

IN THE FRANKLIN COUNTY COURT OF COMMON PLEAS
CIVIL DIVISION

BRUCE A. VANCE, et al., :
 :
 Plaintiffs, :
 :
 vs. : Case No. 16CVH04-3295
 :
 STATE OF OHIO, et al., : JUDGE FRENCH
 :
 Defendants. :

DECISION GRANTING DEFENDANT,
TAX COMMISSIONER OF OHIO'S
MOTION FOR SUMMARY JUDGMENT,
FILED MAY 12, 2017

This matter is before the Court upon the Motion for Summary Judgment, filed by Defendant, Tax Commissioner of Ohio (hereinafter "Defendant Tax Commission"), on May 12, 2017. On July 23, 2017, Plaintiffs, Bruce A. Vance, et al. (hereinafter "Plaintiffs"), filed an Initial Brief in Opposition to Defendant Tax Commissioner's Motion for Summary Judgment, and on August 17, 2017, the Court ordered that Plaintiffs shall have 60 days to conduct limited discovery for the purposes of responding to Defendant Tax Commissioner's Motion for Summary Judgment, and ordered that Plaintiffs shall file their Memorandum Contra Defendant Tax Commissioner's Motion for Summary Judgment within 90 days. On November 16, 2017, the Court extended Plaintiffs' time to respond and ordered that Plaintiffs shall have until January 16, 2018 to file a Memorandum Contra to Defendant Tax Commissioner's Motion for Summary Judgment. On January 15, 2018, Plaintiffs filed their Memorandum in Opposition to Defendant Tax Commissioner's Motion for Summary Judgment, and on January 22,

2018, Defendant Tax Commissioner filed a Reply Brief in Support of Defendant Tax Commissioner's Motion for Summary Judgment.

I. Background

On June 26, 2015, Plaintiffs filed their original Class Action Complaint in the Court of Common Pleas of Ashtabula County. On July 27, 2015, Plaintiffs filed an Amended Class Action Complaint in the Court of Common Pleas of Ashtabula County, and on September 15, 2015, Defendants filed a Motion to Transfer Venue and to Dismiss. On November 9, 2015, Plaintiffs filed a Memorandum in Opposition to Defendants' Motion to Transfer Venue and to Dismiss, as well as a Motion for Leave to File Second Amended Complaint.

Thereafter, on January 19, 2016, Plaintiffs filed a Motion Requesting Recusal of Judge Harris of the Ashtabula Court of Common Pleas. On January 20, 2016, Judge Harris granted Plaintiffs' Motion Requesting Recusal, and on January 22, 2016 the case was transferred to the docket of Judge Gary Yost of the Ashtabula Court of Common Pleas.

On January 22, 2016, Plaintiffs filed a Notice of Dismissal of Defendant Governor John R. Kasich, and on January 29, 2016, Plaintiffs filed a Supplemental Brief in Opposition to Defendants' Motion to Transfer and to Dismiss.

On February 16, 2016, Judge Yost held a Pending Motions Hearing, and on February 24, 2016, Judge Yost granted the portion of Defendants' Motion requesting a transfer of venue, and ordered that the action be transferred to the Franklin County Court of Common Pleas.

On April 6, 2016, this action was officially filed/transferred to this Court. However, the Court noted that while the action was pending in the Ashtabula Court of Common Pleas, Judge Yost did not issue a ruling on Plaintiffs' Motion for Leave to File Second Amended Complaint, or the portion of Defendants' Motion requesting dismissal of Plaintiffs' Amended Complaint. As such, on November 2, 2016, this Court issued a Decision and Entry Granting Plaintiffs' Motion for Leave to File Second Amended Complaint, and a Decision and Entry Denying Defendants' Motion to Dismiss.

On May 12, 2017, Defendant Tax Commissioner filed the Motion for Summary Judgment, which is now before the Court.

II. Standard of Review

A party seeking summary judgment, on the grounds that the nonmoving party cannot prove its case, bears the initial burden of: 1) informing the trial court of the basis for the motion; and, 2) identifying those portions of the record which demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims. See *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, citing, *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264; *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115. "The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case. Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims." *Dresher*, at 288-289. If the moving party fails to satisfy this initial burden, the motion for summary

judgment must be denied. See *Kulch v. Structural Fibers, Inc.* (1997), 78 Ohio St.3d 134, 147; *Dresher*.

