

COPY

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

COPY

MERRILL LYNCH, PIERCE,
FENNER & SMITH, INC. AND
AFFILIATES,)

Case No. CI 05-274

Plaintiff,)

vs.)

ORDER

NEBRASKA DEPARTMENT OF
REVENUE, and MARY JANE EGR,
NEBRASKA STATE TAX
COMMISSIONER,)

Defendants.)

This matter came before the court on April 22, 2005, on the defendants' motion to dismiss. The plaintiff appeared by attorney Richard E.V. Harris and Assistant Attorney L. Jay Bartel appeared for the defendants. The matter was argued and submitted on briefs. The court, being fully informed, now finds and orders as follows:

FACTS

The Nebraska State Tax Commissioner entered a default judgment and order of dismissal on December 23, 2004, which dismissed the plaintiff's petition for redetermination of a deficiency assessment for Nebraska corporate income tax. The plaintiff subsequently filed a petition for review of the commissioner's final decision pursuant to Neb. Rev. Stat. § 84-917 (Reissue 1999). Service was attempted on the Attorney General on February 7, 2005, by Byron J.V. Harris, the son of the plaintiff's attorney, Richard E.V. Harris, by physical delivery of the

summons to Nancy Johnson, the Attorney General's receptionist. Johnson is an individual authorized to accept service on behalf of the Nebraska Attorney General.

STANDARD OF REVIEW

The defendants' motion to dismiss is brought pursuant to Neb. R. Civ. P. 12(b)(6). To succeed on a 12(b)(6) motion, failure to state a claim for which relief can be granted, the moving party must show "beyond doubt that the plaintiff can provide no set of facts in support of his claim [that] would entitle him to relief." *Parnes v. Gateway 2000 Inc.*, 122 F.3d 539, 546 (8th Cir., 1997). A party may move to dismiss for failure to state a claim when a necessary element to the claim is missing or when an affirmative defense or other bar to relief appears on the face of the complaint. *2 Moore's Federal Practice*, § 12.34[4][a]&[b] (Matthew Bender 3rd ed. 2002).

This appeal is brought pursuant to the Administrative Procedure Act, Neb. Rev. Stat. § 84-901 through § 84-920 (Reissue 1999). Accordingly, the review is conducted by the court, without a jury, on the record of the agency. Neb. Rev. Stat. § 84-917 (Reissue 1999).

DISCUSSION

The defendants move to dismiss not on the basis that there was absence of delivery of the summons to the Attorney General, as it was received by an authorized person, but because the service was legally insufficient as it was attempted by someone not authorized by Nebraska law to validly serve summons. Under the APA, "summons shall be served within 30 days of the filing of the petition in the manner provided for service of a summons in section 25-510.02." Neb. Rev. Stat. § 84-917 (Reissue 1999). Neb. Rev. Stat. § 25-510.02 (Reissue 1995) provides that service can be completed by "leaving the summons at the office of the Attorney General with

the Attorney General, deputy attorney general, or someone designated in writing by the Attorney General, or by certified mail service addressed to the office of the Attorney General.”

The APA consists of Neb. Rev. Stat. § 84-901 through § 84-920 and they must be considered together. “[W]hen considering a series or collection of statutes pertaining to certain subject matter which are in pari materia, they may be conjunctively considered and construed to determine the intent of the legislature, so that different provisions of the act are consistent and sensible.” *Footie v. O’Neill*, 262 Neb. 467, 472, 632 N.W.2d 313, 319 (2001)(citations omitted). Additionally, summons must be served in accordance with the provisions of the APA. A suit against a state agency is a suit against the State itself. In order to vest a district court with jurisdiction over a state agency in a case arising under the Administrative Procedure Act, the petitioner must serve summons upon the Attorney General. *Neb. Methodist Health Sys., Inc. v. Dept. of Health*, 249 Neb. 405, 543 N.W.2d 466 (1996). While Neb. Rev. Stat. § 25-510.02 states that a summons can be left at the Office of the Attorney General, the method for such delivery is outlined in § 25-506.01 (Cum. Supp. 2004).

Neb. Rev. Stat § 25-506.01 (Cum. Supp. 2004) provides two methods for effective service,

(1) Unless the plaintiff has elected service by certified mail, the summons shall be served by the sheriff of the county where service is made, by a person authorized by section 25-507 or otherwise authorized by law, or by a person, corporation, partnership, or limited liability company not a party to the action specially appointed by the court for that purpose.

