**IN THE COURT OF COMMON PLEAS**
**CUYAHOGA COUNTY, OHIO**

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| **MUSIAL OFFICES, LTD., *etc., et al.*** | ) | **CASE NO. CV 11 746704** |
| | ) | |
| **Plaintiffs,** | ) | **JUDGE JOHN P. O'DONNELL** |
| | ) | |
| **vs.** | ) | **JUDGMENT ENTRY OF** |
| | ) | **FINDINGS OF FACT AND** |
| **COUNTY OF CUYAHOGA, *et al.*** | ) | **CONCLUSIONS OF LAW** |
| | ) | **UPON A BENCH TRIAL** |
| **Defendants.** | ) | |

***John P. O'Donnell, J.:***

This is a class action lawsuit for the restitution of overpaid real estate property taxes. The certified class of plaintiffs is defined as follows:

> Cuyahoga County property owners who filed a complaint against valuation for tax year 2008 that resulted in the board of revision reducing the taxable value of the property, whose 2009 property's value was taxed using a higher value.

***The second amended complaint and the trial***

The operative pleading is the second amended complaint filed June 6, 2012. The named plaintiff is Musial Offices, Ltd., on behalf of itself and all others similarly situated. The second amended complaint includes causes of action labeled as counts one through six. Count one is for disgorgement. Count two alleges unjust enrichment. Those two "counts" together constitute a single cause of action since disgorgement is merely the remedy for unjust enrichment. Count three claims that the defendants violated the constitutional rights of the plaintiff class members to the equal protection of the law by failing to apply the tax laws uniformly.[1] The fourth count seeks an injunction against the continued collection of the allegedly overcharged taxes. Count

[1] The second amended complaint also alleged an unconstitutional taking of property without due process of law. That claim was waived in closing argument at trial.

five claims that the defendants violated section 2723.01 of the Ohio Revised Code prohibiting the collection of illegal taxes. The sixth count seeks a writ of mandamus ordering the board of revision to certify to the county's fiscal officer that clerical errors resulted in excess property tax charges and ordering the fiscal officer to refund the overcharges.

Because disgorgement and an injunction[2] are remedies, not causes of action, the pending claims are the equal protection constitutional violation, illegal taxation, unjust enrichment and for a writ of mandamus. The named defendants are the County of Cuyahoga, the county fiscal officer, the Cuyahoga County Board of Revision, the county executive and the treasurer.

The second amended complaint includes a jury demand, but the defendants moved to strike the jury demand and, in response, the plaintiff withdrew the jury demand and agreed to try the lawsuit to the court.

A three-day trial took place ending September 29, 2015. Although it was a bench trial, an advisory jury was empaneled pursuant to Rule 39(C) of the Ohio Rules of Civil Procedure. After deliberating, the jury returned answers to interrogatories and a verdict in favor of the plaintiff and against the county on the unjust enrichment claim. Final arguments to the court alone were heard on December 18 and this judgment follows.

***Real estate tax assessments and challenges***

All real property in Ohio is subject to taxation, with some exceptions not applicable in this case. Ohio Revised Code §5709.01(A). Real property tax is based on a percentage of the property's taxable value and a county auditor is charged under R.C. 5713.01(B) with assessing the taxable value of real property. County auditors must appraise every property every three years through what are known as sexennial and triennial appraisals. R.C. 5713.01(B) and 5715.24. The sexennial appraisal requires the auditor to actually look at and appraise each parcel

[2] Additionally, the 2012 sexennial reappraisal moots the request for an injunction.

of land; the triennial appraisal – also referred to as a "statistical update" – involves only the application of a "use factor" to all properties in a class based on an estimation of the average percentage of appreciation or depreciation in value of classes of property since the latest sexennial appraisal. After applying the use factor, all parcels in the class are reappraised – up, down or no change – by the same percentage amount. The auditor may also change a property's value in any year that an event has occurred to diminish or increase the property's value.

