

OHIO BOARD OF TAX APPEALS

Sexton 1987 Hillside Ltd. Partnership IX,)	CASE NO. 2007-V-1056
)	
Appellant,)	(REAL PROPERTY TAX)
)	
vs.)	DECISION AND ORDER
)	
Montgomery County Board of Revision,)	BTA Vacated/Remanded to BOR Mar. 4, 2009
Montgomery County Auditor, and the)	Upon Appeal to Ohio Supreme Court
Centerville City School District)	Case No. 2008-1599
Board of Education,)	
)	
Appellees.)	

APPEARANCES:

For the Appellant -	Bailey Cavalieri, LLC Harlan S. Lewis One Columbus 10 West Broad Street Suite 2100 Columbus, OH 43215-3422
For the County Appellees -	Mathias H. Heck, Jr. Montgomery County Prosecuting Attorney Nolan Thomas Assistant Prosecuting Attorney 301 West Third Street P.O. Box 972 Dayton, OH 45422
For the Appellee - BOE	McGown & Markling Co., LPA Elizabeth Grooms Taylor 1894 North Cleveland-Massillon Road Akron, OH 44333

Entered July 15, 2008

Ms. Margulies and Mr. Dunlap concur. Mr. Eberhart dissents.

This appeal is now considered by the Board of Tax Appeals following the issuance of an order requiring appellant Sexton 1987 Hillside Ltd. Partnership IX (“Sexton”) to show cause as to why this board should not affirm the decision of the

Montgomery County Board of Revision (“BOR”) dismissing the underlying complaint. The appellant has filed a written response to this board’s order.

In the instant case, a review of the statutory transcript (“S.T.”) certified to this board by the Montgomery County Auditor indicates that the underlying complaint filed with the BOR was dismissed for failure to prosecute after neither the appellant nor its counsel appeared at a rescheduled hearing before the BOR. S.T. at D.

In *LCL Income Properties v. Hamilton Cty. Bd. of Revision* (1995), 71 Ohio St.3d 652, the Ohio Supreme Court held that the failure of a property owner to appear at a board of revision hearing is proper grounds for the dismissal of the owner’s complaint. *LCL* was an affirmation of the court’s earlier ruling in *Swetland v. Evatt* (1941), 139 Ohio St. 6, in which it held:

“A county board of revision *** is a quasi-judicial body, and where a taxpayer files a complaint against the assessed value of his real property and thereafter fails to attend a hearing of which he has had notice and no evidence in support of such complaint is offered by or on behalf of the taxpayer, a county board of revision is justified in fixing the valuation complained of in the amount assessed by the county auditor.” (Paragraph nine of the syllabus.)

In its written response to this board’s order, counsel for Sexton gives his explanation of the circumstances surrounding the BOR’s dismissal, which is supported by the record. Counsel states that he prepared and filed the underlying complaint on behalf of the appellant and that notice of the BOR’s initial hearing was mailed to counsel. S.T. at B. Counsel alleges that after receiving a continuance of the BOR’s hearing, the BOR failed to send notice of the rescheduled hearing to counsel;

rather, the BOR mailed the notice of hearing directly to the appellant. *Id.* Thereafter, neither the appellant nor appellant's counsel appeared at the hearing before the BOR. After the BOR dismissed the complaint, Sexton filed a motion for reconsideration explaining that counsel had not received notice. *Id.* at C. Based on the record submitted to this board, it does not appear that the BOR provided any written response to Sexton's motion for reconsideration.

In *Knickerbocker Properties Inc. XLII v. Delaware Cty. Bd. of Revision* Slip Opinion No. 2008-Ohio-3192, the court held that the period to appeal the decision of the BOR did not begin until the BOR sent notice of its decision to the owner at its proper address. The BOR in *Knickerbocker* sent notice of the hearing and subsequent decision to the incorrect address listed on the complaint form rather than the correct address listed on the recent deed and conveyance fee statement for the subject property. In construing who bears the responsibility for providing proper notice to the owner, the court held:

“R.C. 5715.19(B) explicitly requires the auditor, ***, to give notice of the filing of a complaint in particular situations. R.C. 5715.19(C) also requires that the BOR furnish notice of a hearing to a property owner when the complaint was filed by someone other than the owner. Finally, R.C. 5715.12 requires the BOR to notify the owner of a hearing before increasing the valuation, while R.C. 5715.13 requires the BOR to notify other parties of a hearing before decreasing the valuation.” *Id.* at ¶12.