If the moving party satisfies its initial burden, “the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party.” *Dresher*, at 288-289; followed by *Conway v. Calbert* (C.A.10 1997), 119 Ohio App.3d 288, 291, 695 N.E.2d 271, 272-273. Thus, “[a] motion for summary judgment forces the non-moving party to produce evidence on issues for which that party bears the burden of production at trial.” *Wade-Hairston v. Franklin Cty. Bd. of Mental Retardation and Developmental Disabilities* (Dec. 17, 1998), Franklin App. No. 98AP-456, unreported, citing, *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, 111; see, also, *Dresher*, at 288-289; *Carter v. Consol. Rail Corp.* (C.A.10 1998), 126 Ohio App.3d 177, 181, citing, *Stewart v. B.F. Goodrich Co.* (1993), 89 Ohio App.3d 35, 623 N.E.2d 591; *Cullen v. Ohio Dept. of Rehab. & Corr.* (C.A.10 1998), 125 Ohio App.3d 758, 764, citing, *Stewart*. “The non-movant must also present specific facts and may not merely rely upon the pleadings or on unsupported allegations.” *Wade-Hairston*, citing, *Shaw v. J. Pollock & Co.* (1992), 82 Ohio App.3d 656, 612 N.E.2d 1295. Moreover, “[w]hen a party moves for summary judgment supported by evidentiary material of a type and character set forth in Civ.R. 56[(C)], the opposing party has a duty to submit materials permitted by Civ.R. 56(C) to show that there is a genuine issue for trial.” *Wade-Hairston*, citing, *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 375 N.E.2d 46.

III. Discussion

A. Defendant Tax Commissioner's argument that Plaintiffs' equitable restitution claim must fail.

Defendant Tax Commissioner contends that Plaintiffs' equitable restitution claim against the Tax Commissioner fails as a matter of law because the Ohio Department of Taxation never collected or possessed the funds to which Plaintiffs claim they are entitled.

In *Cristino v. Ohio Bureau of Workers' Comp.*, the Ohio Supreme Court noted that "[i]t is well established that restitution can be either a legal or an equitable remedy." *Cristino v. Ohio Bureau of Workers' Comp.*, 118 Ohio St. 3d 151, 152, 2008-Ohio-2013, ¶ 7, 886 N.E.2d 857, 859, 2008 Ohio LEXIS 1194, *4, citing *Santos v. Ohio Bureau of Workers' Comp.*, 2004-Ohio-28, 801 N.E.2d 441, at ¶ 11. "In order to determine whether a claim for restitution requests legal or equitable relief, we look to the basis for the plaintiff's claim and the nature of the underlying remedies sought." *Id.* citing, *Santos*, 2004-Ohio-28, at ¶ 13.

The *Santos* Court looked to the U.S. Supreme Court's decision in *Great-West Life & Annuity Ins. Co. v. Knudson* (2002), 534 U.S. 204, 213, 122 S. Ct. 708, 151 L. Ed. 2d 635, where Justice Scalia provided the following guidance:

Restitution is available as a *legal* remedy when a plaintiff cannot "assert title or right to possession of particular property, but in which nevertheless he might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him." *Id.*, quoting Dobbs, *Law of Remedies* (2d Ed.1993) 571, Section 4.2(1). Restitution is available as an *equitable* remedy "where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Id.* "Thus, for restitution to lie in equity, the action generally must seek not to impose personal liability on the

defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." *Id.* at 214, 122 S. Ct. 708, 151 L. Ed. 2d 635. [Emphasis added.]

Santos v. Ohio Bureau of Workers' Comp., 101 Ohio St. 3d 74, 76, 2004-Ohio-28, ¶ 12, 801 N.E.2d 441, 444, 2004 Ohio LEXIS 59, *6-7.