(2) Service by certified mail shall be made by plaintiff or plaintiff’s attorney.

The plaintiff elected not to send the summons via certified mail, but rather by personal delivery to the Office of the Attorney General. As outlined above, and according to § 25-506.01(1), this

delivery must be done by the sheriff of the county where service is made, someone authorized by § 25-507 or otherwise authorized by law, or by a person specifically appointed by the court for that purpose. As evident, service was neither attempted by the sheriff nor by a court appointee. Therefore, the question becomes whether Byron Harris was a person authorized under § 25-507 or otherwise authorized by law to effect service.

Neb. Rev. Stat. § 25-507(1) (Cum. Supp. 2004) states,

In any county which does not have a person contracted as a constable pursuant to section 25-2229, any person twenty-one years of age or older or a corporation, partnership, or limited liability company that satisfies the requirements of subsection (2) of this section shall have the same power as a sheriff to execute any service of process or order.

There is no evidence that Lancaster County does not have a person contracted as a constable pursuant to § 25-2229 (Cum. Supp. 2004). Therefore, Neb. Rev. Stat. § 25-507 does not apply. Additionally, there is no other evidence that Harris was otherwise authorized by law to effect service.

In the alternative, the plaintiff asserts that the defendants acknowledged service and otherwise waived any objections to service and, therefore, there is both subject matter and personal jurisdiction over the defendants. The plaintiff argues that Department of Revenue's filing of the administrative record and the demand of payment operated to waive the state's objections to improper service.

....A voluntary appearance of a party is equivalent to service and, in effect, is another mode of service. Neb. Rev. Stat. § 25-516.01... To permit another entity to make a voluntary appearance would undermine the legislative provisions requiring service on the Attorney General.

...only the State's designated agent, the Attorney General, has authority to enter a voluntary appearance and waive the issue of personal jurisdiction in actions brought under the Administrative Procedure Act.

Neb. Methodist Health Sys., 249 Neb. at 410, 543 N.W.2d at 469. The court went on to find, “[t]he Department lacked any authority to enter a voluntary appearance on behalf of the Attorney General. Therefore, the Department’s act of filing the administrative record can have no jurisdictional effect.” *Id.* Thus, in the present case, the Department of Revenue’s filing of an administrative record and demanding payment was not a voluntary appearance or jurisdictional waiver as only the Attorney General has the authority to enter a voluntary appearance. Therefore, the defendants’ objection to service was properly preserved for the current motion to dismiss.

Finally, the plaintiff argues that if jurisdiction can not be found under the APA, that there is jurisdiction under the Nebraska Due Process Clause, the Federal Commerce Clause, and the Federal Due Process Clause. However, this is incorrect.

Any final action of the Tax Commissioner may be appealed, and the appeal shall be in accordance with the Administrative Procedure Act. The appeal provided by this section shall be the exclusive remedy available to any taxpayer, and no other legal or equitable proceedings shall issue to prevent or enjoin the assessment or collection of any tax imposed under the Nebraska Revenue Act of 1967.

Neb. Rev. Stat. § 77-27,127 (Reissue 2003)(emphasis added). Additionally, “[t]he review provided by section 77-27,127 shall be the exclusive remedy available to any taxpayer for the review of an action in respect to the assessment of a proposed deficiency.” Neb. Rev. Stat. § 77-27,128 (Reissue 2003). Therefore, an appeal pursuant to the APA is the only manner in which this court is vested with jurisdiction.


As summons was not properly served on the Attorney General, as required under the APA, and because there is no evidence that the plaintiff properly and effectively served summons on the Attorney General within the required thirty days, this court does not acquire jurisdiction

over the defendants in this matter. Additionally, jurisdiction was not waived by the Attorney General. This defect in service cannot be cured.

IT IS ORDERED that, for the reasons set forth above, the defendants' motion to dismiss is sustained and this case is dismissed for lack of prosecution.

DATED AND SIGNED this 30th day of June, 2005.

BY THE COURT:



Bernard J. McGinn
District Judge

cc *Richard E.V. Harris*, Attorney for Plaintiff
Assistant Attorney General L. Jay Bartel, Attorney for Defendants