

Court of Appeals, State of Michigan

ORDER

Taxpayers for Michigan Constitutional Government v State of Michigan

Docket No. 334663

Kurtis T. Wilder
Presiding Judge

Karen M. Fort Hood

Douglas B. Shapiro
Judges

The Court holds that, with the exception of the matters addressed separately herein, the issues framed in the parties' pleadings and supporting briefs present jurisprudentially significant questions of law. The Court therefore orders that this original action proceed to a full hearing on the merits in accordance with MCR 7.206(E)(3)(c). The parties shall file and serve cross-motions for summary disposition within 56 days of the entry of this order, citing appropriate grounds for such relief pursuant to MCR 2.116(C). The parties may submit the matter on stipulated facts pursuant to MCR 2.116(A), if they reach agreement to do so. Briefs in support of the motions shall, to all extents practicable, conform to the requirements of MCR 7.212(B) and (C) and shall be supported by an appendix containing documentary proof. Additionally, the motions and supporting briefs shall address only the merits of the substantive issues raised by plaintiffs, any remedy or remedies to which plaintiffs may be entitled should this Court find a violation of the Headlee Amendment, and any defense or defenses—other than those dismissed in this order—asserted by defendants. The parties shall file and serve their respective answers to the motions for summary disposition no later than 28 days after those motions have been filed with the Clerk of this Court. The answers shall, to all extents practicable, conform to the requirements of MCR 7.212(B) and (D) and shall be supported by an appendix containing any documentary proof not presented in the parties' prior motions. The parties shall file and serve any reply no later than 14 days after the corresponding answer is filed with the Clerk of this Court. Replies shall be limited to 20 pages and shall otherwise conform to the requirements of MCR 7.212(G). Upon motion of a party, the Court may grant a brief period of discovery and issue a scheduling order setting forth a revised briefing schedule. MCR 7.206(3)(d).

The Court further holds that several of defendants' well-pleaded procedural defenses fail as a matter of law and, therefore, peremptorily dismisses those defenses pursuant to MCR 7.206(3)(b). Initially, the Court denies defendants' request to dismiss plaintiffs' complaint for noncompliance with the pleading requirements of MCR 2.112(M) as construed in *Adair v Michigan*, 497 Mich 89 (2014) (*Adair III*). Although this action is one "involving" Headlee § 29 on at least a collateral basis, plaintiffs do not allege a *violation* of § 29. Rather, they allege violations of Const 1963, art 9, § 30. Thus, plaintiffs are not required to meet the special pleading requirements for actions involving § 29. See *Adair III*, 497 Mich at 106. See also *Adair v Michigan*, 486 Mich 468, 497 (2010) (*Adair II*) (MARKMAN, J., dissenting) (explaining the § 29-specific rationale underlying MCR 2.112(M)). Applying the appropriate pleading requirements, the Court concludes that plaintiffs' complaint contains sufficient allegations to satisfy the requirements of both MCR 7.206(E)(1) and MCR 2.112(M).

Likewise, the Court holds that defendants have failed to carry their burden of demonstrating that plaintiffs' claims are barred by res judicata. See *Baraga Co v State Tax Comm*, 466 Mich 264, 269 (2002) (“[T]he burden of proving the applicability of . . . res judicata is on the party asserting it.”). For res judicata to preclude a claim, three elements must be satisfied: “(1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first.” *Adair v State of Michigan*, 470 Mich 105, 121 (2004) (*Adair I*).

“To be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert.” *Adair I*, 470 Mich at 122. “The outer limit of the doctrine traditionally requires both a ‘substantial identity of interests’ and a ‘working functional relationship’ in which the interests of the nonparty are presented and protected by the party in the litigation.” *Id.* (quotation marks and citations omitted). Although privity is, as a general rule, broadly applied against private taxpayer plaintiffs in tax proceedings, privity only exists when the taxpayers in the first action “adequately presented and protected” the interest of the taxpayers in the second action. *Id.* The relief sought is an important consideration for determining whether taxpayers in different Headlee actions share a substantial identity of interests. See *id.* at 122-123.

Here, defendants have demonstrated neither that plaintiffs were parties to any of the prior *Durant* or *Adair* cases nor that plaintiffs share a substantial identity of interest with the *Durant* or *Adair* plaintiffs. Indeed, the *Adair I* Court explicitly found that, as in *Durant*, the *Adair* taxpayer plaintiffs “all ha[d] the same interest: that mandated activities are funded as they are required to be under” § 29. *Id.* at 123. Contrastingly, here plaintiffs primarily seek enforcement of § 30, based in part on a proposed construction of §§ 29 and 30. Hence, plaintiffs in this action do not share a substantial identity of interests with the *Adair* and *Durant* plaintiffs. Moreover, those prior plaintiffs—who failed to seek enforcement of § 30—did not “adequately” present and protect the interests of plaintiffs in this case such that privity exists. This conclusion is underscored by the marked difference between the several remedies sought by plaintiffs here and the remedies sought by the plaintiffs in *Durant* and *Adair*.

Nor have defendants satisfied the third element for res judicata. That doctrine “bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not.” *Id.* at 121. In other words, Michigan courts employ the broad, pragmatic “same transaction test,” often referred to as the “transactional test,” not the narrower “same evidence test.” *Id.* at 123-125. While the question of whether the same evidence is necessary to support claims “may have some relevance, the determinative question is whether the claims in the instant case arose as part of the same transaction as did [the plaintiffs’] claims in” the original action. See *id.* at 125. “Whether a factual grouping constitutes a transaction for purposes of res judicata is to be determined pragmatically, by considering whether the facts are related in *time, space, origin or motivation*, [and] whether they form a convenient trial unit. . . .” *Id.* (alteration and emphasis in original), quoting 46 Am Jur 2d, Judgments, § 533, p 801.

