

IN THE SUPERIOR COURT OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

RICHARD KORN,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. N11C-11-039-WCC
)	
STATE OF DELAWARE, AUDITOR)	
OF ACCOUNTS, R. THOMAS)	
WAGNER, JR., IN HIS OFFICIAL)	
CAPACITY AS STATE AUDITOR,)	
)	
Defendant.)	

Submitted: June 4, 2012
Decided: September 28, 2012

On Defendant’s Motion to Dismiss – GRANTED

OPINION

Ronald G. Poliquin, Esquire c/o James Liguori, Esquire; Liguori & Morris, 46 The Green, Dover, DE 19901. Attorney for Plaintiff Richard Korn.

Peter O. Jamison, III, Esquire, and Frank N. Broujos, Esquire. 820 N. French Street, Wilmington, DE 19801. Attorneys for Defendant State of Delaware, Auditor of Accounts, R. Thomas Wagner, Jr., in his official capacity as State Auditor.

CARPENTER, J.

Petitioner and New Castle County taxpayer Richard Korn alleges State of Delaware Auditor of Accounts R. Thomas Wagner, Jr. has failed to audit New Castle County school districts for several years, as required by statute. Korn seeks a writ of mandamus compelling the Auditor to comply with the statute while Defendant moves to dismiss Korn's petition.

For the reasons discussed below, Defendant's Motion to Dismiss is hereby **GRANTED**.

BACKGROUND

Petitioner Richard Korn is a resident and taxpayer of New Castle County, Delaware. Defendant State of Delaware Auditor of Accounts, R. Thomas Wagner, Jr., ("Wagner") has served as Delaware's Auditor since 1989. Korn alleges that, since 2003, Wagner has failed to perform compliance audits of New Castle County school districts as required by *29 Del. C. § 2906(f)*, and that this dereliction has allowed fraud and theft to go undetected in several school districts, resulting in multimillion losses of taxpayer dollars.¹

Korn seeks a declaratory judgment against Wagner for his alleged noncompliance with *29 Del. C. § 2906(f)*, a writ of mandamus directing Wagner to

¹ See *29 Del. C. § 2906(f)* ("The Auditor of Accounts shall conduct postaudits of local school district tax funds budget and expenditures annually.").

perform his duties per 29 *Del. C.* § 2906(f), and costs and attorney fees. Wagner moves the Court to dismiss Korn's petition.

STANDARD OF REVIEW

Wagner moves the Court to dismiss Korn's petition on the grounds of untimely and insufficient service of process, lack of subject matter and personal jurisdiction, and failure to state a claim upon which relief may be granted.²

Where, as here, a motion to dismiss has been presented at a preliminary stage of the proceedings, the Court must determine with reasonable certainty that no set of facts can be inferred from the pleadings upon which the plaintiff could prevail.³

The Court must also give the plaintiff the benefit of all reasonable inferences that can be drawn from the pleadings.⁴

DISCUSSION

1. Service of Process⁵

According to Wagner, the Court lacks personal jurisdiction because Korn did not properly serve this action's summons and complaint within 120 days of its filing.⁶ To address this issue, some procedural background is helpful. Korn

² See Super. Ct. Civ. Rules 4(j), 12(b)(1), 12(b)(2), 12(b)(5), and 12(b)(6).

³ *Diamond State Tel. Co. v. Univ. of Delaware*, 269 A.2d 52, 58 (Del. 1970).

⁴ *In re USACafes, L.P. Litig.*, 600 A.2d 43, 47 (Del. Ch. 1991).

⁵ Super. Ct. Civ. Rules 4(j) and 12(b)(4).

