

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

TX 2011-000452

05/14/2013

HONORABLE DEAN M. FINK

CLERK OF THE COURT  
S. Brown  
Deputy

CITY OF PEORIA

ELLEN M VAN RIPER

v.

LOS OLIVOS CARNISERIA L L C, et al.

CHARLES W BASSETT

**UNDER ADVISEMENT RULING**

The Court took Plaintiff's Motion for Summary Judgment to Collect Transaction Privilege Taxes, Motion to Strike Controverting Statement of Facts and Motion for Rule 56(g) Award of Attorneys' Fees under advisement following oral argument on May 13, 2013. Upon further consideration, the Court finds as follows.

The Court begins by pointing out that Defendants' citation of this Court's unpublished decision in *Arizona Dept. of Revenue v. Accurate CAD Service* was both improper and pointless. Unpublished decisions are not to be cited as precedent in the Arizona Tax Court. Ariz. Tax Court Rule 15.1(c); compare ARCAP 28.1(b). Even if the citation were proper, that decision has been superseded by the Supreme Court's definitive interpretation of the responsible person statute in *Arizona Dept. of Revenue v. Action Marine, Inc.*, 218 Ariz. 141 (2008). *Slodov v. United States*, 436 U.S. 238 (1978), construed the federal responsible person statute, 26 U.S.C. § 6672, and extensively parsed the specific language of that statute. Defendant has pointed to nothing in the Arizona statute as interpreted by *Action Marine* that would make *Slodov* persuasive.

Because the outcome of the motion to strike will largely determine its decision on the motion for summary judgment, the Court begins there. The Court can discern nothing in the Answer to indicate that Mr. Rivero intended to raise the defense that he was not in control of Los Olivos at the time the TPT was incurred; the closest he came was in paragraphs 20 and 28, in which he without elaboration denied his obligation to pay the debts of Los Olivos. (The Court is frankly mystified by the argument that raising the affirmative defenses of setoff and abatement in

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the Answer somehow put the City on notice of the defense of lack of control, which is neither setoff nor abatement.) Only on September 11, 2012, nearly a year after the Complaint was filed and fully nine months after settlement negotiations commenced, was any mention made of lack of control, and even then in non-specific terms. Apparently, not until the filing of the Response and the contemporaneous submission of Defendants' disclosure statement was anything like a full chronology provided. This was some three months after the disclosure deadline set by the Court in its September 18, 2012 minute entry, and after the City, having been provided with only a hint of the defense, filed its summary judgment motion without addressing it. The Court is mindful of the recent opinion of the Court of Appeals in *Marquez v. Ortega*, 213 Ariz. —, 296 P.3d 100 (App. 2013). Here as in that case, "the delay ... was both substantial and inexcusable under circumstances that demonstrated complete indifference to [Defendants'] responsibilities to the opposing party and the justice system." *Id.* at 106 ¶ 22. To excuse the lateness "would be encouraging excessive delay rather than the efficient administration of justice." *Id.* That there was hope of a settlement with Los Olivos which might have erased Mr. Rivero's responsible person liability does not justify the failure to disclose, especially in light of the negligible cost this particular disclosure would have entailed. It is rarely and with great reluctance that the Court strikes a responsive pleading. But in this case it believes that to be the appropriate course. The City's motion to strike is granted. In its discretion, the Court denies the motion for attorney's fees under Rule 56(g).

The City still must establish its entitlement to summary judgment. *National Bank of Arizona v. Thruston*, 218 Ariz. 112, 118 ¶ 23 (App. 2008). It has done so. The evidence shows that, following the assessment of TPT, Defendants failed to file a timely request for an administrative hearing, making the assessment final. As for Mr. Rivero, the evidence shows that he never removed his name from the official tax and other records of Los Olivos; nor did he comply with Peoria City Code § 12-595(d). This is sufficient to establish prima facie liability as a responsible person should Los Olivos fail to pay; *see Action Marine, supra* at 146 ¶ 27. The City's motion for summary judgment is therefore granted.

Accordingly,

**IT IS ORDERED** granting the City's Motion to Strike Controverting Statement of Facts, filed March 26, 2013.

**IT IS FURTHER ORDERED** denying the City's Motion for Rule 56(g) Award of Attorneys' Fees, filed March 26, 2013.

**IT IS FURTHER ORDERED** granting the City of Peoria's Motion for Summary Judgment to Collect Transaction Privilege Taxes filed January 15, 2013.

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**IT IS FURTHER ORDERED** vacating the trial scheduling conference set May 20, 2013.

**IT IS FURTHER ORDERED** directing Plaintiff to lodge a form of judgment and file any Application and Affidavit for Attorney's Fees and Statement of Taxable Costs by June 14, 2013.