Holding pragmatism as the watchword, temporal considerations are of primary importance here. “Res judicata does not bar a subsequent action between the same parties or their privies when the facts have changed or new facts have developed.” *Bennett v Mackinac Bridge Auth (On Remand)*, 289 Mich App 616, 636 n 10 (2010). Hence, in the context of tax proceedings—particularly those concerning annual levies—the tax year at issue is a vital consideration for res judicata purposes. See 50 CJS, Judgments, § 1210, pp 592-593, citing *CIR v Sunnen*, 333 US 591, 598 (1948)

(*Sunnen*), superseded by statute on other grounds as stated in *Vetrano v CIR*, 116 TC 272, 280 (2001).¹ As the *Sunnen* Court explained, “[e]ach year is the origin of a new liability and of a separate cause of action. Thus if a claim . . . relating to a particular tax year is litigated, a judgment on the merits is res judicata as to any subsequent proceeding involving . . . the same tax year.” *Sunnen*, 333 US at 598-599 (quotation marks and citation omitted; emphasis added). *Sunnen* suggests that, rather than mechanically applying res judicata to bar taxpayers from perpetually raising similar *claims* each tax year, courts should employ the more precise tool of collateral estoppel to bar continual litigation of the same *issues*. *Id.* at 599-600.

The allegations in plaintiffs’ complaint demonstrate that their four claims in this action are all premised upon defendants’ actions regarding tax years 2015-2016 and 2016-2017. Defendants contend that such claims could have been raised “in any of the prior Headlee challenges involving mandates” under § 29, including the *Adair* cases. As a fundamental matter, however, defendants have failed to provide a timeline indicating whether the claims in this action and those in the *Adair* cases regard the same tax years or whether claims for the tax years at issue here could have, with due diligence, been raised in *Adair*. Therefore, defendants have failed to carry their burden of satisfying the third element for res judicata.

Because defendants have failed to satisfy two of the essential elements, their res judicata defense must fail. Thus, the Court dismisses that defense.

The Court also dismisses defendants’ jurisdictional defense. Defendants assert that plaintiffs have failed to properly invoke this Court’s original subject-matter jurisdiction with regard to their requests for “[d]eclaratory relief finding that Defendants have failed to comply with the reporting requirements of MCL 21.235 and 21.241,” and for “[m]andamus relief directing the State of Michigan to fully comply with the reporting requirements of MCL 21.235.” The statutes referenced by plaintiffs were enacted as part of the implementing legislation authorized by § 34 of the Headlee Amendment, and the consideration of such provisions in this Headlee action clearly falls within the jurisdiction of this Court as conferred by § 32. See *Durant v Michigan*, 459 Mich 876 (1998) (holding that this Court has original jurisdiction under § 32 so long as the gravamen of the action is an alleged Headlee violation); see also *Schmidt v Dep’t of Ed*, 441 Mich 236, 247-248 n 15 (1992) (exercising jurisdiction over an “inartfully worded” claim that could nevertheless be “construed” as asserting a Headlee violation).

Finally, the Court dismisses defendants’ standing challenge, but only as to the individual taxpayer plaintiffs, i.e., Duchane, Blum, and Kandel. Under § 32, “[a]ny taxpayer of the state has standing to bring suit to enforce the provisions of the Headlee Amendment.” *Mahaffey v Attorney General*, 222 Mich App 325, 340 (1997). Because all of plaintiffs’ claims and requested forms of relief are part of an action seeking to enforce Headlee, the individual taxpayer plaintiffs have § 32 standing.

However, vis-à-vis the lead plaintiff, Taxpayers for Michigan Constitutional Government (TMCG), the Court reserves its standing determination. “[A]n organization has standing to advocate for the interests of its members if the members themselves have a sufficient interest.” *Lansing Sch Ed Ass’n*

¹ Although the proper application of res judicata in our courts is a matter of *state* law, see *Hlady v Wolverine Bolt Co*, 393 Mich 368, 376; 224 NW2d 856 (1975), “[t]hough not binding on this Court, federal precedent is generally considered highly persuasive when it addresses analogous issues,” *Wilcoxon v Minnesota Min & Mfg Co*, 235 Mich App 347, 360; 597 NW2d 250 (1999).

v Lansing Bd of Ed, 487 Mich 349, 373 n 21 (2010) (*LSEA*). However, TMCB bears the burden of demonstrating that it has standing, see, e.g., *Moses Inc v Southeast Mich Council of Gov'ts*, 270 Mich App 401, 414 (2006), and TMCB is, with regard to plaintiffs' request for a declaratory judgment, required to "plead *and* prove facts which indicate an adverse interest," *LSEA*, 487 Mich at 372 n 20 (quotation marks and citation omitted; emphasis added). See also MCR 2.605(A)(1) (stating the "actual controversy" requirement for declaratory judgments). Because TMCB has failed to plead or prove the facts necessary to carry its burden of demonstrating that it has standing—specifically, to demonstrate whether its membership has a sufficient interest in this matter to afford organizational standing—the Court holds in abeyance its decision on this issue. The parties may further address the question of TMCB's standing in their respective motions for summary disposition and in any related filings.



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

MAY - 9 2017

Date

A handwritten signature in black ink, appearing to read "Jerome W. Zimmer Jr.", written over a horizontal line.

Chief Clerk