

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

SOUTHWEST GAS CORPORATION,) 1 CA-TX 02-0001
)
Plaintiff-Appellant,) DEPARTMENT T
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ARIZONA DEPARTMENT OF REVENUE,) Rule 28, Arizona Rules
) of Civil Appellate
Defendant-Appellee.) Procedure)
) **FILED 1-21-03**

Appeal from the Arizona Tax Court
Cause Nos. TX 2001-000002 and TX 2001-000003
The Honorable Paul A. Katz, Judge

VACATED AND REMANDED

Fennemore Craig, P.C. Phoenix
by Paul J. Mooney
Jim L. Wright
and
Jennings Strouss & Salmon Phoenix
by Michael J. O'Connor
John J. Egbert
Attorneys for Plaintiff-Appellant

Jones, Skelton & Hochuli Phoenix
By Eileen Dennis GilBride
Attorneys for Defendant-Appellee

P A T T E R S O N, Judge

¶1 Southwest Gas Corporation ("the taxpayer") brought two separate property tax appeals in the Arizona Tax Court challenging appellee Arizona Department of Revenue's ("ADOR") valuations of certain utility properties. The taxpayer's in-house counsel timely

filed the actions within sixty days after the Arizona State Board of Equalization mailed its decisions affirming ADOR's valuations. See Arizona Revised Statutes ("A.R.S.") section 42-16203(C) (Supp. 2002). At the same time, the taxpayer's counsel failed to join as defendants the county in which the properties were located and which collect the taxes in question. See A.R.S. § 42-16208(A)(1) (1999) (required joinder of county that collects tax). Counsel also incorrectly joined the Board of Equalization as a defendant and failed to serve either complaint/notice of appeal within the required ten days after filing the actions. See A.R.S. § 42-16209(A) (1999) (service of process required within ten days after filing).

¶2 Upon discovering these errors, the taxpayer brought in outside counsel, who moved to allow delayed service of process and to amend the complaint to add Maricopa County as a defendant. ADOR moved to dismiss the taxpayer's actions. The tax court granted ADOR's motion and denied the taxpayer's. The taxpayer timely appeals from the court's formal dismissal order,.

¶3 The taxpayer raises these issues on appeal:

1. Did the tax court err in denying the taxpayer's motion for leave to amend its complaint to add Maricopa County as a defendant?
2. Did the tax court err in denying the taxpayer leave to re-file its complaint and notice of appeal under A.R.S. § 12-504(A) (1992)?

As a cross-issue in support of the judgment, ADOR adds:

3. Were the taxpayer's actions properly subject to dismissal for lack of subject matter jurisdiction because the taxpayer failed to join Maricopa County as a defendant within sixty days after the mailing of the Board of Equalization's decision?

We have appellate jurisdiction. A.R.S. § 12-2101(B) (1994).

ANALYSIS

Tax Court's Subject-Matter Jurisdiction

¶4 We review questions of jurisdiction *de novo*. *Murphy v. Bd. of Med. Exam'rs*, 190 Ariz. 441, 446 n.8, 949 P.2d 530, 535 n.8 (App. 1997).

¶5 A taxpayer who is dissatisfied with the valuation or classification of property as reviewed by the Arizona State Board of Equalization may appeal to the tax court or superior court within sixty days after the Board mails its decision. A.R.S. § 42-16203(A), (C) (Supp. 2002). The taxpayer commences such an appeal by filing a notice of appeal in either court. A.R.S. § 42-16207(A) (1999). When the taxpayer's appeal concerns property that is valued by ADOR, as here, the taxpayer must name as defendants ADOR and "either this state or the county in which the property is located, whichever collects the tax." A.R.S. § 16-208(A)(1). The taxpayer must serve a copy of his notice of appeal on each defendant and on ADOR, by certified mail or in the manner provided

for service of process in the Arizona Rules of Civil Procedure, within ten days after filing. A.R.S. § 42-16209(A).

¶6 Because the taxpayer failed to join Maricopa County or any other county as a defendant,¹ ADOR argues that the tax court correctly held that it lacked authority to allow the taxpayer to amend its complaint to add Maricopa County after expiration of the sixty-day limit for appealing from the Board of Equalization's ruling. We disagree.

