NO. CV 084025152S	:	SUPERIOR COURT
ZLOTNICK CONSTRUCTION, INC.	:	JUDICIAL DISTRICT OF FAIRFIELD
V.	:	AT BRIDGEPORT
TOWN OF STRATFORD	:	MARCH 18, 2011

MEMORANDUM OF DECISION

The plaintiff, Zlotnick Construction, Inc. (Zlotnick), is a general contractor with a principal place of business in Mansfield. Regarding the Grand List of October 1, 2007, Zlotnick brings this two-count complaint pursuant to General Statutes §§ 12-117a and 12-119 claiming that the assessor for the town of Stratford (town) made an unspecified assessment for tax purposes of $700,620 on personal property located on its construction job site in Stratford. The plaintiff claims that it was not the owner of this equipment which was assessed to it as personal property.

In March 2007, Zlotnick was engaged as the prime contractor to (1) demolish a former department store building within Stratford, (2) prepare the site for construction and (3) construct a BJ's Wholesale Club building there. Zlotnick hired numerous subcontractors (hereinafter "subs") in order to complete the project by the end of December 2007.

The subs brought their own materials and equipment to the job site such as dump trucks, loading docks, ladders, excavators, front loaders, pay-loaders, various types of

lifts, including scissor lifts, fences, cement and cement containers, back-hoes, dumpsters, dry wall material, welding equipment, electrical equipment, box trailers, various storage containers, plumbing material and supplies, a crane and numerous other types of construction equipment.

The assessor visited the job site in July and September 2007 in order to verify that equipment on the job site had remained in Stratford for three months – the time period that would require any owner of equipment to file a personal property declaration with the assessor pursuant to General Statutes § 12-43.[1] At the job site, the assessor saw a Zlotnick sign posted and assumed that Zlotnick owned all the materials and equipment there. The assessor photographed the items at the job site from an off-site position because the comptroller would not permit the assessor onto the site for safety reasons as the assessor did not have the proper attire.

Zlotnick's comptroller filed a personal property declaration with the assessor listing a rented job trailer containing office furniture, equipment and supplies and a rented dumpster. The disclosed value of this personal property was $873. After reviewing the items listed on Zlotnick's personal property declaration, the assessor concluded that the

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[1] General Statutes § 12-43 provides, in relevant part, as follows: "Each owner of tangible personal property located in any town for three months or more during the assessment year immediately preceding any assessment day, who is a nonresident of such town, shall file a declaration of such personal property with the assessors of the town in which the same is located on such assessment day."

declaration was incomplete. However, the plaintiff claims that the items that the assessor had previously photographed were clearly labeled with the names of the true owners.

After taking the photographs, the assessor compiled a list of equipment and did a valuation of these items using the Internet and equipment guides. Because she did not know the age of the various pieces of equipment, the assessor used the Internet to determine averages. From the compiled list, the assessor levied a personal property assessment of $700,620 against Zlotnick for the Grand List of October 1, 2007. This resulted in a tax bill of $21,375.92 which Zlotnick has not paid.

As the prime contractor, Zlotnick published a list of all subs working on the job site in order to coordinate the various phases of work that each sub was to perform. The assessor requested this "subs list" from the comptroller but was refused. Following this rejection, the assessor gave Zlotnick's comptroller a number of personal property declaration forms to pass out to all the subs for completion. Zlotnick's comptroller refused to comply with this request as well.

Zlotnick appealed the assessment for all the personal property at the job site to the board of assessment appeals (BAA). The plaintiff appeared before the BAA represented by counsel and explained that Zlotnick did not own the equipment located at the job site and that individual subs working at the site owned the items. The BAA, in a three to two

vote, upheld the assessment.[2]

During the course of the trial, the assessor acknowledged that she subsequently learned that Zlotnick did not own the equipment located on the job site as of October 1, 2007. Although the plaintiff filed this two-count complaint pursuant to §§ 12-117a and 12-119, it is clear that the issue is whether the assessor had the authority to assess Zlotnick for the personal property that the subs owned. Also before the court is the issue of whether Zlotnick is entitled to attorney's fees because Zlotnick did not own the personal property on the job site. The plaintiff claims that attorney's fees may be awarded to the taxpayer where the assessor has engaged in bad faith while exercising her duties.