Regardless of whether the auditor has reappraised a parcel in a given year, a property owner may challenge the auditor's valuation for a current tax year by filing a complaint with the auditor no later than March 31 of the next tax year. R.C. 5715.19(A)(1)(d). Real property taxes are billed one year behind so that, for example, a taxpayer will be billed for the first half of a tax year based on the property's valuation as of January 1 of that year in December of the same year. As such, a taxpayer challenging the valuation for tax year 2008 had until March 31, 2009, to file his complaint. After a complaint is filed, the auditor is required to present it to the county's board of revision, established under R.C. 5715.01(B) to "hear complaints and revise assessments of real property for taxation." In most cases, the auditor must also notify the local board of education of the complaint within 30 days of March 31, whereupon the board of education – the ultimate recipient of a large percentage of the tax collected – may file within 30 additional days its own complaint against the value. R.C. 5715.19(A)(1) and (B).

The board of revision consists of the county treasurer, county auditor and a county commissioner. Those three officials may in turn create hearing boards as "necessary to the expeditious hearing of valuation complaints." R.C. 5715.02. As of 2008 in Cuyahoga County there were three three-member hearing panels. Under R.C. 5715.19(C), a board of revision "shall hear and render its decision on a complaint" within 90 days of the date the owner's

complaint was filed with the board or, if the board of education asserted its own challenge to the value, within 90 days of the board's counterclaim. Considering these statutory deadlines, and assuming the auditor's presentment of a complaint to the board of revision is done when the auditor gets the complaint, a complaint with a counterclaim must be decided no later than 120 days after April 30, i.e. before the end of August.

***Musial Office, Ltd. and the other members of the class file complaints in 2008***

Cuyahoga County Auditor Frank Russo conducted a sexennial appraisal in 2006. At that time, plaintiff Musial Office's property was appraised as having a market value of $679,500. The plaintiff paid taxes on that value for tax years 2006 (paid in 2007) and 2007 (paid in 2008). Musial Office then received its tax bill for the tax year 2008 in December 2008. That bill was also paid on a market value as of the tax lien date, January 1, 2008, of $679,500.

In the meantime the subprime mortgage market had collapsed in late 2007, precipitating a broader financial crisis and economic downturn. The effect on many owners of real estate in Cuyahoga County was a decrease in their property's value. Because of that, over 20,000 taxpayers – including Musial Office, Ltd. – filed complaints in early 2009 with the board of revision seeking a reduction in value.

Musial filed its complaint with the board of revision on January 16, 2009. Almost five months later, on June 2, 2009, the Westlake Board of Education filed its own complaint[3] arguing that the value should be maintained. Under R.C. 5715.19(C) the board of revision was thus required to hear and decide the complaint and counterclaim by September 1, yet the hearing itself was not held until November 25, a period of 86 days after the decision deadline. The board ultimately mailed Musial Office a decision on January 13, 2010, over three months past the

[3] Referred to by some of the trial witnesses and lawyers as a countercomplaint, but referred to in this judgment entry as a counterclaim.

statutorily allowed time. By then, the county treasurer had sent Musial Office the tax bill for the first half of 2009 – which Musial Office received on December 14, 2009 – showing an assessed market value of $679,500, *i.e.* the same 2008 value that the plaintiff objected to at the board of revision.

The board of revision's decision was in Musial Office's favor: the $679,500 value was reduced to $499,000, effective January 1, 2008. Included with the decision was a notification of Musial Office's appeal rights with the assurance from County Auditor Russo that if "no [appeal] action is taken, the Board's decision will be reflected in your next tax bill." No appeal was filed and at that point Musial Office's "next tax bill" was the one to be sent in June 2010 to cover the second half of 2009. Yet, under R.C. 5715.19(A)(1)(d)'s deadline for Musial Office to contest the tax valuation for the current tax year – 2009's valuation of $679,500 as reflected in the December 2009 bill from the treasurer – Musial Office had to file a complaint with the board of revision by March 31, 2010. Having been assured by the auditor on January 13, 2010, that the valuation of $499,000 would be reflected in the June 2010 bill Musial Office did not contest the 2009 valuation with the board of revision.

