FILED
FEB 26 1985
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

DUNCAN K. ROSS and **JIMMY L. ROSS**, et al.,

Plaintiffs-Appellants,

vs.

BOARD OF REVIEW OF THE CITY OF CEDAR RAPIDS, et al.,

Defendants-Appellees.

Filed February 26, 1985

4-514
84-162

Appeal from the Iowa District Court for Linn County - Thomas M. Horan, Judge.

Plaintiff property owners bring a consolidated appeal from the order sustaining defendants' special appearance in an action challenging property tax assessments. AFFIRMED.

Thomas J. Wilkinson, Jr. of Terpstra, Wilkinson & Van Horne, Cedar Rapids, Phillip D. Klinger of Klinger, Robinson & McCuskey, Cedar Rapids, and F. James Bradley of Bradley & Riley, Cedar Rapids, for plaintiffs-appellants.

David F. McGuire, City Attorney, Cedar Rapids, for defendants-appellees.

Heard by Oxberger, C.J., and Donielson and Snell, JJ.

Plaintiff property owners were aggrieved by a real estate assessment decision of the board of review, which adjourned on June 15, 1983. Petitions and notices of appeal to district court were filed within the twenty-day appeal period provided by statute. The chairman, James Bowker, left town on July 1 for vacation. Counsel for the taxpayers contacted Bowker's office and was told that he would return on July 5, the last day of the twenty-day period. On the last day, notice was delivered to the sheriff with instructions stressing the importance of immediate service upon the board chairman.

Unaware of the taxpayers' attempts to locate him, Bowker did not return on the 5th. On July 6, the sheriff's office succeeded in locating Bowker at the cabin where he was staying in northeast Iowa. Bowker indicated he would pick up the documents on July 7, but did not actually do so until July 8.

Relying on Economy Forms Corp. v. Potts, 259 N.W.2d 787 (Iowa 1977), the district court sustained defendants' special appearance on the ground that service had not been accomplished within twenty days as required by Iowa Code section 441.38.

On appeal, the taxpayers assert that delivery to the sheriff tolled the twenty-day limitations period; that they substantially complied with the statute; that the district court's holding operates to deny them due process and equal protection; and that Mr. Bowker had a duty to make himself available for service.

The controlling case in Iowa on the issue of timeliness of service in appeals in tax assessment cases is Economy Forms Corp. v. Potts, 259 N.W.2d 787 (Iowa 1977). That case dealt with the district court's jurisdiction when notice of appeal is not filed within twenty days of adjournment of the tax assessment board. The court's analysis in that case began by recognizing that the district court's jurisdiction of assessment board appears cases is not original but rather is wholly statutory. Id. at 788. The statute requires:

> Appeals may be taken from the action of the board of review with reference to protests of assessment, to the district court of the county in which such board holds its sessions within twenty days after its adjournment. . . . . Appeals shall be taken by a written notice to that effect to the chairman or presiding officer of the board of review and served as an original notice.

Iowa Code § 441.38 (1983).

The court went on to state that Iowa Rules of Civil Procedure 48 to 55 are not applicable to appeals to the district court from the board of review. Id. These rules, the court stated, "establish procedures for commencement of original actions in district court, and an appeal from a decision of the board of review is not an original action. Moreover, the procedure for conferring jurisdiction of an assessment appeal on the district court is specifically provided for in § 441.38." Id. This statute requires that notice be served before the expiration of the twenty-day period. The phrase "as original notice" which is used in § 441.38 prescribes the method of service and authorizes service as provided by rule 56.1 I.R.C.P.

I. Delivery to the Sheriff. In arguing that delivery to the sheriff tolled the twenty-day limitations period, taxpayers rely on Grundon Holding v. Board of Review of Polk City, 237 N.W.2d 755 (Iowa 1976). They cite this for the premise that delivery to the sheriff within seventeen days after adjournment was timely although actual service was not made until twenty-one days after adjournment. In Grundon, there was no specific finding of when the board adjourned. The court did not specifically address the question of whether delivery to the sheriff was sufficient. Rather, the court noted that the specific date of adjournment was unclear and assumed for purposes of the case that the board had adjourned on June 23, 1969. The court then stated that delivery to the sheriff was made on July 10, 1969, and service was completed on July 14, 1969. The court concluded by saying: "Even if the Board adjourned on the day the protest was denied, notice of appeal was timely under the statute." Grundon Holding, 237 N.W.2d at 757. We

reject the taxpayers' claim that the Grundon Holding finding that delivery of notice to the sheriff within the time period is controlling in view of the following facts: the court in Grundon Holding did not specifically address the issue of whether delivery to the sheriff itself was sufficient to toll the statute of limitations; in Grundon Holding there was no specific finding of when the board adjourned; and July 13, 1969, was a Sunday as noted by the trial court in this case, so delivery on the 14th would have been timely.

II. Substantial Compliance. We find that BHC Co. v. Board of Review of Cedar Rapids, 351 N.W.2d 523 (Iowa 1984), controls the question of whether the taxpayers have "substantially complied" with Iowa Code section 441.38. This exact issue was raised in BHC, and the Iowa Supreme Court held:

> Plaintiff also argues that, even if old rule 49 does not apply in this case, its efforts on June 5 nevertheless "substantially complied" with a notice requirement to section 441.38. When the same contention was raised in condemnation appeals we rejected it as follows:
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> > As a result of appellants' failure to serve notice of appeal in substantial compliance with the statute the court did not have jurisdiction of the parties. The effect of a contrary holding would be to extend the time within which an appeal may be taken. This we cannot do.
>
> We adhere to the same view here.

