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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

TOWNSHIP TRUSTEES OF SCHOOLS TOWNSHIP 38 NORTH, RANGE 12 EAST,	)	
Plaintiff and Counter-Defendant,	)	No. 13 CH 23386
v.	)	Hon. Thomas M. Mulroy
LYONS TOWNSHIP H.S. DISTRICT 204,	)	Calendar I
Defendant and Counter-Plaintiff.	)	(Transferred to Law)

LT'S RESPONSE TO
THE TTO'S MOTION TO DISMISS
LT'S THIRD AND FOURTH AFFIRMATIVE DEFENSES

I. INTRODUCTION

Defendant Lyons Township High School District 204 ("LT"), by its counsel, respectfully asks this Court to deny the motion to dismiss the third and fourth affirmative defenses of LT that Plaintiff Township Trustees of Schools Township 38 North, Range 12 East ("the TTO") recently filed.

The TTO seeks to dismiss LT's third affirmative defense based on the voluntary payment doctrine. In 2017, the TTO replied to this defense. In 2018, the TTO moved for summary judgment on this defense, which motion this Court denied in July 2019. The TTO now asks this Court to create new law in Illinois by ruling that the TTO is immune from the voluntary payment doctrine. The TTO bases its position on an argument that it is immune from statutes of limitation – an argument this Court rejected in July 2019. The TTO also asks the Court to accept its view on the disputed facts of this case, and to disregard the facts that LT has alleged, in order to hold that the doctrine is factually inapt. LT's affirmative defense based on the voluntary payment doctrine is legally valid and should proceed to trial.

In addition, the TTO asks this Court to dismiss LT's fourth affirmative defense based on the American Rule governing the recovery of attorneys' fees. The TTO previously moved to strike this affirmative defense in the 2018 case previously pending before Judge Reilly – who did not decide the motion. The TTO first asks this Court to decide that the TTO Trustees' attorneys' fees are expenses of the Treasurer's office within the meaning of Section 8-4 of the School Code. LT denied these allegations in its answer to the complaint, and the present 2-615 motion is not a proper mechanism for resolving this disputed factual issue. Also, the TTO asks this Court to decide as a matter of law that the American Rule on the recovery of attorneys' fees is inapplicable to this case. LT has presented a valid legal and factual basis for this defense, and it should be resolved after a trial on the merits.

I. THE STANDARD FOR MOTIONS TO DISMISS AFFIRMATIVE DEFENSES.

The TTO's motion to dismiss does not cite to the controlling legal standard for a motion to dismiss affirmative defenses or specify whether it is a 2-615 or 2-619 motion. However, it seems clear that the TTO's motion is brought under Section 2-615.

Under Illinois law, a motion to dismiss or strike an affirmative defense is subject to the standards of 735 ILCS 5/2-615. *Hartmann Realtors v. Biffar*, 2014 IL App (5th) 130543, ¶ 20. "In reviewing the sufficiency of a complaint [or affirmative defense], we accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts. We also construe the allegations in the complaint [or affirmative defense] in the light most favorable to the [non-movant]. Thus, a cause of action should not be dismissed pursuant to section 2-615 unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery." *Marshall v. Burger King Corp*., 222 Ill.2d 422, 429 (2006).

II. THE TTO'S STATEMENT OF FACTS DISREGARDS LT'S ALLEGATIONS.

The TTO's motion to dismiss does not conform to the legal standard for 2-615 motions because it disregards LT's well-pled allegations and, instead, relies on the TTO's own, disputed allegations. The TTO contends that its claims involve "undoing financial benefits granted to LT by the former Lyons Township Treasurer of Schools, Robert Healy." Motion at 1. This assertion is contrary to LT's well-pled factual allegations that the TTO Trustees were aware of the financial arrangements between LT and the TTO on setoffs to the pro rata invoices and payment for LT's annual audits; the Trustees voted unanimously to accept LT's proposal made in 2000 on the setoff arrangement; and the Trustees voted regularly to approve the statements of accounts the Treasurer presented to them for approval that included these transactions. LT's Answer, Affirmative Defenses, and Counterclaim, p. 14-15, 18-23.

