

**THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT**

CHESHIRE, SS

No. 08-E-0103

**Z.B.H. Realty, LLC
and
Mark Hagemeyer**

v.

**Commissioner, New Hampshire
Department of Revenue Administration**

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

The parties are before the Court on a de novo appeal of an order made by the Commissioner of the Department of Revenue Administration, who imposed a tax on the transfer of real estate from petitioner, Mark Hagemeyer, to petitioner, Z.B.H. Realty, LLC. The petitioners move for summary judgment, arguing that there is no dispute of fact, and that they are entitled to judgment as a matter of law. The respondent filed a cross-motion for summary judgment, agreeing there is no dispute of fact, but maintaining that the tax should apply to the transfer at issue. The Court concludes the petitioners are entitled to summary judgment as follows.

Facts

The following facts are undisputed. Z.B.H. Realty, LLC is a New Hampshire limited liability company. (Mark Hagemeyer Aff. ¶ 2.) There are two members of the LLC, Mark and Melissa Hagemeyer. (Id. ¶¶ 2, 3.) Mr. Hagemeyer is the sole manager. (Id. ¶ 2.) On March 22, 2004, Mr. Hagemeyer transferred a 17.7-acre lot located in

Rindge, N.H. to the LLC. The deed indicated the transfer was “non-contractual” in accordance with RSA 78-B:2, and it was recorded in the Cheshire Registry of Deeds. (Resp’t’s Memo. Law Support Obj. Mot. Summ. J., Ex. 2.) The respondent issued a tax bill to both petitioners on March 22, 2007.

The petitioners assert in the Hagemeyer affidavit that the transferred property was not treated as a contribution toward Mr. Hagemeyer’s capital account with the LLC. (Hagemeyer Aff. ¶ 6.) The respondent has not disputed this assertion. Mr. Hagemeyer received no money or direct benefit from the transfer. The respondent has not presented verified facts to rebut Mr. Hagemeyer’s sworn statement that he received no consideration and that Z.B.H. Realty, LLC assumed no obligation in exchange for the real estate.

Standard of Review

A moving party is entitled to summary judgment if the pleadings, admissions and affidavits “show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” RSA 491:8-a, III. “An issue of fact is material if it affects the outcome of the litigation.” Horse Pond Fish & Game Club v. Cormier, 133 N.H. 648, 653 (1990) (quotation omitted). The Court must consider the evidence presented on summary judgment in the light most favorable to the non-moving party, giving the non-moving party the benefit of all favorable inferences that may be reasonably drawn from the evidence. See Del Norte, Inc. v. Provencher, 142 N.H. 535, 537 (1997).

Discussion

The petitioners make two alternative arguments. First, they argue that they are entitled to summary judgment because RSA 78-B:1, I (a) (2003), which imposes the tax, does not apply to the transfer of the real estate in this case. Alternatively, the petitioners contend that even if the transfer was of a type covered by the statute, it was a "noncontractual transfer," and thus excepted from taxation pursuant to RSA 78-B:2, IX (2008). The respondent disagrees.

The transfer tax statute states: "A tax is imposed upon the sale, granting and transfer of real estate and any interest therein including transfers by operation of law. Each sale, grant and transfer of real estate, and each sale, grant and transfer of an interest in real estate shall be presumed taxable unless it is specifically exempt from taxation under RSA 78-B:2." RSA 78-B:1, I (a).

The petitioners contend that the statute does not apply because Mr. Hagemeyer's transfer of real estate to Z.B.H. Realty, LLC did not qualify as a "sale, grant and transfer." According to RSA 78-B:1-a, V (Supp. 2008), "'Sale, grant[] and transfer' means every contractual transfer of real estate, or any interest in real estate from a person or entity to another person or entity, whether or not either person or entity is controlled directly or indirectly by the other person or entity in the transfer." A "contractual transfer" is defined as "a bargained-for exchange of all transfers of real estate or an interest therein," including transfers from an individual to an organization in which he holds an interest. RSA 78-B:1-a, II (2008).

The petitioners do not deny that Mr. Hagemeyer is a member of Z.B.H. Realty, LLC. Contrary to the respondent's representation, the petitioners do not argue that the

transfer falls outside the scope of the transfer tax statute simply because of the relationship of the two parties involved. Instead, the petitioners contend that the transfer was not a "contractual transfer" because there was no bargained-for exchange. The respondent contends that a bargained-for exchange is not necessary in order for a transfer to come within the statute, since RSA 78-B:1-a, specifically includes transfers between related entities, and since RSA 78-B:1, 1(a) specifically states that all sales, granting and transfers of real estate are presumed to be taxable.

As a starting point, the Court looks to the definition of bargained-for exchange. A bargained-for exchange means that the promisor manifests an intent to induce a promise or performance and the promisee manifests a corresponding intention. See Panto v. Moore Business Forms, 130 N.H. 730, 740 (1988). It contemplates the exchange of a promise for a promise or a promise for performance, or vice versa. See Black's Law Dictionary, 169-70 (9th ed. 2009) (defining "bargain" as "an agreement between parties for the exchange of promises or performance," and defining "bargained for exchange" as "[a] benefit or detriment that the parties to a contract agree to as the price of performance").

Based on the plain meaning of RSA 78-B:1-a, the Court finds that for a tax to apply there must be a "contractual transfer," and for there to be a "contractual transfer," there must be a bargained-for exchange of promises between the transferor and transferee, with the transferor receiving some benefit or consideration in exchange for the transfer of real estate. To find otherwise would be to ignore the definition of "contractual transfer" that the legislature chose to include. Courts should not interpret statutes in a

way that renders statutory language mere surplusage. Maxi Drug North, Inc. v. Comm'r, N.H. Dep't of Health and Human Servs., 154 N.H. 102, 109 (2006).