BHC Co., 351 N.W.2d at 526 (citations omitted).

III. Constitutionality. Taxpayers challenge the constitutionality of the tax assessment statute on the grounds that it denies them due process and equal protection. In McLeland v. Marshall County, 199 Iowa 1232, 201 N.W. 401, (1925), the Iowa Supreme Court faced a challenge to a tax statute which governed the appropriation of fees collected under a motor vehicle license act. On the question of the constitutionality of the statute, the court stated:

> A party is not deprived of his property without due process of law by the enforced collection of taxes merely because, in individual cases, it works hardships or imposes unequal burdens. Kelly v. Pittsburg, 104 U.S. 78. If a tax is for a

> public purpose, as distinguished from a private purpose, it will be upheld by the courts, and will not amount to the taking of private property without due process of law. Green v. Frazier, 253 U.S. 233; Jones v. City of Portland, 245 U.S. 217.

McLeland, 199 Iowa at 1243-44, 201 N.W. at 405.

In this case, the hardship is not permanent. The taxpayers can challenge the board's assessment next year. We find that they were not denied equal protection because all taxpayers in the Cedar Rapids area were treated the same. Although this statute may result in some inequality and hardship on the taxpayers, we decline to find it unconstitutional.

IV. Duty to be Available for Service. Taxpayers argue that Mr. Bowker had a duty to make himself available for service and that by leaving town he violated this duty. Bowker did not intentionally absent himself from the county. Rather, he was on vacation and knew nothing of the taxpayers' attempts to contact him. Although the taxpayers were told that Bowker was to be back on July 5, the twentieth day, we cannot accept his failure to return as an excuse for extending the twenty-day period. The supreme court's holding in BHC v. Board of Review of Cedar Rapids, 351 N.W.2d 523, 525 (Iowa 1984), compels such a finding. In that case, the supreme court concluded with the following statement:

> Finally, plaintiff asserts that this case requires reversal as a matter of "public policy." It asserts it would be extremely unjust if, a defendant were able to avoid a lawsuit by ". . . being unavailable for service during critical times." The assertion is misplaced. In Cunningham v. Iowa Department of Job Service, 319 N.W.2d 202, 205 (Iowa 1982) we said: "Jurisdiction does not attach, nor is it lost, on equitable principles. It is purely a matter of statute."
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> We do not suggest, if the case were subjected to an equitable balance, plaintiff would prevail. The Iowa rules of civil procedure clearly provide a method, under rule 56.1(n), of serving notice if the proper official is not available. This procedure was used in Cowles, 266 N.W.2d at 627-28.
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> We note, too, even if the board's assessment is erroneous, plaintiff is harmed for only one year. See Farmers Grain Dealers Association v. Woodward, 334

N.W.2d 295, 298 (Iowa 1983). Finally, there is a compelling reason for adhering to procedural rules:

> It is not for us to regret that we have been compelled to follow a strict and technical line in our decision set out above. The so-called technicalities of the law are not always what they seem. When they establish an orderly process of procedure, they serve a definite purpose and are more than technical; they have substance, in that they lay down definite rules which are essential in court proceedings so that those involved may know what may and may not be done and confusion, even chaos, may be avoided. They are necessary; without them litigants would be adrift without rudder or compass. We have, and should have, no compunction in following them when they are clear and definite.

Esterdahl v. Wilson, 252 Iowa 1199, 1208, 110 N.W.2d 241, 246 (1961).

BHC, 351 N.W.2d at 526. The procedure for petition for alternative service when the board chairman is unavailable is set forth in Cowles Communications, Inc. v. Board of Review of Polk City, 266 N.W.2d 626, 632 (Iowa 1978). Because this procedure was available to the taxpayers and in view of the supreme court's holding in BHC, we find that the trial court acted properly in sustaining the special appearance. The ruling by the trial court is affirmed.

AFFIRMED.

All judges concur except Oxberger, C.J., who dissents.

OXBERGER, C.J., (dissenting).

I believe the plaintiffs here have substantially complied with Iowa Code section 441.38. The majority indicates BHC Co. v. Board of Review of Cedar Rapids, 351 N.W.2d 523 (Iowa 1984), controls here. That case indicated that compliance was not substantial when the sheriff was given papers to serve the board chairman on the last day for appeal, and the chairman could not be located until the twenty-first day following the board's adverse decision. Id. at 523-24. However, in this case, unlike BHC, counsel for plaintiffs contacted the chairman's office and was assured by personnel there that the chairman would return on the last day of the twenty-day period.

I believe this case can be distinguished from BHC on this basis. Plaintiffs had a right to rely on the statements made by officials at the chairman's office that he would return July 5. The court in BHC noted, "Untimely service by an officer, wrong service, or no service at all are hazards which attend eleventh-hour attempts to serve." Id. at 525 (citation omitted). Plaintiffs were told by personnel at the office when the chairman would return, and it was this statement, not the eleventh-hour attempt to serve, which resulted in the chairman not being properly served.

I would reverse the special appearance.