"The general rule of law known as the American rule is that attorney's fees and ordinary expenses and burdens of litigation are not allowed to the successful party absent a contractual or statutory exception. This rule is generally followed throughout the country. Connecticut adheres to the American rule." (Citations omitted; internal quotation marks omitted.) New Hartford v. Connecticut Resources Recovery Authority, 291 Conn. 511, 517, 970 A.2d 583 (2009). A bad faith exception to the American rule has been recognized, permitting "a court to award attorney's fees to the prevailing party on the basis of bad faith conduct of the other party or the other party's attorney." (Internal quotation marks omitted.) ACMAT Corp. v. Greater New York Mutual Ins. Co., 282

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[2] The two negative votes appear inclined to pursue the subs for the taxes owed.

Conn. 576, 582, 923 A.2d 697 (2007). In addition,"[i]t is generally accepted that the court has the inherent authority to assess attorney's fees when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons[.]" Id., 583.

Here, the burden is on the plaintiff to establish bad faith by clear and convincing evidence, with a high degree of specificity. See Andy's Oil Service, Inc. v. Hobbs, 125 Conn. App. 708, 715, 9 A.3d 433 (2010) ("[i]t is the burden of the party asserting the lack of good faith to establish its existence"). (Internal quotation marks omitted.) See also Maris v. McGrath, 269 Conn. 834, 845, 850 A.2d 133 (2004).

"Bad faith in general implies both actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. . . . Bad faith means more than mere negligence; it involves a dishonest purpose." (Internal quotation marks omitted.) 19 Perry Street, LLC v. Unionville Water Co., 294 Conn. 611, 637, 987 A.2d 1009 (2010).

The plaintiff offered to settle this case upon the withdrawal of the assessment against it and the payment of $10,000 in attorney's fees. Although the assessor was willing to withdraw the improper assessment, the town's attorney advised the assessor not to pay the plaintiff's claim for attorney's fees, which currently amounts to over $40,000.

The facts in this case do not support a finding that the assessor engaged in bad faith. The assessor unsuccessfully sought the plaintiff's help to identify the subs owning the equipment on the job site. The plaintiff's comptroller prevented the assessor from going onto the job site, refused to furnish the assessor with a list of subs who were working at the job site and refused the assessor's request to pass out personal property declaration forms to the subs. The assessor was caught between a "rock and a hard place"[3] by the need to identify the owner(s) of the equipment on the job site and to heed the advice of the town's attorney not to pay attorney's fees to the plaintiff. Therefore, the question arises whether the assessor's reliance on counsel's advice is a defense to a bad faith claim.

As noted in Allstate Ins. Co. v. Clancy, 936 N.E.2d 272, 276 (Ind. App. 2010), some jurisdictions hold that a good faith reliance upon counsel's advice is a complete defense to a bad faith claim while other states hold that reliance on counsel's advice is simply one of a number of factors to be considered in making such a determination. The more sensible approach is that reliance on counsel's advice must be reasonable. See, e.g., Barnes v. Oklahoma Farm Bureau Mutual Ins. Co., 11 P.3d 162, 174 (Okla. 2000). In the

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[3] See In re Frisch, 784 N.W.2d 670, 677 (Wis. 2010), for an example of the "proverbial 'rock and a hard place.'"

present action, the assessor's reliance on the town attorney's advice was not unreasonable, given the choice of complying with the advice of her attorney or disregarding it.

The plaintiff further argues that the assessor could have conducted an audit pursuant to General Statutes § 12-53 (c) (1) in order to discover the identity of the actual owners of the equipment on the job site. General Statutes § 12-53 (c) (1) provides, in relevant part, as follows: "The assessor . . . may perform an audit . . . of any personal property required to be declared pursuant to section 12-40 or section 12-43. The assessor shall give notice in writing to the owner, custodian or other person having knowledge of any such property or the valuation thereof . . . ." However, this discretionary power on the part of the assessor is for the benefit of the assessor, not the taxpayer. The relevance of the assessor's use of her discretion, if any, does not absolve the plaintiff of the obligation to cooperate with the assessor.