¶7 Two Arizona cases hold to the contrary. *Ellman Land Corp. v. Maricopa County*, 180 Ariz. 331, 336, 342, 884 P.2d 217, 222, 228 (App. 1994); *Pesqueira v. Pima County Assessor*, 133 Ariz. 255, 257, 650 P.2d 1237, 1239 (App. 1982), *disapproved on other grounds by Hibbs v. Chandler Ginning Co.*, 164 Ariz. 11, 15 n.3, 790 P.2d 297, 301 n.3 (App. 1990). In both *Ellman Land* and *Pesqueira*, the taxing authority argued that the taxpayers' failure to join required parties-defendant deprived the superior court of jurisdiction to proceed with their appeals. *Ellman Land*, 180 Ariz. at 336, 884 P.2d at 222; *Pesqueira*, 133 Ariz. at 257, 650 P.2d at 1239. In *Pesqueira*, the court recognized that adhering to the statutory procedures for mounting a tax appeal, including naming

¹ADOR does not argue that the taxpayer's failure to timely serve its complaint/notice of appeal deprived the tax court of jurisdiction. ADOR recognizes that *Maricopa County v. Ariz. Tax Court*, 162 Ariz. 64, 69-70, 781 P.2d 41, 46-47 (App. 1989), forecloses any such argument.

and serving the proper defendants, was necessary "to confer subject matter jurisdiction on the court." *Id.* Both cases likewise held, however, that if the taxpayers moved to amend their complaints/notices of appeal to join the omitted defendants and the superior court properly granted that motion, the court would acquire jurisdiction in the action. *Ellman Land*, 180 Ariz. at 342, 884 P.2d at 228; *Pesqueira*, 133 Ariz. at 257, 650 P.2d at 1239.

¶8 ADOR cites seven cases from other jurisdictions holding that the plaintiff's failure to timely join a statutorily-mandated defendant creates a jurisdictional defect. Several also hold, contrary to *Ellman Land* and *Pesqueira*, that a defect of that kind cannot be corrected by amending the complaint after the deadline for filing it. Relying on these cases, ADOR argues in a footnote that *Pesqueira's* "suggestion" to the contrary is "inappropriate."

¶9 ADOR does not elaborate on this argument and cites no Arizona authority that supports it. Our own research likewise finds none. The bare existence of non-Arizona cases that hold differently from *Ellman Land* and *Pesqueira* fails to convince us to depart from these settled Arizona holdings.

Denial of Amendment to Add Maricopa County as Defendant

¶10 We review an order denying a motion to amend a pleading under Rule 15, Arizona Rules of Civil Procedure, for clear abuse of discretion. *Hall v. Romero*, 141 Ariz. 120, 124, 685 P.2d 757, 761 (App. 1984).

¶11 Rule 15(c) provides in pertinent part:

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment, plus the period provided by Rule 4(i) for service of the summons and complaint, the party to be brought in by amendment (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

¶12 The tax court denied the taxpayer's motion to amend its complaint/notice of appeal to add Maricopa County as a party-defendant on two grounds. First, the court determined that it was "not empowered to extend the 60-day deadline . . . without all required defendants named." Second, it determined that the taxpayer's in-house counsel's failure to join Maricopa County as a party defendant within the sixty-day period had not resulted from "excusable neglect," but rather from his "failure to use reasonable diligence in locating substantive statutes which are well indexed in both the book and computer versions of the Arizona Revised Statutes."

¶13 We have already rejected the view that the tax court lacked authority to grant relief under Rule 15(c) in this case. We likewise point out that under the express language of that rule the proper standard for determining whether relation-back should be allowed is not whether the plaintiff's failure to timely join a required party defendant resulted from "excusable neglect."² It is rather whether the terms of Rule 15(c) have been met. *Cf. Watts v. State*, 115 Ariz. 545, 547-48, 566 P.2d 693, 695-96 (App. 1977) (summarizing the Rule 15(c) criteria).

¶14 It is quite clear that in ruling on the taxpayer's request for relief under Rule 15(c), the tax court focused exclusively on the conduct of the taxpayer's in-house counsel. The ruling reflects no consideration of the three specific criteria on which the appropriateness of such relief is to be determined. Although the parties have briefed these criteria, this court declines to be the first to exercise its discretion in applying them to resolve the Rule 15(c) issue. That is the function of the trial court.

¶15 As we remand this matter for consideration based on the factors specified in Rule 15(c), we need not reach the issue of the applicability of A.R.S. § 12-504(a).

²"Excusable neglect" is language from Rule 6(b) of the Arizona Rules of Civil Procedure and is a test pertinent to the enlargement of time and not to the amendment of pleadings.

CONCLUSION

¶16 The tax court had jurisdiction to rule on the taxpayer's motions for relief under Rule 15(c), Arizona Rules of Civil Procedure. The tax court's ruling reflects that it failed to apply the appropriate criteria in resolving the issue.

¶17 The taxpayer requests an award of attorneys' fees on appeal pursuant to A.R.S. § 12-348(B). Because the taxpayer has not yet prevailed on the merits of this litigation, and this appeal does not determine "an issue of law sufficiently significant that the appeal may be considered as a separate unit," we deny the request. *Wagenseller v. Scottsdale Mem'l Hosp.*, 147 Ariz. 370, 393-94, 710 P.2d 1025, 1048-49 (1985).

¶18 The judgment is vacated and remanded for proceedings consistent with this decision.

CECIL B. PATTERSON, JR.
Judge

CONCURRING:

ANN A. SCOTT TIMMER, Presiding Judge

G. MURRAY SNOW, Judge