

COPY

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

MICHAEL G. MCGEE and)	CI. 12-9410
KATHLEEN M. MCCALLISTER,)	
)	
Plaintiffs,)	
)	
vs.)	ORDER GRANTING
)	DEFENDANT EWALD'S
DOUGLAS A. EWALD, Tax)	MOTION TO DISMISS
Commissioner for State of Nebraska,)	
)	
Respondents.)	

This matter came on for hearing on November 29, 2012 on the Motion to Dismiss filed by Defendant Douglas Ewald, Tax Commissioner for the State of Nebraska on November 19, 2012 seeking to dismiss the Complaint filed by the Plaintiffs Michael McGee and Kathleen McCallister on November 19, 2012 for the reason that this Court does not have personal jurisdiction over the case because the Defendant was not properly served through the Attorney General's office as required by statute.

At the hearing on November 29, 2012, Plaintiffs appeared pro se; Jay Bartel appeared on behalf of the Defendant Douglas Ewald, Tax Commissioner. The Court received Exhibit 1 and heard arguments of the parties.

The matter was taken under advisement. Now having considered the record, arguments of counsel and relevant case law, the Court now finds as follows:

1. On or about September 7, 2012 the Plaintiffs received a Denial of Claim letter from the Tax Commissioner for the State of Nebraska in connection with an alleged overpayment by the Plaintiff. The Denial of Claim informed the Plaintiffs that they could "appeal the Tax Commissioner's decision, you must contact either the District Court where you reside or the District Court of Lancaster County within 30 days after the

DEPARTMENT OF JUSTICE

DEC 03 2012

STATE OF NEBRASKA

date of this letter. No further action can be taken by this Department. If an appeal is not filed in district court within 30 days, the Tax Commissioner's decision becomes final."

2. On October 9, 2012, the Plaintiffs filed a Complaint in the district court in an attempt to appeal the decision of the tax commissioner. The Plaintiffs had the Complaint was served on Defendant Ewald as tax commissioner by certified mail at Defendant Ewald's office address in Lincoln Nebraska.

3. The Defendant Ewald as Tax Commissioner filed a Motion to Dismiss on November 19, 2012 seeking to dismiss the Complaint for the reason that this Court does not have personal jurisdiction over the case because the Commissioner was not properly served through the Attorney General's office as required by Neb. Rev. Stat. § 25-510.02 (Reissue 2008).

4. Pursuant to the Administrative Procedures Act set forth at Neb. Rev. Stat. § 84-917 (Supp. 2009), a party seeking to appeal a decision from a state agency is required to follow:

proceedings for review shall be instituted by filing a petition in the district court of the county where the action is taken within thirty days after the service of the final decision by the agency. All parties of record shall be made parties to the proceedings for review. If an agency's only role in a contested case is to act as a neutral factfinding body, the agency shall not be a party of record. In all other cases, the agency shall be a party of record. Summons shall be served within thirty days of the filing of the petition in the manner provided for service of a summons in section 25-510.02.

Id.

5. Section 25-510.02 of the Nebraska Revised Statutes requires that service upon a state agency be completed in the following manner,:

(1) The State of Nebraska, any state agency as defined in section 81-8,210, and any employee of the state as defined in section 81-8,210 sued in an official capacity may be served 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.

Neb. Rev. Stat. § 25-510.02 (Reissue 2008).

6. In the instant case, the Plaintiffs do not dispute that they did not serve their Summons and Complaint upon the Attorney General as set forth under the statutes. Plaintiffs claim that they followed the directions set out by the tax commissioner's office in the Denial of Claim letter that they received.

7. In Concordia Teachers College v. Nebraska Department of Labor, 252 Neb. 504, 509 (Neb. 1997), the Nebraska Supreme Court stated with respect to the applicability of §25-510.02, "Therefore, when §25-510.02 applies, as it does in the present case, a summons must be served on the Attorney General in order to institute judicial review under the Administrative Procedures Act."

8. Pro se litigants such as Plaintiffs are held to the same standards as all others who appear before the courts. Nolan v Campbell, 13 Neb. App. 212, 219 (Neb. Ct. App. 2004).

9. In the instant case, Nebraska law is clear that anyone who files an appeal to contest an action of a state agency must serve the Attorney General with their Summons and Complaint. There is no other method of service that is allowable under Nebraska law. Without proper service this Court has no judicial authority to act against the State or any State agency.

THEREFORE, Defendant Ewald's, as Tax Commissioner's Motion to Dismiss shall be and hereby is granted.

IT IS ORDERED that Plaintiffs Complaint is hereby dismissed with prejudice.

DATED this 30th day of November, 2012.

BY THE COURT:



MARLON A. POLK
District Court Judge

cc:

Kathleen McCallister, Pro Se
Michael McGee, Pro Se
3027 S 49th Av
Omaha, NE 68106

L. Jay Bartel, Esq.
Asst Atty Gen
State Capitol
Lincoln, NE 68509-8920

IN THE DISTRICT COURT OF Douglas COUNTY, NEBRASKA

NOTICE OF DISMISSAL

Michael G McGee v. Douglas A Ewald Tax Commissioner

Case ID: CI 12 9410

Case has been dismissed.

Judgment Date: 11/30/2012

If a money judgment other than child support is owed to the court, payment may be made directly to the court or on-line at: ne.gov/go/paycourts. For information regarding child support payments contact 1-877-631-9973.

Date: NOVEMBER 30, 2012

BY THE COURT:

John M. Friend
Clerk



Jon Bruning
P.O. Box 98920
Lincoln, NE 68509

DEPARTMENT OF JUSTICE

DEC 03 2012

STATE OF NEBRASKA

CP-1