Appellant argues that the BOR's dismissal and subsequent refusal to reconsider its dismissal deprives the appellant of a fair review of the complaint on the merits, citing *S. Euclid/Lyndhurst Bd. of Educ. v. Cuyahoga Cty. Bd. of Revision*

(1996), 74 Ohio St.3d 314, 319; *Nucorp, Inc. v. Montgomery Cty. Bd. of Revision* (1980), 64 Ohio St.2d 20, 22. We disagree.

In construing which address the BOR should use in providing notice to the owner, the court in *Knickerbocker*, supra, held:

“[W]e have held that the constitutional due-process principle supplies the rule: the owner may be served at an address that is reasonably calculated to give notice to the owner.” *Id.* at ¶17.

Based upon the record before us, it appears that Sexton was served with the appropriate notice.

In this board’s order, we addressed Sexton’s argument that the BOR should have continued to provide notice to counsel based upon Civ.R. 5(B), which provides that, where a party is represented by an attorney of record in the proceedings, “*** service shall be made upon the attorney unless service upon the party is ordered by the court.” See *Swander Ditch Landowners’ Assn. v. Joint Bd. of Huron & Seneca Cty. Commrs.* (1990), 51 Ohio St.3d 131, 134.

Appellant argues that case law cited in this board’s order denying the application of Civ.R. 5 by this board is limited to cases where a party has attempted to enlarge the 30-day timeframe to perfect an appeal from the decision of a BOR. *Osborne v. Lake Cty. Bd. of Revision* (Jan. 31, 1992), Lake App. No. 91-L-076, unreported, appeal denied (1992) 64 Ohio St.3d 1413.¹ Appellant argues the instant appeal was filed timely, which does not require this board to enlarge the appeal time,

¹ Cf. *Aleem, Inc. v. Limbach* (Feb. 16, 1990), BTA No. 1988-A-650, unreported, in which we found that service upon a taxpayer was sufficient to trigger the appeal period from a final determination of the Tax Commissioner, although the taxpayer’s attorney of record before the commissioner did not receive a copy of the determination.

but rather, the board should remand the instant appeal and order the BOR to consider the underlying merits, given the BOR's denial of Sexton's motion for reconsideration was unreasonable. In the alternative, Sexton asks this board to proceed to the underlying merits of the appeal and provide an opportunity for the appellant to introduce evidence.

In Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision

(Feb. 1, 2008), BTA No. 2007-T-397, unreported, at 7-8, we held:

“*Osborne*, supra, is especially germane to the issue now before us. *Osborne* concerned a decision issued by a county board of revision that had been sent by certified mail to the complainant property owner but not to the attorney who represented the owner before the BOR. The owner cited Civ.R. 5(B) in support of its contention that its appeal time did not begin to run until the owner's attorney received a copy of the BOR's decision. However, the court found Civ.R. 5(B) to be inapplicable because R.C. 5715.20 specified that notice be provided to the property owner, as the complainant. Relying upon *Ramsdell*, supra, the court concluded that ‘*** where the legislature has dictated the procedure by which an appeal is to be perfected, the courts are bound to interpret the statutory rule as it is written. *** In the instant case, *** the legislature has provided a statutory procedure by which a county Board of Revision must notify the property owner (and other complaining parties, if any) and the tax commissioner. Further, this notification must be done by certified mail. This requirement is a higher burden than service required by Civ. R. 5(B) ***.’ See, also, *Parkbrook*, supra (‘Since the statutory scheme for appeals *** expressly states the type of notice to be provided potential appellants, the requirements of R.C. 5715.20 *** were not subject to Civ.R. 5(B).’), and *Midtown Industrial Warehouse, Inc., v. Cuyahoga Cty. Bd. of Revision* (Mar. 9, 2001), BTA No. 2000-B-668, unreported (holding, ‘Although good practice might indicate notice should be given to the attorney of record, deposit of the decision by certified mail addressed to the listed property owner fully satisfies the notice requirements of R.C. 5715.20.’). n4 This finding is consistent with the holding in *Swander*, supra, as the statutory appeal to the common pleas court in that case did not

provide what type of notice the administrative body was required to provide the parties. Civ.R. 5(B) was employed, in essence, to ‘fill the gap.’”

