SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

1015 15th STREET, N.W. ASSOCIATES,

v. Tax Docket No. 7853-99

DISTRICT OF COLUMBIA,

MEMORANDUM ORDER

On October 17, 2000 the District of Columbia filed a Motion to Vacate Order and Reinstate Case [hereinafter "Motion to Vacate"]. The motion is opposed by the taxpayer. The Court has reviewed the entire record and has determined that the Motion must be denied. A hearing is not necessary for reasons that are set forth, *infra*.

The controversy herein emerges from a situation in which the District failed to oppose an oral motion for voluntary dismissal. The District belatedly now seeks to force the taxpayer to re-open its own case.

Background. This case was commenced when the appeal Petition was filed on November 12, 1999. Therein, the taxpayer contended that the

real property assessment for Tax Year 1999 was too high. The original assessment was $25,902,002.00. The subject property, descriptively, is an office building in the downtown area of the District of Columbia.

The taxpayer did exhaust all of its administrative remedies before commencing the Superior Court tax appeal. After receiving no relief from the initial administrative review at the Office of Tax and Revenue, an appeal was filed with the Board of Real Property Assessments and Appeals.

The result of the Board appeal was a determination that the correct assessment should be $24,683.233.00. The Board ordered this relief, and a copy of its decision is appended to the Petition herein.

Even though the taxpayer succeeded in winning relief at the Board level, the taxpayer nonetheless took the next step in the tax appeal process. The taxpayer (which is a partnership) filed its Petition in the Superior Court.

The District filed an Answer to the Petition on January 13, 2000. The case was scheduled for an initial status hearing. On that date, a mediation date of May 17, 2000 was selected. The case also was continued to June 5, 2000 for a status hearing, so that counsel could report on whether a settlement had been achieved.

At the status hearing before this Court on June 5, 2000, counsel for the Petitioner orally moved to dismiss the Petition. Because there was no opposition from Government counsel who was present, the Court granted the motion in open court. The Court had no independent reason not to approve the voluntary dismissal.

The Assistant Corporation Counsel who was present at the June 5, 2000 status hearing was not the same lawyer who was actually assigned to the case and who participated in the mediation session. This attorney was Amy Schmidt, Esq. However, the Assistant who appeared in court on June 5, 2000 was Richard Amato, Esq.

Issues Raised in the Motion. Reduced to its essence, the Motion embraces a complaint that the attorney representing the District of Columbia at the status hearing was personally unaware that the assigned Assistant Corporation Counsel (Schmidt) would have opposed the oral Motion to Dismiss. Consequently, he did not voice any opposition to the Motion in his capacity as stand-in counsel.

It is uncontested in the present pleadings that Petitioner's counsel (Stuart A. Turow, Esq.) told Schmidt shortly after the mediation that the Petitioner would seek to dismiss the case. Within the week following the

mediation, she responded to him that the District probably would oppose a voluntary dismissal – but that she would check with the Director of the Office of Tax and Revenue.

The District contends that Schmidt did arrange with a colleague (Assistant Corporation Counsel Nancy Smith) to make certain representations in open court on June 5, 2000. However, the District points out that Smith was ill on that morning and could not come to court. For this reason, Assistant Corporation Counsel Richard A. Amato unwittingly failed to oppose the Motion without any knowledge of the conversation between Schmidt and Smith, and lacking knowledge of the exchange between Schmidt and Turow.

The Petitioner does not dispute the explanation as to why Smith was not present in court on June 5th, but implies that any errors of the Respondent were purely an internal matter among Government counsel. The key point stressed by Petitioner is that the District had no right to block the dismissal in any event.

The District seeks relief from the judgment of dismissal, under the rubric of Rule 60(b)(1) of the Superior Court Civil Rules. The District

contends that the failure to oppose the oral motion was within the ambit of excusable neglect, mistake, or inadvertence.

The Merits of the Motion to Vacate Judgment and Reinstate Case. Even if the District's failure to oppose the oral Motion to Dismiss was an accident (due to Smith's illness), the Court cannot say with fair assurance that the real cause of the accident was "excusable neglect" that should support vacating the judgment of dismissal. Moreover, the core issue is whether there was ever any substantive basis on which the Court could have denied the oral Motion to Dismiss – even if Smith or Schmidt had attended the status hearing. For a host of reasons, this Court concludes that there was none.

