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Notice of Judgment

June 19, 2009

Docket Number: 2008 - CA - 1287

Keith Marcel d/b/a Uniquely Wood and Keith and Teresa Marcel
versus
Tangipahoa Parish School System and Donna Drude

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You are hereby served with a copy of the opinion in the above-entitled case. Your attention is invited to Rule 2-18. Rehearing of the Uniform Rules of Courts of Appeal.

I hereby certify that this opinion and notice of judgment were mailed this date to the trial judge, all counsel of record, and all parties not represented by counsel as listed above.

Peggy J. Landry

CHRISTINE L. CROW
CLERK OF COURT

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 CA 1287

KEITH MARCEL d/b/a UNIQUELY WOOD AND KEITH AND TERESA MARCEL

VERSUS

TANGIPAHOA PARISH SCHOOL SYSTEM AND DONNA DRUDE

Judgment Rendered: JUN 19 2009

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On Appeal from the Twenty-First Judicial District Court
In and For the Parish of Tangipahoa
State of Louisiana
Docket No. 2007-000086

Honorable M. Douglas Hughes, Judge Presiding

* * * * * *

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* * * * * *

BEFORE: PARRO, McCLENDON, AND WELCH, JJ.

Welch J. concurs without reasons.

McCLENDON, J.

This is an appeal from a trial court judgment striking certain paragraphs from the plaintiffs' petition for a refund of taxes paid under protest and overpaid sales and use taxes. For the reasons that follow, we dismiss the appeal in part and affirm in part.

FACTUAL AND PROCEDURAL BACKGROUND

The plaintiffs, Keith Marcel d/b/a Uniquely Wood and Keith and Teresa Marcel (the Marcels), filed a Petition for Refund on January 10, 2007, seeking a refund of taxes paid under protest and sales and use taxes previously paid by them, which they allege were not due and owing. Named as defendants were the Tangipahoa Parish School System (TPSS) and Donna Drude, the TPSS sales and use tax administrator. In their petition, the Marcels alleged that they are the owners of Uniquely Wood, a furniture store located in Hammond, Louisiana, and that the TPSS sales and use tax division conducted "many" tax audits of Uniquely Wood covering the tax period from January 1, 2000, to June 30, 2003. The Marcels further assert that they challenged the original assessment in the amount of $49,852.27 and requested an administrative hearing. Upon providing additional information, the assessment was reduced to $41,644.30. Further information was provided by the Marcels, and the assessment was again lowered to $37,858.44. The Marcels objected to the assessment and requested a hearing, which was held on April 8, 2005. Thereafter, the assessment was further reduced to $29,642.78, which was challenged by the Marcels. A request for another hearing was denied. By letter dated December 12, 2006, the Marcels objected to the assessment but paid the $29,642.78 amount under protest. The Marcels aver that they do not owe the amount paid under protest, contending that they had timely paid the proper amount of taxes due and therefore owed no additional taxes. Further, the Marcels contend that they overpaid sales and use taxes in that they were not allowed to keep the appropriate vendor's compensation.

The defendants filed an answer and reconventional demand. Thereafter, the defendants filed a Motion to Strike and for Sanctions,[1] a Declinatory Exception of Lack of Jurisdiction over the Subject Matter, a Peremptory Exception of No Cause of Action, and a Peremptory Exception of No Right of Action. The matter was set for hearing, after which the motion and exceptions were dismissed due to the defendants' failure to appear. The defendants filed a motion for new trial for argument only, asserting that because of a clerical error by the clerk of court's office, they were denied due process of law in that they were denied proper notice and an opportunity to be heard. On January 28, 2008, a hearing on the motion for a new trial was held, the motion was granted, and the previous judgment and amended judgment, both signed on November 19, 2007, were annulled and set aside. Further, the motion to strike and the declinatory exception raising the objection of lack of jurisdiction over the subject matter filed by the defendants were argued, and the trial court ruled in favor of the defendants. Judgment was signed on February 6, 2008, granting the motion for a new trial, setting aside the previous judgments, and granting the motion to strike. The trial court ordered that paragraphs XII, XIV, and XVII of the Marcels' petition, as well as paragraphs 3, 4, and 5 of the prayer of the petition, be stricken from the record of the proceedings. Additionally, the Marcels were ordered to pay to the defendants $250 in attorney fees and costs. On October 22, 2008, a further judgment was rendered and signed, decreeing that, pursuant to LSA-C.C.P. art. 1915B, there was no just reason for delay, and the February 6, 2008 judgment was designated as a final judgment. Thereafter, the Marcels appealed. In their appeal, the Marcels appealed only that portion of the trial court's judgment striking paragraphs XII and XIV of their petition. The defendants answered the appeal, requesting additional attorney fees for the appeal.