But the next tax bill did not show the $499,000 value. The bill, received by Musial Office on June 11, 2010, listed a market value of $679,500 for the second half of 2009. By then the chance to appeal the 2009 assessment to the board of revision had expired. Musial Office then filed this lawsuit on January 24, 2011, after the treasurer persisted in billing the plaintiff on a market value of $679,500 instead of the revised value of $499,000.

The plaintiff's experience was not unique, hence the class certification here. Around 3,000 property owners who successfully argued for a reduction in 2008 value on complaints filed in early 2009 received their favorable board of revision decisions after the auditor's 2009

triennial appraisal, and the triennial – or "statistical" – appraisal used those owners' inflated 2008 values as the basis for the 2009 adjustment instead of the lower value as declared by the board of revision. As a result, all of the class members were assessed more taxes than they owed for tax year 2009, and many continued to be assessed on the inflated value in 2010 and 2011 until the sexennial appraisal in 2012. Moreover, because the auditor guaranteed them that the revised valuation would be "reflected in" the tax bill they would get in the middle of 2010 they were barred from going back to the board of revision in 2010 to contest 2009's value. Then, even though this lawsuit was pending, the Cuyahoga County government continued to bill them on the inflated value instead of the correct value.

But Musial Office also filed another board of revision complaint against the 2010 value before March 31, 2011, eventually getting a reduction in its tax year 2010 value to $503,000. Ultimately, although Musial Office did eventually get a refund of the overpayment for tax year 2008, it was forced to pay taxes on the erroneous $679,500 value for tax year 2009, as was every other member of the class. Moreover, many members of the class, unlike Musial Office, did not file a board of revision complaint against valuation for the 2010 and 2011 tax years, and thus overpaid taxes for those years because the auditor did not use the value decided by the board of revision as the starting point for the 2009 statistical reappraisal. Accordingly, for itself, Musial Office seeks restitution of its overpayment – i.e., the difference in taxes owed on a $679,500 property and a $499,000 property – for the 2009 tax year and, for the class members, restitution of any overpayments for tax years 2009, 2010 and 2011 resulting from the auditor's failure to use the corrected board of revision value as the basis for the statistical reappraisal.

### *The illegal taxation claim*

The first claim of the class of plaintiffs is that they were forced to pay an illegal tax. This claim is asserted under R.C. 2723.01 which provides, in pertinent part:

> Courts of common pleas may enjoin the illegal levy or collection of taxes and assessments and entertain actions to recover them when collected, without regard to the amount thereof.

R.C. 5713.03 requires the auditor to determine the true value of property "from the best source of information available." According to Musial Office, the real estate tax was illegally levied and collected because the auditor violated this duty by using the class members' inflated 2008 values for the 2009 statistical appraisal – then simply carrying that value over for 2010 and 2011 – instead of using the best information available, namely the board of revision's determination of the 2008 value.

For their part, the defendants oppose the claim that the tax was illegal on two grounds: that the auditor couldn't wait for the board of revision to decide the 2008 value before deciding the 2009 value, and that the claim is barred in the first place by the plaintiff's failure to comply with R.C. 2723.03. That statute provides that a lawsuit by a plaintiff who sues to recover taxes illegally collected will not be dismissed on the basis that the plaintiff voluntarily paid the taxes if the taxes were paid under protest and a notice of intention to sue.

The first question is whether the auditor's conduct here comes within the ambit of "the illegal levy or collection of taxes" redressable under the statute. Since there was clearly the "collection" of taxes in this case – Musial Office was billed for the taxes and paid them under the threat of litigation, penalties and interest if they were not paid – not much time needs to be spent on whether there was a "levy" of taxes, other than to note that the word levy, especially when

distinguished from collection by including both actions in the statute as different grounds for recovery, usually means the determination to impose the tax, as distinct from assessment and collection. *State ex rel. Board of Education v. Hamrock*, 11 Ohio Misc. 36, 40-41 (1967). In other words, the levying of taxes occurs when legislation creating the tax is enacted, and the levy here was not illegal since real estate taxes are authorized by law.