Several concepts are important to the Court's analysis. First, the Court must determine whether the District is entitled to relief pursuant to Rule 60(b)(1) of the Superior Court Civil Rules or because of Rule 9 of the Superior Court Tax Rules or Rule 12-I(d) of the Civil Rules. The District relies on these two Rules for its argument. At best, granting the relief requested by the District would only afford the District an opportunity to articulate the basis of its opposition to the oral motion. The instant Motion serves that very purpose.

Secondly, the Court must set forth the legal principles that apply because of the special nature of tax litigation as compared to ordinary civil litigation.

The District's Argument as to Civil Rule 60(b)(1). The crux of the District's request for relief from judgment is that the District failed to oppose the oral motion to dismiss because of accidental circumstances. In a nutshell, Schmidt had arranged for a stand-in counsel, but the stand-in could not come to court on that day. For the following reasons, the Court finds that there was no "excusable" neglect or other mistake that warrants relief.

First and foremost, the record is insufficient to demonstrate that the inability of Smith to attend the status hearing was necessarily the reason why no opposition to the motion was presented by the District. The causal connection is not proven. The Court looks closely at the District's retrospective proffer of what Smith would have represented to the Court – had she been in the courtroom.

In the instant Motion, the District states, "Prior to the hearing, Ms. Schmidt gave Nancy Smith detailed instructions to continue this matter so that there could be further discussions about the status of this case

specifically to consider a meeting with Dr. Gandhi."[1] This directive to her colleague to seek a continuance includes no reference to dismissal issues at all. This proffer does not even contain a claim that Schmidt actually told Smith about a potential attempt to dismiss the case. The whole business of allowing the taxpayer to further lobby Dr. Gandhi (the agency Director) would be completely pointless and moot if the taxpayer was going to abandon the Superior Court appeal. Thus, in the face of an oral Motion to Dismiss, Smith might have done exactly what Amato did. The message from Schmidt would have become irrelevant.

In addition, as the Petitioner states in its Opposition, Amato could have attempted (on the morning of June 5, 2000) to contact Schmidt or Smith by telephone to confirm whether anything special might occur with their cases on that day. The facts clearly imply that he did not do so, and the District does not address this point. This is why the so-called "neglect" is not excusable. Since the Government liberally uses stand-in counsel at status hearings, with the Court's permission, it is all the more important for stand-in counsel to be fully cognizant of what his or her colleagues intend to represent to the Court. See further discussion, *infra*.

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[1] See District's Memorandum of Points and Authorities in Support of Motion to Reinstate at 2.

The dismissal was reflected in the court jacket entry for the date of June 5, 2000, but was never reduced to a formal order. It is uncontested in the pleadings that Schmidt first learned of the dismissal on August 23, 2000 when she called Turow to tender a new settlement offer. Yet, the District made no attempt to seek relief from the judgment until October 17, 2000.

It does not appear that the District exercised due diligence in formulating its complaint about the oral motion. The District has not explained why so such time passed before it bothered to file the instant Motion to Reinstate. The failure to move with alacrity following the judgment of dismissal is not excusable, especially since the District has implied that it will be prejudiced by the dismissal. See Memorandum of Points and Authorities in Support of Motion to Vacate at footnote 1. See further discussion, *infra*.

Failure to Demonstrate Harm or Prejudice. It is important to recognize that even if the failure to object to the oral motion was indeed an unambiguous and excusable mistake or inadvertent event, the law is clear that relief under Rule 60(b) is not to be granted unless the party seeking relief can demonstrate that it has been harmed by the judgment.

Classically, a voluntary dismissal of a lawsuit operates as an adjudication on the merits. *See Thoubboron v. Ford Motor Co.*, 624 A.2d 1210, 1215 (D.C. 1993). The Court of Appeals has observed that "the purpose of 60(b) is to respect the finality of judgments by providing post-judgment relief only under exceptional circumstances, in unusual and extraordinary situations justifying an exception to the overriding policy of finality, or where the judgment may work an extreme and undue hardship." *Clement v. Dept.of Human Services*, 629 A.2d 1215, 1219 (D.C. 1993)(citations omitted). The District has manifestly failed to allege harm or prejudice, much less prove it.

Remarkably, the District now states, "Due to the confidential nature of mediation, counsel cannot disclose the reasons for the District's refusal to dismiss this case, [*sic*] however the District contends that it is prejudiced by the dismissal of this case and counsel for the petitioner is aware of the District's reasons." Memorandum of Points and Authorities in Support of District's Motion to Vacate at 2 n. 1.