We are sympathetic to Sexton’s predicament, where it appears that the BOR initially provided counsel with notice of the first hearing, and then refrained from doing so when rescheduling the hearing. Furthermore, the BOR apparently failed to even address Sexton’s motion for reconsideration. However, this board does not have equity powers, and we are compelled to follow the clear language of the statute. *Columbus Southern Lumber Co. v. Peck* (1953), 159 Ohio St. 564.

In *Sycamore Com. School Dist. v. Hamilton Cty. Bd. of Revision* (Dec. 5, 1997), BTA No. 1997-P-590, unreported, this board previously held that the failure to notify counsel for the complainant did not constitute error when there is no statute that expressly requires the BOR to additionally notify counsel. See, also, *Knickerbocker*, supra.

This board is constrained to find that the rationale for our decision in *Sycamore Com. School Dist.*, supra, is sound. Therefore, this board accordingly finds that the BOR’s action was within its discretion and affirms the decision of the BOR in dismissing the underlying appeal.

Mr. Eberhart dissents.

I respectfully dissent from the majority’s decision and order.

In *S. Euclid/Lyndhurst Bd. of Ed.*, supra, the court held:

“While this court has never encouraged or condoned disregard of procedural schemes logically attendant to the pursuit of a

substantive legal right, it has also been unwilling to find or enforce jurisdictional barriers not clearly statutorily or constitutionally mandated, which tend to deprive a supplicant of a fair review of his complaint on the merits.” *Id.* at 319.

The failure of the BOR to send notice to taxpayer’s counsel of record of a rescheduled hearing deprives the taxpayer of a fair review of its complaint on the merits based on the record before this board. Counsel properly entered his appearance before the BOR, and upon the scheduling of the initial merit hearing, received notice from the BOR. The failure of the BOR to send notice to counsel upon the rescheduling of the hearing would appear to have been an oversight in the first instance; however, it is troubling to see that counsel’s attempt to have the BOR reopen the hearing (after explaining to the BOR that it had failed to send counsel notice of the rescheduled hearing) fell on deaf ears. Fairness dictates that the BOR should have reopened the case to permit the complainant to have its day in court.²

Although the majority relies upon the court’s recent decision in *Knickerbocker*, *supra*, I submit the same principle of fairness used in *Knickerbocker* should permit Sexton to have its case heard on the merits.

This board has previously refrained from applying the court’s holding in *Swander Ditch Landowners’ Assn.*, *supra* (Civ.R. 5(B) requires service upon counsel of record) in situations where the appellant seeks to enlarge the period of time to perfect an appeal before this board. However, the record before this board does not present the same issue; appellant is not seeking to enlarge any time-frame mandated

² Further, the court’s ruling in *Sharon Village Ltd. v. Licking Cty. Bd. of Revision* (1990), 51 Ohio St.3d 479, recognized that involvement of counsel is not only a need, but a jurisdictional requirement.

by statute.

This board's previous holding in *Sycamore Com. School Dist.*, supra, is distinguishable. In *Sycamore*, this board was critical of appellant's failure to attempt to rectify the error by filing a timely motion for reconsideration before the BOR. Here, the appellant filed a motion for reconsideration, and the BOR failed to provide any response to the motion. Further, as argued by the appellant, the BOR had previously sent notice to counsel and additionally communicated with counsel regarding the need for a continuance. The BOR's unexplained failure to serve notice upon counsel and failure to respond to the motion for reconsideration appears prejudicial given the BOR's consistency in serving the BOE's counsel of the first hearing and of the rescheduled hearing.

I would remand the case to the BOR with instructions to hear the case on the merits.

ohiosearchkeybta