The next question is who collected the tax? The answer is the county treasurer. See R.C. Chapter 323 and, effective January 1, 2010, Cuyahoga County Charter, Section 5.07. Here, the plaintiffs cannot point to something illegal that the treasurer did by collecting the tax. The violation of law alleged by the plaintiffs – the auditor's failure to abide by his statutory obligation to value property based on the best information available – happened before the treasurer billed the plaintiff and other class members. Since the county treasurer did not have a say in calculating the amount owed, the treasurer did not violate the law by simply billing for and collecting a tax he had no reason to know was excessive.

That leads to a third question: does the assessment by the auditor of a property's value amount to the levy or collection of taxes as those terms are used in R.C. 2723.01? The answer is no. Real estate tax is exacted from property owners in three steps. First, a law is passed to establish the government's authority to impose the tax, i.e. the levy of the tax. Second, a computation of the amount of tax owed is made based upon the terms of the levy and the value of property owned by the taxpayer, i.e. the auditor's assessment. Third, the treasurer collects the assessed amount. While it is true that the auditor's duty to assess cannot be accomplished without reference to the enacting legislation, and the amount the treasurer seeks to collect is dependent upon the auditor's assessment, the three functions are separate and R.C. 2723.01

covers only two of them. Because the record evidence fails to prove the illegal levy or collection of taxes, judgment on the R.C. 2723.01 claim in the defendants' favor is appropriate.

***The equal protection claim***

The Fourteenth Amendment to the United States Constitution provides that no state shall deny to any person within its jurisdiction the equal protection of the laws. Article I, Section 2, of Ohio's constitution says that all political power is inherent in the people and government is instituted "for their equal protection and benefit." The limitations placed upon governmental action by the federal and state equal protection clauses are essentially the same. *McCrone v. Bank One Corp.*, 107 Ohio St. 3d 272, 2005-Ohio-6505, ¶7. Simply stated, the equal protection clauses require that individuals be treated in a manner similar to others in like circumstances. *Id.*, ¶6. The equal protection clauses simply keep governmental decisionmakers from treating differently persons who are in all relevant respects alike. *Pickaway County Skilled Gaming, L.L.C. v. Cordray*, 127 Ohio St. 3d 104, 2010-Ohio-4908, ¶16.

Musial Office and the other class members claim they were denied the equal protection of the law because the defendants "discriminated against the plaintiffs by knowingly using the wrong tax-year valuation" for 2008 as the basis for the 2009 through 2011 valuations without "a rational basis to use an incorrect value [for the class members] but use a correct value" for everyone else.[4]

There are two obstacles to a recovery on this claim. The first is that a constitutional violation of the right to equal protection of the law usually involves a conscious decision by government – typically through legislation or an executive branch policy – to take a group of people who are similarly situated and to sort them by some defined classification which results in those within the classification being treated differently than those not in the classification.

[4] The plaintiff's posttrial brief, page 9.

Unless the government action implicates a fundamental right or a suspect class is involved, it will not violate equal protection if it bears a rational relationship to achieving a legitimate governmental interest. *Conley v. Shearer*, 64 Ohio St. 3d 284, 289 (1992). In this case, however, there was no *de jure* grouping of county residents into a class, on the one hand, of those who filed a successful tax year 2008 protest with the board of revision and, on the other hand, of those who did not contest the tax year 2008 valuation.

Second, the plaintiff class and the taxpayers not in the class are not similarly situated. The members of the class all successfully contested their 2008 values; those taxpayers not within the plaintiff class did not. So the initial sorting of taxpayers into classes was not done by governmental fiat. Moreover, to the extent the plaintiff might argue that all of them are real estate tax payers and only those who successfully contested their values are being discriminated against by the government, the plaintiff has failed to show any intent to discriminate. There is no evidence that the county government ignored Musial Office's reduced 2008 value when calculating the basis for the 2009 triennial reappraisal as a means of punishing the plaintiff for successfully exercising its right to contest the value at the board of revision. At worst, the evidence demonstrated that the failure to use the correct 2008 tax year value as the starting point for the 2009 statistical reappraisal happened through neglect, not a deliberate decision. Because the record evidence fails to prove that the defendants, or any one or more of them, violated the right of the class members to the equal protection of the law, judgment on the constitutional equal protection claim in the defendants' favor is appropriate.