The Court recognizes that arguably an inconsistency may exist in how transfers are characterized based on the Court's interpretation. Pursuant to RSA 78-B:1, there is a presumption that each sale, grant and transfer of real estate is taxable unless specifically exempted by RSA 78-B:2. Accepting the Court's interpretation, RSA 78-B:2 would include in its list of "exceptions" numerous transactions that do not involve a bargained-for exchange and, therefore, would not be subject to tax under RSA 78-B:1, I (a) in the first place. For example, the list includes transfers by "deed or other instrument which corrects a deed or other instrument previously given," RSA 78-B:2, V; "transfers that occur by devise or by the laws regulating intestate succession and descent or by the death of any cotenant in real estate held by joint tenancy," RSA 78-B:2, XI; transfers "to the beneficiary of a partnership interest where the partnership dissolves by operation of law due to the death of a partner," RSA 78-B:2 XII; and "noncontractual transfers," RSA 78-B:2, IX. The question then is if transfers occurring without bargained-for exchange were not within the scope of the taxation statute to begin with, why the legislature would have felt it necessary to enact a provision excluding them from taxation. However, if the Court were to construe the phrase "contractual transfers" more expansively as respondent urges, by including as taxable transfers more transfers than those involving bargained-for exchanges, such a construction would be at odds with the legislature's expressed and unambiguous definition of "contractual transfers."

Based upon the evidence submitted, the Court concludes that the transfer in this case did not involve a bargained-for exchange and, thus, was not a contractual transfer

subject to taxation. The facts show that (1) Mr. Hagemeyer gave the land to Z.B.H. Realty, LLC, (2) Mr. Hagemeyer received no promise in return, and (3) Mr. Hagemeyer received no money, property or services from the LLC. In fact, it appears there was no exchange at all, much less an exchange that was bargained-for.

Moreover, the Court need not resolve the statutory ambiguity discussed above. Even if the Court accepted the respondent's view, the transfer at issue would be exempt from taxation as a "noncontractual transfer" under RSA 78-B:2, IX. A noncontractual transfer is defined as "a transfer which satisfies the three elements of a gift transfer:

- (a) Donative intent;
- (b) Actual delivery; and
- (c) Immediate relinquishment of control."

RSA 78-B:1-a, III.

The Court agrees with petitioners that, based on undisputed facts, all three elements of a gift transfer are satisfied in this case. The Respondent does not dispute that there was actual delivery, and thus the Court assumes that this requirement was met. See Wells v. Jackson Iron Mfg. Co., 48 N.H. 491, 537 (1869) (stating the delivery of a deed "may be inferred or presumed from the circumstances. Thus, the signing, the attesting by witnesses, the acknowledgement by the grantor and the recording of the deed have been considered full prima facie evidence of delivery.").

Looking at the facts in a light most favorable to respondent, the facts also support the conclusions that Mr. Hagemeyer evinced donative intent and immediately relinquished control when he gave the land to the LLC without receiving any consideration and without retaining ownership rights in the parcel.

Mr. Hagemeyer stated in his affidavit that he received no consideration when he transferred the property to the LLC. The respondent did not present verified facts to rebut this assertion. See Omiya v. Castor, 130 N.H. 234, 237 (1987) (stating that mere denials of moving party's assertions constitute inadequate response to motion for summary judgment). The respondent maintains that even if Mr. Hagemeyer did not receive money or goods or services as a result of the transfer, he did receive consideration in the form of limited liability, or a promise thereof, as a result of the transfer of the land. The Court does not find this argument persuasive. As a member of the LLC, he already had limited liability for the debts, obligations and liabilities of the company, including liabilities arising from the ownership of property. See RSA 304-C: 25. Whatever protection he received as a member arose by operation of law and was not the result of any act or forbearance on the part of the entity.

The respondent contends that the petitioners failed to establish the third prong of the donor test, because Mr. Hagemeyer retained control over the parcel as the sole manager of Z.B.H. Realty, LLC. Pursuant to the operating agreement for Z.B.H. Realty, LLC, the manager has "full and complete authority, power, and discretion to direct, manage and control the business affairs, and properties of the LLC, to make all decisions regarding these matters and to perform any and all other acts or activities customary or incident to the management of the LLC's business." (Pet'rs' Memo. Law Support Mot. Summ. J., Ex. A [LLC Operating Agreement § 5.2].)

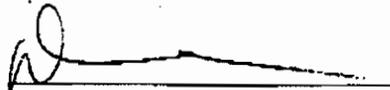
However, as a manager, the petitioner has a fiduciary duty to act in a manner that is consistent with the interests of the other members. See, e.g., RSA 304-C: 31, IV, V (b). (See also Pet'rs' Memo. Law Support Mot. Summ. J., Ex. A, § 5.5 (stating a

manager may be liable to the LLC or members for gross negligence or willful misconduct).) As stated in Mr. Hagemeyer's affidavit, the transfer was not considered to be a part of his capital contribution. Thus, upon dissolution, after each member received the value of their capital contributions, the balance of the LLC assets would be split in proportion to the contributions. See RSA 304-C: 58, II. Thus, while Mr. Hagemeyer retains the ability to control and manage the property as manager of the LLC, he lost the ability to use or alienate the property as he pleases since he has a duty to act on behalf of the LLC and the other member and upon dissolution, he will receive a lesser share of the value of the property.

Based on the foregoing, the Court concludes that the petitioners are entitled to summary judgment. Accordingly, the petitioners' motion is GRANTED. To the extent the Department of Revenue Administration assessed a tax against the petitioners, the assessments shall be rescinded and any taxes paid shall be refunded. The respondent's cross-motion for summary judgment is DENIED.

SO ORDERED.

8/25/09
Date


Diane M. Nicolosi
Presiding Justice