The District seeks to tender an argument in the shadows. It declines to reveal to the Court what the purported prejudice actually entails. If the taxpayer presumably knows what the prejudice is, there is no reason for the

District not to divulge it to the Court. It does not matter what the Petitioner knows.[2] Thus, the unwillingness to articulate the prejudice on the record is a fatal flaw in the Government's argument. For this pivotal reason alone, the instant Motion to Vacate must be denied.

The District's Argument as to Tax Rule 9 and Civil Rule 12-I(d). The District argues that the Motion to Dismiss was required to be filed in written form and that the failure to do so and entitles the District to the reopening of the case. This is not correct. Tax Rule 9(b) specifies that motions are to be filed in writing, "except those made orally during hearing or trial." The Motion to Dismiss herein was by nature an oral motion made during a hearing.

Citing no authority whatsoever, the District expansively argues that "the framers of the rule did not intend to waive the requirement of a written motion for a routine status hearing." Memorandum of Points and Authorities at 3. The Tax Rules contain no Comment, footnotes, or other indicators that oral motions shall not be made at status hearings.[3] Thus, this argument is frivolous.

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[2] If the District had a concern about divulging factual matters to the Court, in anticipation of a non-jury trial, this could have been addressed by seeking recusal at a later time. Any judge on the Court can try a tax case, by certification. Recusal and certification happens in other Divisions, such as with juvenile cases that involve pretrial evidentiary hearings.

[3] Similarly, the Civil Rules do not prohibit oral motions made at status hearings.

The District also cites Rule 12-I(d) of the Superior Court Civil Rules. This Rule provides that "[w]ith the exception of motions made in open court during hearing or trial when opposing counsel is present . . . every petition or motion to the Court shall be reduced to writing and filed with the Clerk." Here, the Motion to Dismiss was made in open court and Government counsel was present. The Rule does not specify that "opposing counsel" means one lawyer who represents a client as opposed to another lawyer who also represents the same client. This Court cannot engraft such a distinction into the Rule where that distinction does not exist. In any event, this Civil Rule also does not even apply to the Tax Division. It is not one of the enumerated Civil Rules that are incorporated by reference into the Tax Rules. See Rule 3(a) of the Superior Court Tax Rules.

The District's complaint about oral motions especially lacks merit because the District historically and consistently tolerates -- and does not oppose -- oral Motions to Dismiss at the regular call of the tax calendar.[4] The present dispute is truly unique. In the last six and one half years, this Court has never seen the District object to any oral Motion to Dismiss. In

[4] Until recently, the regular tax calendar of status hearings was called each Monday. The calendar consists mostly of status hearings, but no trials. With the new triennial assessment system, the lower number of tax appeals has resulted in the tax calendar being scheduled only about twice per month. Formal hearings on written motions are usually scheduled for the same date of a tax calendar, for the convenience of all counsel. The same lawyers are usually present at most calendar calls.

fact, this Court does not recall ever adjudicating a Motion to Dismiss that was filed in writing by a Petitioner. The complaint about the impropriety of an oral Motion to Dismiss is unconvincing.

Voluntary Dismissal in Tax Cases. The genuine issue in this controversy is whether the District ever had a lawful basis on which to force the taxpayer to go any further with this case. Clearly, the District did not. Regardless of any instructions given to Smith, the record is still devoid of any indication of what Schmidt would have argued in opposition to dismissal. This is why the question about an oral motion versus a written motion is a red herring. For several reasons, it is clear in retrospect that neither Schmidt nor Smith would have had a meritorious argument. The Court pauses to illustrate why the unique nature of tax litigation affords the District little space within which to stop a taxpayer from withdrawing prior to trial.

In ordinary civil litigation, a defendant does have the right to oppose a request for voluntary dismissal. This is permitted by Civil Rule 41(a)(2), but only where no answer, dispositive motion or stipulation of dismissal has been filed. However, it is clear that no part of Civil Rule 41 applies to cases in the Tax Division of the Superior Court.