In the case at hand, Defendant Tax Commissioner contends that he never collected or possessed the CAUV (Current Agricultural Use Valuation) property taxes paid by Plaintiffs and the members of their putative class. Defendant Tax Commissioner has attached the Affidavit of Shelley Wilson, the Executive Administrator of the Tax Equalization Division of the Ohio Department of Taxation, which states that the taxable value of CAUV property is appraised and assessed by the auditor of the county in which the property is situated. *Wilson Aff.* at ¶ 7; see also, R.C. 5713.01(A) and R.C. 5713.31. The CAUV property taxes are then paid directly by the taxpayer to each of Ohio's 88 county treasurers. *Id.* at ¶ 8; and R.C. 323.12. From there, county treasurers disburse the collected taxes to various local entities. R.C. 321.33. Defendant Tax Commissioner contends that at no point from appraisal through collection and distribution are CAUV property taxes collected, maintained, or possessed by the Tax Commissioner or the Ohio Department of Taxation. *Id.* at ¶ 9. Therefore, because Defendant Tax Commissioner has never collected, possessed, or distributed the CAUV property taxes paid by Plaintiffs, Defendant Tax Commissioner contends that Plaintiffs' claim for equitable restitution must fail as a matter of law.

In response, Plaintiffs contend that Defendant Tax Commissioner has a statutory responsibility to direct and supervise the appraisal of all real property, and the collection of all property taxes, across the State of Ohio. Plaintiffs further contend that because no

county auditor, treasurer, or other official of any subdivision of the State of Ohio has authority to deviate from Defendant Tax Commissioner's appraisal values set forth in the annual Soil Tables, these county auditors and treasurers are simply agents of Defendant Tax Commissioner that collect the CAUV property taxes exactly per the direction and control of Defendant Tax Commissioner. Plaintiffs direct the Court to R.C. 5715.01 which states in pertinent part as follows:

The tax commissioner shall direct and supervise the assessment for taxation of all real property. The commissioner shall adopt, prescribe, and promulgate rules for the determination of true value and taxable value of real property by uniform rule for such values and for the determination of the current agricultural use value of land devoted exclusively to agricultural use.

R.C. 5715.01(A).

Plaintiffs further contend that when Defendant Tax Commissioner breaches his legal and fiduciary duty to properly calculate the values of CAUV lands, the State retains in its treasury the amount of taxes overpaid on CAUV lands by shifting its payment obligations for local education and government funding.

Therefore, based on the foregoing, the Court finds that the sole dispositive issue before it is whether or not Defendant Tax Commissioner in fact "assessed and retained" the funds that Plaintiffs demand in restitution. The Court finds that he did not.

More specifically, the Court finds that Defendant Tax Commissioner does not collect or assess the CAUV property taxes. In *Ohio Utilities Co. v. Collins*, the Ohio Supreme Court rejected the argument that it should "equate payment to a county treasurer with payment to the Treasurer of State." *Ohio Utilities Co. v. Collins*, 48 Ohio St. 2d 169, 171-172, 357 N.E.2d 1077, 1079, 1976 Ohio LEXIS 728, *7, 2 Ohio Op. 3d 370.

The *Collins* Court further agreed with the Board of Tax Appeals' finding that "the county treasurer is not merely an agent of the Department of Taxation." *Id.*

In addition, the Court finds that Plaintiffs have failed to contest the Affidavit of Shelley Wilson, which states that neither Defendant Tax Commissioner nor the Department of Taxation has ever collected or possessed Plaintiffs' CAUV property tax dollars. See, *Wilson Aff.* at ¶ 4. Instead, Plaintiffs argue that the State is essentially saving or "holding" the money that it has collected from Plaintiffs' increased CAUV taxes, because it results in the State having to pay less funding to the local school districts and governments. However, the Court finds that Plaintiffs' claim to this "saved" money does not satisfy the traceability requirement of *Great West* and *Santos, supra*. As stated above, "[r]estitution is available as an *equitable* remedy "where money or property identified as belonging in good conscience to the plaintiff *could clearly be traced to particular funds or property in the defendant's possession.*" *Santos v. Ohio Bureau of Workers' Comp.*, 101 Ohio St. 3d 74, 76, 2004-Ohio-28, ¶ 12, 801 N.E.2d 441, 444, 2004 Ohio LEXIS 59, *6-7, citing *Great-West Life & Annuity Ins. Co. v. Knudson* (2002), 534 U.S. 204, 213, 122 S. Ct. 708, 151 L. Ed. 2d 635. Here, the Court finds that the funds Plaintiffs seek in restitution cannot be clearly traced to Defendant Tax Commissioner, as there is no evidence that such funds were ever actually paid to Defendant Tax Commissioner.