***The unjust enrichment claim***

Unjust enrichment occurs where a person has and retains money or benefits which in justice and in equity belong to another. *Johnson v. Microsoft Corp.*, 106 Ohio St. 3d 278, 2005-

Ohio-4985, ¶20. Restitution is the remedy designed to prevent one from retaining property to which he is not entitled. *Id.* To prevail on a claim for unjust enrichment, a plaintiff must prove by a preponderance of the evidence that: (1) the plaintiff conferred a benefit upon the defendant, (2) the defendant had knowledge of such benefit, and (3) the defendant retained that benefit under circumstances in which it would be unjust for him to retain that benefit. *San Allen v. Buehrer*, Cuyahoga App. No. 99786, 2014-Ohio-2071, ¶115.

The defendants oppose the unjust enrichment claim on the grounds that governments and government actors cannot be sued for unjust enrichment. But most of the defendants' legal support for this argument rests on the general proposition that a governmental entity cannot be sued under an implied contract theory where the formalities of a contract have not been satisfied, and this is not a contract case where the plaintiff class members risked a loss by knowingly conferring a benefit in the absence of a formal contract. Instead, this case has more in common with a fraud or promissory estoppel action insofar as the class members relied on the auditor's promise to "reflect" the lower value in the "next tax bill," thereby inducing the class members not to contest their inflated 2009 tax year values by the March 31, 2010, deadline. Additionally, the defendants' argument ignores the nature of an unjust enrichment claim: it is, as quoted above, an equitable action designed to restitute benefits that in "justice and in equity belong to another." An equitable claim is allowed so that justice may be done when the facts of a case do not fall within the elements of a statute that would provide relief, nor do they fit squarely within a common law contract or tort action. Equitable relief in the form of restitution is available if the plaintiff class demonstrates that it has superior equity, making it unconscionable for the defendants to retain the benefit. *Id.*, ¶120. I therefore reject the contention that the equitable

claim for unjust enrichment is not, as a matter of law, possible in this case and I will proceed to decide the merits of the claim.

The first element of the claim is whether a benefit was conferred. Undoubtedly it was: the plaintiff class members gave their money to the defendant treasurer and in amounts that exceeded their actual tax liability. For all of the class members, their property values as of January 1, 2008, were determined by the board of revision and not appealed by the county, so the board of revision value should have been the starting point for the triennial statistical reappraisal effective January 1, 2009. Instead, the auditor used the higher value rejected by the board of revision, and then persisted, as to most class members, in using that incorrect higher value for tax years 2010 and 2011, so each class member paid more taxes than they owed for 2009, and many overpaid for 2010 and 2011.

The second element is knowledge of the benefit. The treasurer's awareness of the payments by plaintiff class members is evidenced by the fact that their checks were cashed and credits given to their accounts, thus the plaintiff has established knowledge of the benefit.

The first component of the third element is retention of the benefit. The defendants argued that the evidence proves that at most the county kept about 4% of the total claimed overpayments and that the rest of the amounts collected were distributed to various social service agencies, boards of education and other taxing authorities. But "retention" of a benefit in the context of an unjust enrichment claim does not require that the recipient of the benefit must keep the money intact and unspent, all it requires is that the benefit was never restituted to the payor in the first place, which is the case here. It would defeat the purpose of equity to say that a defendant who receives money to which it is not entitled but then uses the money cannot be held to answer for its return. Such a strict interpretation of the meaning of "retention" would subvert

equity by providing an incentive for an unjust enrichment defendant to get rid of the benefit as quickly as possible.