There is no legal basis for the TTO's request that the Court accept the TTO's view of how the financial transactions at issue were negotiated, approved, and perpetuated, and by whom.

III. THE VOLUNTARY PAYMENTS DOCTRINE IS A VALID DEFENSE.

On 3-8-2017, LT filed its first amended affirmative defenses in this case, which included an affirmative defense based on the voluntary payment doctrine. On 4-28-2017, the TTO filed a reply that answered that affirmative defense and did not seek to dismiss it. On 9-24-2018, the TTO filed a motion for summary judgment that asked for judgment on LT's voluntary payment doctrine affirmative defense based on the same grounds raised in the present motion. On 7-31-2019, this Court denied the TTO's summary judgment motion in its entirety.

The TTO's now asks this Court to make new Illinois law, on a motion to dismiss, by holding that governmental entities are immune from the voluntary payment doctrine. The TTO argues that it should be exempt from the voluntary payment doctrine under the same principle that

it says makes it exempt from all statutes of limitation. This Court rejected this argument in the 7-31-2019 order by ruling that the TTO was not exempt.

The TTO also contends that because 5 of the other 49 states have granted immunity to municipalities and townships from the voluntary payment doctrine in cases decided between 1898 and 1943, this Court should follow that authority. This is an argument ill-suited to a motion to dismiss. The TTO further argues that some legal doctrines in Illinois are applied to municipalities only in extraordinary and compelling circumstances, such as estoppel and laches – but that is not the same thing as the blanket immunity that the TTO seeks. LT respectfully submits that if a Court is willing to entertain the creation of a new legal exemption, it would be best to do so after a full record is created at trial.

The TTO also argues, without citation to authority, that the voluntary payment doctrine is inapplicable to the facts that LT alleges. The TTO presents no legal authority stating that the voluntary payment doctrine cannot apply to payments that the TTO made to Baker Tilly at LT's request, as LT alleges. LT's Answer, Affirmative Defenses, and Counterclaim, p. 15.

The voluntary payment doctrine provides as follows: "Under the voluntary payment doctrine, money voluntarily paid under a claim of right to the payment, and with knowledge of the facts by the person making the payment, cannot be recovered by the payor solely because the claim was illegal. Absent fraud, misrepresentation, or mistake of fact, money voluntarily paid under a claim of right to the payment, with full knowledge of the facts by the person making the payment, cannot be recovered unless the payment was made under circumstances amounting to compulsion." *Jenkins v. Concorde Acceptance Corp.*, 345 Ill.App.3d 669, 674-75 (1st Dist. 2003).

As the *Jenkins* case shows, there is no additional legal requirement that the plaintiff have made payments *directly to* the defendant as opposed to *on behalf of and at the demand of* the

defendant. In other words, LT saying "you pay these bills for us" is no different, under the legal standard for this defense, than saying "you pay us money so we can pay these bills."

On the pro rata expense claim, the TTO contends that the setoffs of LT's business function costs against the pro rata expenses did not constitute "payments." The TTO makes this argument without citation to legal authority. As LT sufficiently alleges, LT's Answer, Affirmative Defenses, and Counterclaim, p. 14-15, and as LT will show at trial, the TTO paid the costs of LT's business functions by setting those amounts off against the annual pro rata invoices.

Again, there is no additional legal requirement under the voluntary payment doctrine that a payment be made *directly in cash to* the defendant as opposed to being made *in the form of a setoff or credit against other charges to* the defendant. In other words, "you pay these costs by giving us a check" is no different, under the legal standard for this defense, than saying "you pay these costs by setting them off against your pending invoice to us."

The third affirmative defense has a valid legal basis and should proceed to trial.