Therefore, the Court finds that because Defendant Tax Commissioner has never assessed or retained the CAUV property taxes that Plaintiffs demand in restitution, Plaintiffs' claim for equitable restitution fails as a matter of law.

B. Defendant Tax Commissioner’s argument that this Court lacks subject matter jurisdiction over Plaintiffs’ remaining claim for declaratory judgment.

Defendant Tax Commissioner contends that because Plaintiffs’ claim for equitable restitution fails, this Court is deprived of subject matter jurisdiction over Plaintiffs’ remaining claim for declaratory judgment. The Court agrees.

The Court finds that because Plaintiffs’ claim for restitution is legal, rather than equitable in nature, this Court does not have subject matter jurisdiction over Plaintiffs’ claims. See, *Measles v. Indus. Comm’n of Ohio*, 128 Ohio St. 3d 458, 460, 2011-Ohio-1523, ¶ 7, 946 N.E.2d 204, 206, 2011 Ohio LEXIS 806, *5 (“The Court of Claims . . . has exclusive jurisdiction over civil actions against the state for money damages that sound in law.”) The Court further finds that although Plaintiffs have also asserted a claim for declaratory judgment, “[t]he Court of Claims has exclusive, original jurisdiction in all civil suits for money damages even where ancillary relief such as an injunction or declaratory judgment is sought.” *Id.* quoting *Ohio Hosp. Assn. v. Ohio Dept. of Human Servs.* (1991), 62 Ohio St.3d 97, 103, 579 N.E.2d 695. Therefore, the Court finds that because the restitution that Plaintiffs seek is legal rather than equitable, this Court lacks subject matter jurisdiction over Plaintiffs’ claims, including their claim for declaratory judgment.

IV. Conclusion

Therefore, based on the foregoing, the Court accordingly hereby **GRANTS** Defendant Tax Commissioner’s Motion for Summary Judgment relating to subject matter jurisdiction, and **ORDERS** that Plaintiffs’ Complaint shall be dismissed without

prejudice. Counsel for Defendant Tax Commissioner shall submit the appropriate Judgment Entry pursuant to Loc.Rs. 25.01 and 25.02.

IT IS SO ORDERED.

Copies to:

Kevin T. Roberts, Esq.
The Roberts Law Firm
7622 Columbia Road
Olmsted Falls, Ohio 44138
*Counsel for Plaintiffs, Bruce A. Vance,
et al.*

Benjamin Calkins, Esq.
The Calkins Law Firm
100 North Main Street, Suite 235
Chagrin Falls, Ohio 44022
*Counsel for Plaintiffs, Bruce A. Vance,
et al.*

Joshua R. Cohen, Esq.
James B. Rosenthal, Esq.
Cohen Rosenthal & Kramer LLP
The Hoyt Block Building – Suite 400
700 West St. Clair Avenue
Cleveland, Ohio 44113
*Counsel for Plaintiff, Bruce A. Vance, et
al.*

Daniel W. Fausey, Esq.
Christine T. Mesirov, Esq.
Daniel Kim, Esq.
Assistant Attorneys General
30 East Broad Street, 25th Floor
Columbus, Ohio 43215
*Counsel for Defendant, Joseph W. Testa,
Tax Commissioner of Ohio*

Franklin County Court of Common Pleas

Date: 05-17-2018
Case Title: BRUCE A VANCE -VS- OHIO STATE
Case Number: 16CV003295
Type: DECISION

It Is So Ordered.

A handwritten signature in cursive script, appearing to read "J.A. French". The signature is written in black ink and is positioned to the right of a circular, textured stamp or seal.

/s/ Judge Jenifer A. French

Court Disposition

Case Number: 16CV003295

Case Style: BRUCE A VANCE -VS- OHIO STATE

Motion Tie Off Information:

1. Motion CMS Document Id: 16CV0032952017-05-1299980000

Document Title: 05-12-2017-MOTION FOR SUMMARY
JUDGMENT - DEFENDANT: OHIO STATE DEPARTMENT
TAXATION

Disposition: MOTION GRANTED