As an example, in the tax appeal Mulero v. Wethersfield, Superior Court, judicial district of New Britain, Docket No. CV 08 4017412 (September 22, 2009) (*Aronson, JTR)*, the court considered a self-represented taxpayer's refusal to cooperate with the assessor's numerous requests to inspect the taxpayer's home. The court in Mulero relied on the concept expressed in J.C. Penney Corp. v. Manchester, 291 Conn. 838, 845, 970

A.2d 704 (2009), that "the taxpayer cannot justly complain if the assessors, acting in good faith, make an error in judgment in listing and valuing his property." In Mulero, the court emphasized that each taxpayer has a "personal obligation to cooperate with the assessor in the valuation of his or her property for tax purposes and to furnish such facts upon which the valuation may be based."

Although the court finds that the assessor's actions cannot form a basis for a bad faith claim, the BAA's rejection of the plaintiff's appeal by a three-to-two vote presents another matter of concern to the court.

"One of the statutory functions of the . . . [BAA] is to determine appeals taken by taxpayers claiming to be aggrieved by the action of the assessor. In performing this function, the [BAA] acts as an administrative board, not a judicial tribunal and in performing its duties it acts largely upon the knowledge of its members as to valuations and as to the taxable property of the taxpayers." Nargi v. Waterbury, Superior Court, judicial district of Waterbury, Docket No. CV 96 0133015 (March 5, 2002) (*Aronson, JTR),* citing Bugbee v. Putnam, 90 Conn. 154, 158, 96 A. 955 (1916) and Burritt Mutual Savings Bank v. New Britain, 146 Conn. 669, 674-75, 154 A.2d 608 (1959).

As noted above, the assessor informed the BAA that she had ascertained that Zlotnick was not the owner of the equipment on the subject site. In addition, Zlotnick's

counsel presented to the BAA information showing it was not the owner of the equipment. However, a majority of the BAA members wholly ignored the assessor and upheld the assessment, perhaps to sidestep the issue regarding the outstanding attorney's fees.

Upon consideration of all the facts in this case, the plaintiff's appeal is sustained, voiding the personal property assessment of $700,620 on the Grand List of October 1, 2007, because the plaintiff did not own the equipment at issue. However, as to the plaintiff's claim for attorney's fees, the court is mindful that, pursuant to General Statutes §§ 12-117a and 12-119, it has the equitable and inherent power to grant such relief as "justice and equity appertains" and "upon such terms and in such manner and form[.]"[4]

Although the plaintiff is seeking over $40,000 in attorney's fees, it is the decision of this court to award the plaintiff $2,000 for attorney's fees.[5] This amount is based on the

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[4] General Statutes § 12-117a provides, in relevant part, as follows: "The court shall have power to grant such relief as to justice and equity appertains, upon such terms and in such manner and form as appear equitable . . . and, upon all such applications, costs may be taxed at the discretion of the court." General Statutes § 12-119 provides, in relevant part, as follows: "In all such actions, the Superior Court shall have power to grant such relief upon such terms and in such manner and form as to justice and equity appertains, and costs may be taxed at the discretion of the court."

[5] The plaintiff's motion for special finding (#119), pursuant to General Statutes § 52-226a, is denied for the reasons stated in this memorandum of decision.

BAA inexplicably rejecting the plaintiff's appeal when it was clearly informed that Zlotnick did not own the subject equipment. The award is also tempered by the plaintiff's unwillingness and failure to cooperate with the assessor in identifying the subs/owners of the subject equipment during the early stages of the assessor's information gathering.[6]

Judgment may enter in accordance with this decision without costs to either party.

Arnold W. Aronson
Judge Trial Referee

[6] This action would have "nipped the problem in the bud." Brown v. U.S., 766 A.2d 530, 545 (D.C. 2001) (exemplifying a case where a prompt correction of a misstatement would have had significant effect).