III. THE AMERICAN RULE ON FEES IS A VALID DEFENSE.

In LT's answer to the complaint in this case, LT denied that the TTO's attorneys' fees and expenses incurred in its litigation with LT ("the Attorneys' Fees") were expenses of the treasurer's office within the meaning of Section 8-4 of the School Code. In LT's fourth affirmative defense, LT asserted an additional defense: even if the TTO's attorneys' fees could be considered expenses of the treasurer's office under Section 8-4, this part of the TTO's complaint is barred by a superseding legal principle – namely, the American Rule governing the recovery of attorneys' fees. The American Rule, as adopted in Illinois, requires each party in a dispute to bear its own attorneys' fees and expenses, unless there is a statute or contract that specifically allows the party to recover fees and expressly employs the words "attorneys' fees." LT's argument is that attorneys'

fees are treated specially under the law in Illinois and cannot be recouped by an opponent in litigation in the form of charges for "office expenses" under Section 8-4 – which does not specifically provide for recovery of attorneys' fees.

The TTO's motion to dismiss joins these two issues together and asks the Court to decide both in the TTO's favor prior to trial.

A. Attorneys' Fees as Expenses of the Treasurer's Office.

On the first issue – whether the Attorney's Fees are expenses of the Treasurer's office – the TTO asserts that the Attorneys' Fees were incurred by the TTO Trustees, and that the Trustees bring claims in this case on behalf of the TTO Treasurer. The TTO then makes the conclusory argument that only the Trustees can assert lawsuits, and that all expenses the Trustees incur necessarily are expenses of the Treasurer's office under Section 8-4. As its sole support for this argument, the TTO relies on the decision in *Lynn v. Trustees of Schools,* 271 Ill.App. 539, 547 (4th Dist. 1933).

Appellate Court decisions issued prior to 1935 "have no binding authority," but can be considered "as persuasive." *North Shore Cmty. Bank & Tr. Co. v. Kollar*, 304 Ill.App.3d 838, 844 (1st Dist. 1999). To be clear, LT takes no issue with the holding in *Lynn*, insofar as that holding goes.

In *Lynn*, the Trustees hired private attorneys to sue several individuals who owed money to "the several school districts" in the township. *Id.* at 540. The individuals claimed that only the schools could sue them. The *Lynn* Court recognized that the School Code requires TTO organizations to serve as fiscal agents for their member districts: "trustees of schools are the fiscal agents for the business of their townships, of which the funds of the various school districts are a part, and, as such, have the management of such funds and financial affairs." 271

Ill.App. at 547. The Court concluded that the Trustees "are empowered to sue for moneys due the township or the school districts," and can hire attorneys "through whom they will act." *Id.*

What the *Lynn* case did not involve, though, is a situation like the present case in which school trustees claimed to be suing one school district on behalf of one or more other school districts. There was no issue in *Lynn* as to how the attorneys' fees were to be allocated, given the Court's finding that the Trustees sued outside individuals on behalf of all the township's school districts. The *Lynn* case therefore does not support the TTO's request that this Court decide, as a matter of law, that the Attorneys' Fees constitute expenses of the Treasurer's office under Section 8-4.

Furthermore, the standard for a Rule 2-615 motion does not permit the TTO to advance its "we can only bill the Attorneys' Fees in one way, as expenses under Section 8-4" argument. This is a factual argument not suited for resolution on a motion to dismiss. LT alleges, in its pleadings in this case, that the TTO has sought to recover expenses through methods other than pro rata billing under Section 8-4 – including taking money from insurance recoveries belong to the districts, and taking money from the pooled investment funds of the districts. LT's Answer, Affirmative Defenses, and Counterclaims, page 25, 27. It is beyond the scope of a Rule 2-615 motion to rule on LT's position that the TTO should have, and could have, sought the permission of the other districts to sue LT and to charge those districts with their shares of the Attorneys' Fees that the TTO claimed to be incurring on their behalf.