This leaves the heart of an unjust enrichment claim: whether the circumstances demonstrate that an injustice will be done if the defendant is permitted to keep the benefit. To put it simply, the question to be answered is what is fair? That question has already been implicitly answered by the summary of the facts in the preceding portions of this entry. The board of revision did not decide the class members' cases on time. Then, the auditor used the wrong 2008 value as the basis for the 2009 statistical reappraisal. To compound that error, the auditor informed class members of the high 2009 reappraisal, but then assured them when the board of revision decided in their favor that the next tax bill would be changed to use the lower amount decided by the board of revision, thereby effectively inducing the class members not to file timely complaints against the 2009 value. Finally, the auditor did nothing to amend the 2010 and 2011 values to comport with the board of revision's favorable 2009 revaluation despite full knowledge of the mistakes and the pending litigation. There is nothing about that sequence of county government mistakes, false assurances and omissions that would make it remotely fair to bar the plaintiff class members from getting refunds of their tax overpayments for 2009, 2010 and 2011.

In short, Musial Office proved the unjust enrichment claim and a judgment on that claim in favor of the plaintiff class is appropriate.

### *The claim for a writ of mandamus*

The plaintiff has conceded that its mandamus claim is dependent on a finding in the defendants' favor on every other cause of action.[5] Since I have found in favor of the plaintiff on the unjust enrichment claim, the mandamus claim is moot.

### *The remedy for unjust enrichment*

As discussed above, the remedy for an unjust enrichment is an order requiring the recipient of the benefit to return it to the person who bestowed the benefit. Here, evidence of the correct dollar amount of restitution for each class member was presented at trial through a joint stipulation of damages, admitted at trial as Plaintiff's Trial Exhibit 29. That exhibit includes, as Exhibit A to Plaintiff's Trial Exhibit 29, a voluminous printed spreadsheet identifying property owners, with their parcel numbers, who fall within the defined class. For each class member the spreadsheet shows the owner's overpayments due to the auditor's inflated assessments for the 2009 tax year and, if applicable, 2010 and 2011, amounting to a grand total of $3,927,385.91. Accordingly, the remedy required to correct the inequity created by the defendants' conduct is restitution to the class members of that $3,927,385.91.

The mistakes and false assurances leading to the ultimate inequity of collecting taxes that were not owed were made by the board of revision, the auditor and, to a lesser extent, the treasurer. But these are all agents of the county government and the tax money went directly into the county's treasury. Thus, the defendant who must make that restitution is the County of Cuyahoga.

### *This is not a final judgment entry*

Although this decision sets forth clearly for the parties my findings of fact and conclusions of law after consideration of all the evidence presented at trial, this is not a final

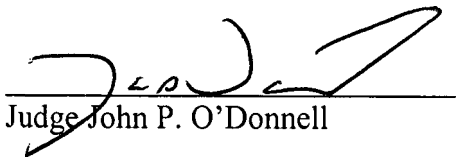
[5] See plaintiff's posttrial brief, p. 10.

judgment entry in the case. There are issues of fact and law that must be addressed before a final judgment entry consistent with this opinion and compliant with Rules 23(C)(3) and 58 of the Ohio Rules of Civil Procedure.

The class here was certified, in part, under the "predominance" provision of Civil Rule 23(B)(3), and Civil Rule 23(C)(2)(b) requires notice to all class members. The form of notice was stipulated to by the parties on February 3, 2015, and on April 29, 2015, the trial court ordered the plaintiff to send the notice within seven days, but the docket does not reflect proof of such notice and, assuming the notice was sent, I have not been informed of the names of the class members who opted out of the class so as to exclude them from any final judgment. A second outstanding issue is class counsel's claim for attorney's fees. Finally, I am interested in the parties' suggestions on the appropriate exact verbiage of a final judgment entry.

A posttrial attorney conference to discuss these, and any other, remaining issues will be scheduled by a separate judgment entry. Thereafter a Civil Rule 58 final judgment entry incorporating this decision will be journalized.

**IT IS SO ORDERED:**



Judge John P. O'Donnell

Date: March 23, 2018

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Judge John P. O'Donnell

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