[1] The defendants sought attorney fees as sanctions pursuant to LSA-C.C.P. art. 893A(2).

DISCUSSION

Initially, we address that portion of the February 6, 2008 judgment that granted the defendants' motion to strike paragraph XII of the Marcels petition. Paragraph XII provides as follows:

> The Marcel's [sic] and Uniquely Wood aver the TPSS auditors used a faulty and unreliable sampling procedure that does not comply with the American Institute of Certified Public Accountant's [sic] (AICPA) or other acceptable standards for conducting such audits in that it was not representative of the business operations. Out of the approximately 2500 sales invoices provided by the Marcel's [sic], the TPSS auditors used only 59 samples. The TPSS auditors also failed to give the Marcel's [sic] and/or Uniquely Wood advance notice of assessment of the sampling procedure as is required by LSA-R.S. 47:1541.

The Marcels contend that the trial court erred in striking paragraph XII because the paragraph sets forth factual allegations and related legal authority, including facts alleging why the defendants miscalculated the Marcels' taxes. The defendants assert that the state statute is inapplicable to local taxing authorities for the tax period in question and therefore does not apply to the defendants. The trial court agreed with the defendants and ordered that paragraph XII be stricken. Thereafter, the trial court designated the entire judgment as final pursuant to LSA-C.C.P. art. 1915B. Because only a final judgment may be appealed, we must examine whether the judgment was correctly designated as final in order to determine whether this court has jurisdiction over this matter. See LSA-C.C.P. art. 1841; **City of Baton Rouge v. American Home Assur. Co.**, 06-0522, p. 5 (La.App. 1 Cir. 12/28/06), 951 So.2d 1113, 1117.

Louisiana Code of Civil Procedure article 1841 provides:

> A judgment is the determination of the rights of the parties in an action and may award any relief to which the parties are entitled. It may be interlocutory or final.
>
> A judgment that does not determine the merits but only preliminary matters in the course of the action is an interlocutory judgment.
>
> A judgment that determines the merits in whole or in part is a final judgment.

In this matter, that part of the February 6, 2008 judgment striking paragraph XII merely removed a paragraph from the petition regarding the use

of sampling procedures in conducting an audit and did not dispose of or address any issues in the case. Because it decided only a preliminary matter and did not decide the merits of the Marcels' claims, in whole or in part, that portion of the judgment is not a final judgment. Instead, it is an interlocutory judgment, which is appealable only when expressly provided by law. See LSA-C.C.P. art. 2083C.[2] There being no provision in the law for the appeal of such an interlocutory judgment, the trial court had no authority under LSA-C.C.P. art. 1915B to designate as final that portion of the judgment granting the defendants' motion to strike paragraph XII of the Marcels' petition as final.[3] Thus, the trial court erred when it designated that portion of the judgment as final and appealable. Consequently, we have no appellate jurisdiction to consider an appeal from that portion of the judgment.

However, for the reasons that follow, we also conclude that the portion of the trial court judgment dismissing the Marcels' refund claim for overpaid sales and use taxes, found in paragraph XIV of their petition, was properly certified as a final judgment pursuant to LSA-C.C.P. art. 1915B.