The Superior Court Tax Rules do incorporate by reference a large number of the Civil Rules, and they are enumerated specifically in Tax Rule 3. Notably, Civil Rule 41 is not among them. There is no corresponding Tax Rule that grants to the District the right to object to a voluntary dismissal by a taxpayer. The District ignores this fact, although the taxpayer pointedly refers to it in its Opposition.[5]

It should surprise no one that Rule 41 was not swept into the Tax Rules when the Tax Rules were comprehensively overhauled and revised in 1996. This is because voluntary dismissal of a tax appeal does not imply any negative consequences to any party other than the Petitioner.[6]

Even if Civil Rule 41 were applicable to tax cases, the District cannot show that it is entitled to relief under the case law that interprets Rule 41. The case law interpreting Rule 41 addresses issues and problems that are simply irrelevant to tax litigation. The Court pauses to consider this point, for the sake of being thorough.

For example, the Court of Appeals has emphasized that where voluntary dismissal is sought pursuant to Rule 41, "[t]he court's inquiry

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[5] Opposition to Motion to Vacate at 5.

[6] The Court of Appeals has impliedly recognized this truism, when it observed that a taxpayer's failure at trial to prove that the assessment was defective "cannot logically have adverse consequence for *the District* (which is the taxpayer's adversary)." *District of Columbia v. New York Life Ins. Co.*, 650 A.2d 671, 672

primarily concerns whether the defendant will be subjected to legal prejudice by the allowance [of dismissal]. It is not enough that he may be forced to suffer the incidental annoyance of a second suit in another forum." *D.C. Rent-A-Car Co. v. Cochran*, 463 A.2d 696, 698 (D.C. 1983) (quoting *D.C. Transit System, Inc. v. Franklin*, 167 A.2d 357, 358-9 (D.C. 1961). This kind of prejudice, of course, is irrelevant to tax appeal litigation because simply is no other forum in which to appeal a local tax assessment.

The Court of Appeals also stated in *Cochran*, "To compel a favorable ruling the defendant must show a real and substantial detriment." *Id.* The District has failed to articulate any kind of detriment that it will suffer if it cannot continue to litigate this case.

Notably, the Court of Appeals has warned that " 'it is not a bar to dismissal that plaintiff may obtain some tactical advantage thereby.' " *Thoubboron, supra*, at 1214 (quoting 9 Wright & Miller, §2364, at 165-66). The only tactical advantage of a voluntary dismissal in this particular case is one that has nothing to do with litigation tactics within the case itself. Litigation advantage, as such, was the implication noted in *Cochran*. At best, the only benefit to the taxpayer herein is the elimination of risk that the

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(D.C. 1994)(emphasis in original). This concept is all the more true where the case never reaches trial at all.

trial court might find that the assessment should be higher or that the original assessment should stand.

Dismissal herein may present a secondary "advantage" benefit to the taxpayer – entirely outside of this litigation. In this case, unlike most, the taxpayer obtained some relief from the Board. By virtue of the voluntary dismissal, this taxpayer has effectively elected to keep the relief that it won from the Board.[7] This should be effective for more than one Tax Year, because of the recently enacted "triennial" system of assessments under which one assessment is in place for three years. If this appeal had never been commenced in the Superior Court, the District would still be required to bill the taxpayer at the lower level mandated by the Board. This is not any type of prejudice or unfair "advantage" over the District, since the District is already obligated to abide by the Board's decision.

The Suggestion of Bad Faith. There is an unmistakable suggestion in the District's Motion to Vacate that counsel for the taxpayer somehow acted in bad faith by making the oral motion. This suggestion is captured in the District's assertion that "Petitioner's counsel unfairly seized an opportunity . . . without giving notice to Ms. Schmidt [and] asked Mr. Amato to consent

[7] A Board decision is not vacated by the mere filing of a Superior Court appeal.

to the dismissal without informing him of the true background of this case . . . . Mr. Turow made his motion in court because he knew that if Ms. Schmidt was present or had an opportunity to respond in writing, that she would never consent to this dismissal." Memorandum of Points and Authorities in Support of Motion to Vacate at 5. Based upon the following factors, the Court is unconvinced that any bad faith was involved.

Essentially, there was no objective reason for Turow to think that Schmidt's cases would not be covered by one of her colleagues. Schmidt is rarely ever present for status hearings, because years ago she sought permission of this Court to have stand-in counsel at such proceedings. This was due to her part-time employment arrangement with the Office of Corporation Counsel. The Court granted permission, and no taxpayer's lawyer from any firm objected.[8] In reality, there was no reason for any taxpayer's lawyer to expect anyone other than a stand-in attorney to make representations for the District in Schmidt's cases at a status hearing.

