ¶ 43.

¶ 23 In so ruling, we reject the plaintiff's argument that the State defendants abandoned sovereign immunity as a defense in the lower proceedings. The record reveals that the State defendants did raise sovereign immunity as an affirmative defense to the plaintiff's complaint. Moreover, as the State defendants point out, only the General Assembly can waive sovereign immunity. See *id.* ¶ 19.

¶ 24 Finally, we note that the plaintiff raises arguments as to whether (1) seeking recovery under the Protest Moneys Act was his exclusive remedy against the State defendants; (2) his tax payment was made under duress; and (3) the trial court properly determined that the Attorney General's tax assessment was untimely. However, as we have concluded that the plaintiff's action is barred by sovereign immunity, we need not address any of these arguments. See *id.* ¶ 57.

¶ 25 III. CONCLUSION

¶ 26 For the reasons stated, we reverse the judgment of the circuit court of Kendall County.

¶ 27 Reversed.