LT should be permitted to present, at trial, support for its position that the Attorneys' Fees were not office expenses, and were not expenses of the Treasurer, could have been billed differently to the other districts, and thus should not have been charged to LT under Section 8-4 of the School Code.

B. The American Rule is a Valid Affirmative Defense.

According to long-standing precedent of the Supreme Court of Illinois, "Illinois generally follows the 'American Rule': absent statutory authority or a contractual agreement between the parties, each party to litigation must bear its own attorney fees and costs, and may not recover those fees and costs from an adversary." *Morris B. Chapman & Assoc. v. Kitzman,* 193 Ill.2d 560, 572 (2000) (citing cases); *see also Negro Nest, LLC v. Mid-Northern Mgt.,* 362 Ill.App.3d 640, 641-42 (4th Dist. 2005); *Village of Glenview v. Zwick,* 356 Ill.App.3d 630, 632 (1st Dist. 2005).

Furthermore, for a party to avoid the American Rule, "a statute or contract must allow for attorney fees by specific language, such that the provision at issue must specifically state that 'attorney fees' are recoverable." *Bank of America v. WS Mgt.,* 2015 IL App (1st) 132551 ¶ 120 (citing *Negro Nest,* 362 Ill.App.3d at 640).

For example, a Court held that a party could not recover attorneys' fees based on a contract provision allowing for recovery of "all costs of collection," because that term did not explicitly include the words "attorneys' fees." *Negro Nest,* 362 Ill.App.3d at 651. Likewise, even a statute that allows for the recovery of punitive damages in fraudulent transfer situations cannot support a recovery of attorneys' fees, absent an express reference in the statute to "attorneys' fees." *Bank of America,* 2015 IL App (1st) 132551 ¶ 121.

In addition, governmental entities are barred from creating ordinances (or, by logical extension, other rules or practices) that would purport to allow for a recovery of their attorneys' fees from their adversaries. In *Village of Glenview,* Glenview passed an ordinance allowing it to recover attorneys' fees from its opponents in litigation if Glenview won. 356 Ill.App.3d at 632. The Court struck down the ordinance because it violated the American Rule on attorneys' fees. The Court ruled that "Glenview did not have the authority to create a fee-shifting ordinance," and

that the Illinois Constitution barred "a local entity's imposition of a burden on our state's judicial system." *Id.* at 637.

The *Village of Glenview* shows that a governmental entity cannot legally attempt to recover its attorneys' fees, and thereby "balance its books," by sending a bill for its attorneys' fees to a Glenview resident and litigation opponent. This "recovery process" by Glenview, the Court held, would have placed an unconstitutional "burden on our state's judicial system." Just as the Glenview ordinance was struck down, the TTO's interpretation of Section 8-4 to provide a "recovery process" for its attorneys' fees from LT ultimately can and should be rejected under the American Rule.

The TTO argues that the *Village of Glenview* case is inapplicable because the Village could include its legal fees in its taxes charged to it residents, including its litigation opponent in the case. However, there is a big difference between directly charging LT with 20-25% of the litigation costs of the TTO, and issuing a tax bill to 1 of over 47,000 residents of Glenview with all of its litigation costs. The latter is a *de minimus* amount and not a direct charge to an opponent for legal fees, as the ordinance would have been in that case and as the TTO's pro rata bills are in this case.

Illinois law, through the American Rule, provides for special treatment for attorneys' fees incurred in litigation. For example, if the EPA were authorized by statute to charge a chemical company for "expenses associated with a clean-up project," the American Rule would bar the EPA from charging the company for legal fees in a suit to require the company to perform the clean-up – even though the legal fees plainly were expenses of the EPA – because the statute does not specifically and expressly authorize the EPA to recover "attorneys' fees." The same principle should apply in this case.

Conclusion

For the reasons stated in this response, the TTO's motion to dismiss LT's third and fourth affirmative defenses should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Jay R. Hoffman, an attorney, certifies that on November 19, 2019, he caused the foregoing pleading to be served by eService on the following attorneys:

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