The Marcels contend that the defendants' motion to strike did not include paragraph XIV and that, instead, the defendants filed exceptions with regard to paragraph XIV. Thus, the Marcels assert that the trial court incorrectly granted the motion to strike as to paragraph XIV, because a motion to strike this paragraph was never sought. Upon a review of the record, it is clear that at the hearing on the matter, the trial court heard argument on the exception raising the objection of lack of subject matter jurisdiction regarding paragraph XIV. Although the trial court judgment ordered that paragraph XIV be stricken from

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[2] We note that the amendment of LSA-C.C.P. art. 2083, by Acts 2005, No. 205, § 1, eff. Jan. 1, 2006, removed any discretion the trial court had in allowing an appeal of an interlocutory judgment based on the irreparable injury standard.

[3] The portion of the judgment at issue is not a final partial judgment immediately appealable under LSA-C.C.P. art. 1915A. Nor is that portion of the judgment subject to being designated as a final judgment under LSA-C.C.P. art. 1915B. Pursuant to LSA-C.C.P. art. 1915B, it is only when "a court renders a partial judgment or partial summary judgment or sustains an exception in part, as to one or more but less than all of the claims, demands, issues, or theories," that a judgment might be "designated as a final judgment by the court after an express determination that there is no just reason for delay." Accordingly, Article 1915 does not provide authority for the court to designate such an interlocutory judgment as final.

the petition, the defendants were obviously challenging the trial court's subject matter jurisdiction, and the trial court in essence sustained the defendants' exception raising the objection of lack of subject matter jurisdiction as to this paragraph.[4]

Louisiana Code of Civil Procedure article 1915B(1) provides that when a court sustains an exception in part "as to one or more but less than all of the claims, demands, issues, or theories" presented in an action, that judgment is not final for the purpose of an immediate appeal "unless it is designated as a final judgment by the court after an express determination that there is no just reason for delay." This provision "attempts to strike a balance between the undesirability of piecemeal appeals and the need for making review available at a time that best serves the needs of the parties." **R.J. Messinger, Inc. v. Rosenblum**, 04-1664, p. 13 (La. 3/2/05), 894 So.2d 1113, 1122.

Because the trial court's judgment in this matter, certifying the entire judgment as final, did not provide explicit reasons for such certification, we are required to determine *de novo* whether the certification was proper as to this portion of the judgment. **R.J. Messinger**, 04-1664 at pp. 13-14, 894 So.2d at 1122. In conducting this review, we consider the "overriding inquiry" of "whether there is no just reason for delay," as well as the other non-exclusive criteria trial courts should use in making the determination of whether certification is appropriate, which include:

> (1) The relationship between the adjudicated and unadjudicated claims;
>
> (2) The possibility that the need for review might or might not be mooted by future developments in the trial court;
>
> (3) The possibility that the reviewing court might be obliged to consider the same issue a second time; and
>
> (4) Miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.

R.J. Messinger, 04-1664 at p. 14, 894 So.2d at 1122-23.

[4] Even were we to apply an error of law analysis, the result would be the same.

On review, we agree with the designation pursuant to LSA-C.C.P. art. 1915B, since resolution of the issue involved does not delay the litigation and tends to simplify and clarify the ongoing proceeding. Accordingly, we agree that the certification is correct and that there is no just reason for delay.

Paragraph XIV of the Marcels' petition provides:

> The Marcel's and Uniquely Wood aver the TPSS has for approximately the last several years illegally collected from them more sales and use taxes than the law allows. Per Tangipahoa Parish Ordinance, the vendor's compensation rate is 1.5%. However, for many years the TPSS has allowed the parish's vendor's [sic], including the Marcel's [sic]/Uniquely Wood to keep only a 1% vendor's compensation.