More importantly, Turow had no way to know that Smith had not fully apprised Amato of the inner facts of this particular case. Contrary to the District's suggestion otherwise, Turow had no obligation to educate any

Assistant about any circumstances that might be adverse to the interests of his own client. There was no "misrepresentation by omission," as the District implies. Memorandum of Points and Authorities in Support of Motion to Vacate at 5.

The Lack of Grounds to Oppose a Voluntary Dismissal in the Absence of Prejudice. Clearly, irrespective of whether Rule 41 applies here, the District simply has no basis for opposing a voluntary Motion to Dismiss where the District can prove no prejudice from the dismissal. This is the key point in this controversy.

The lack of a basis to block a voluntary dismissal derives from the fact that the District has no independent right of its own to pursue an appeal of a Board decision. Just as the Petitioner points out in its Opposition, the Code grants to the taxpayer the right to file an appeal from a tax assessment. *See* D.C. Code § 47-825.1(j-l) (2000 Supp.). This right is exclusive to taxpayers. As a practical matter, if the Board grants relief to the taxpayer, the District must live with it, if there is no further successful appeal by the taxpayer.

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[3] The local tax bar is very small, and nearly every firm that conducts such litigation is represented at every call of the tax calendar. Even counting the lawyers for the District, most calendar calls are attended by fewer than seven to ten attorneys from the entire tax bar.

Put another way, if an individual taxpayer were to die in the midst of a Superior Court tax appeal (or if a corporate taxpayer were to dissolve for unrelated reasons), the District would have no statutory right to erect a suit against a non-existent party. In fact, when a client disappears (because of death or dissolution), that client's lawyer scarcely has a proper basis for continuing to appear in court at all.

The District's discomfort in the present case is readily distinguishable from its rights in a situation where a taxpayer seeks to relinquish its challenge to the assessment only after commencement of trial. *See e.g., District of Columbia v. New York Life Ins. Co, supra.*

In the present case the dismissal was requested at the early stage of the case, when there had been no substantive proceedings before the Court. Even though there had been mediation, no formal discovery had been commenced. The Court had not yet scheduled a pretrial conference or a trial date. In fact, the judges of the Tax Division routinely do not even impose a formal litigation schedule until after settlement attempts have been exhausted and it is clear that the taxpayer is still demanding a trial.

The Court cannot indulge in speculation as to the nature of the prejudice that allegedly now confronts the District. Yes, it is worthwhile to

note that if the District is merely concerned about losing the opportunity to seek a higher assessment at trial, this is not genuine prejudice.

The opportunity to prove the basis for a higher assessment is a tactic that only presupposes that a trial has commenced. To be clear, the District does have the right to seek an increase in a tax assessment as part of the trial *de novo* in a Superior Court tax appeal. *See* D.C. Code § 47-3303. However, this right is borne of the trial process itself. It does not arise until after the Petitioner has presented its case in chief, establishing that the original assessment was flawed or incorrect. In other words, the District's right to seek a higher assessment is merely secondary to its right to mount a defense to the taxpayer's trial evidence.

If there is no trial, the District cannot demand a trial of its own as if it is a new Petitioner.[9] This would amount to doing something indirectly which it is plainly not authorized to do directly. The District cannot force a taxpayer to churn the case for the sole benefit of the District.

[9] In the instant case, the District's Answer did not contain any type of counterclaim. A counterclaim, of course, must be something more than a defense, but a cause of action that could be maintained independently. The Tax Rules mysteriously do incorporate Rule 13 of the Civil Rules (referring to counterclaims and cross-claims). The character of any possible Counterclaim is illusive as to an assessment, because the District has no independent statutory right to appeal a Board decision on an assessment. If there had been a lawfully maintained Counterclaim in the District's Answer herein, there might be some prejudice to dismissing the case entirely. In any event, this case is not complicated by any Counterclaim.

Conclusion. Even if the Motion to Dismiss had been filed in writing, and even if the Government had responded with the same points now raised in the Motion to Vacate, the District's position would have lacked merit. No hearing is needed on the instant Motion because the salient facts are not really contested. The Court will not re-open the litigation only for the purpose of permitting the District to file an Opposition to the Motion to Dismiss. There is no reason to inject an extra step in this process. It is fair for the Court to presume that the District has stated its strongest case already.

WHEREFORE, it is by the Court this 18th day of January, 2001

ORDERED that the District's Motion to Vacate Order and Reinstate Case is denied.

Cheryl M. Long
Judge

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