In this paragraph, the Marcels are seeking a refund of taxes they assert were erroneously paid. The defendants assert that this type of claim is not part of the payment-under-protest remedy. The taxes were previously paid and were not paid under protest as the result of an assessment. Thus, the defendants contend that this is the type of claim that arises when the taxpayer, at some point after payment, does not believe the tax was owed and seeks a refund. In other words, it is a separate claim for the overpayment of a tax.

The defendants further assert that, in such a situation, a separate refund remedy was available to the Marcels, which was administrative, and not judicial. The defendants further contend that the Marcels failed to allege in paragraph XIV that they had exhausted their administrative remedies. Consequently, the defendants contend that the trial court lacked subject matter jurisdiction to hear the Marcels' claim for overpayment of a tax. We agree.

It is well settled that the laws regulating the collection of taxes are *sui generis* and taxpayers have clearly defined remedies under the law to recover overpaid taxes from the taxing authorities. **Larrieu v. Wal-Mart Stores, Inc.**, 03-0600, pp. 7-8 (La.App. 1 Cir. 2/23/04), 872 So.2d 1157, 1161-62. Where the law provides for an administrative remedy, a claim must be processed through the administrative channels before a district court will have subject matter jurisdiction to entertain the claim. **Larrieu,** 03-0600 at p. 9, 872 So.2d at 1162. Herein, the defendants are clearly challenging the trial court's subject matter

jurisdiction. The exception of lack of subject matter jurisdiction may not be waived by the parties and may be raised by the court *sua sponte.* **Larrieu,** 03-0600 at p. 9, 872 So.2d at 1162-63.

At all applicable times herein, the law set forth an administrative procedure by which a taxpayer could assert a claim for a refund from the local taxing authorities.[5] Because the Marcels failed to initiate their refund claim through the proper administrative channels, the trial court was without jurisdiction to adjudicate their vendor's compensation refund claim. Accordingly, this claim against the defendants, found in paragraph XIV of the Marcels' petition, was correctly dismissed.

Lastly, the defendants answered the appeal seeking additional attorney fees for additional work necessitated by this appeal. Additional attorney fees are usually awarded on appeal when a party appeals, obtains no relief, and the appeal has necessitated additional work on the opposing party's counsel, provided that the opposing party has appropriately requested the increase. **Loup v. Louisiana State School for the Deaf**, 98-0329, p. 8 (La.App. 1 Cir. 2/19/99), 729 So.2d 689, 694. However, in this matter, the motion for sanctions was based on LSA-C.C.P. art. 893, regarding the pleading of damages. Because the Marcels have not appealed from that portion of the judgment striking their claim for a specific monetary amount of damages, and because the Marcels amended their petition removing the monetary amounts alleged in paragraphs 3, 4, and 5 of their prayer, we decline to award attorney fees to the defendants for this appeal.

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[5] Section 10.02 of the Tangipahoa Parish sales and use tax ordinances provides:

> If any dealer shall have given to the Tax Collector notice within the time provided in §10.01 of this resolution, such dealer thereafter at any time within three (3) years after the payment of any original or additional tax assessed against him may file with the Tax Collector a claim under oath for refund, in such form as the Tax Collector may prescribe stating the ground thereof. However, no claim for refund shall be filed with respect to a tax paid, after protest has been filed with the Tax Collector as hereinafter provided, or after proceeding on appeal has been finally determined.

Similarly, Section 29-184 of the Code of Ordinances, City of Hammond, provides for a claim for refund with a two-year time limit.

CONCLUSION

Based on the foregoing, we dismiss the appeal in part, as it pertains to the striking of paragraph XII, and affirm that portion of the trial court judgment, which dismissed the Marcels' refund claim found in paragraph XIV. Additionally, we decline to award additional attorney fees as requested by the defendants in their answer to the appeal. Costs of this appeal are assessed against the Marcels.

APPEAL DISMISSED IN PART; JUDGMENT AFFIRMED IN PART.