⁶ See Super. Ct. Civ. R. 4(f)(1)(IV) (requiring service to be made on governmental organization by delivering copy of summons, complaint, and affidavit to chief executive officer thereof); Super. Ct. Civ. R. 4(j) (mandating dismissal of complaint not served upon defendant within 120 days of filing if plaintiff cannot show good cause for such late service).

initially filed this case in the Court of Chancery; however, the Court of Chancery dismissed Korn's complaint for lack of *subject* matter jurisdiction, noting that he could transfer the action to the Superior Court within 60 days of the Court of Chancery's decision.⁷ The Court of Chancery dismissed Korn's complaint on September 7, 2011, giving Korn until November 7, 2011 to transfer the action.⁸ The docket reflects that Korn's initial filing was transferred from the Court of Chancery to the Superior Court on November 5, 2011. The accompanying Case Information Statement includes the Civil Case Code designation of "CCHA," indicating "Transfer from Chancery." Korn also notes in the complaint filed with this Court that his case was transferred from the Court of Chancery, and Korn attached the Court of Chancery's decision to his complaint.

Wagner insists Korn's complaint has not been transferred but is, instead, an entirely new action. Only if Wagner is correct does service of process become an issue because "a party is not required to refile its complaint after the case has been transferred . . . much less serve that complaint again on parties that were before the original court."⁹ Based on the docket and the pleadings before it, the Court finds that Korn's complaint was timely transferred from the Court of Chancery to the

⁷ *Korn v. Wagner*, No. 6149-VCN, 2011 WL 4357244, at *2 (Del. Ch. Sept. 7, 2011).

⁸ Sixty days from September 7, 2011 is November 6, 2011. Because November 6, 2011 fell on a Sunday, however, Korn could file the following weekday, on November 7, 2011. Super. Ct. Civ. R. 6(a).

⁹ *Maloney-Refaie v. Bridge at School, Inc.*, 958 A.2d 871, 881-82 (Del. Ch. 2008).

Superior Court. To the extent the docket reflects the creation of a new case filing, such reference is simply an administrative action by court staff that does not affect the timeliness of the Plaintiff's complaint. As a result, Korn was not required to serve Wagner a second time and, therefore, Wagner's argument to dismiss Korn's petition for improper service of process must fail.¹⁰

2. Standing

a. Taxpayer Standing¹¹

Wagner next urges the Court to dismiss Korn's petition, arguing that Korn does not have standing to pursue his complaint. To establish standing, a plaintiff must show that he has suffered an injury in fact – an invasion of a legally protected interest which is concrete and particularized, actual and imminent, causally connected to the challenged action of the defendant, and likely redressed by a favorable decision.¹² Generally, a plaintiff must show that his interest in a controversy is different from the interest of the public at large.¹³

The Court of Chancery mentioned this issue in its review of Korn's case, noting that Korn's allegations "appear to fall short" of the minimum requirements

¹⁰ Nonetheless, the Court commends Korn for attempting a second service on Wagner, as reflected by the writ issued in December 2011 and returned *non est inventus*.

¹¹ See Super. Ct. Civ. R. 12(b)(2) (addressing motions to dismiss for lack of personal jurisdiction).

¹² *Dover Historical Soc'y v. Dover Planning Comm'n*, 838 A.2d 1103, 1110 (Del. 2003).

¹³ *Stuart Kingston, Inc. v. Robinson*, 596 A.2d 1378, 1382 (Del. 1991).

for standing for several reasons.¹⁴ First, the Court of Chancery noted that Korn has not alleged he has suffered any harm distinguishable from the harm suffered by the general public.¹⁵ This Court agrees. Even assuming Korn’s remaining arguments are true, Korn’s interest in compelling Wagner to comply with 29 *Del. C.* § 2906(f) is no different from that of any other taxpayer.

Additionally, the Court of Chancery noted that the harm Korn complains of—theft of school district funds—is only tenuously related, if at all, to Wagner’s alleged failure to audit the school districts.¹⁶ In fact, Korn does not accuse Wagner of participating in fraud or theft.¹⁷ Rather, Korn argues that Wagner’s inaction led to the misappropriation of taxpayer funds.¹⁸ Aside from his own conclusory statements, however, Korn offers no evidence of a causal connection between these events.

Finally, the Court of Chancery commented on the slight chance that a judgment in Korn’s favor would redress the harm he alleges, stating that “[a]t best, an audit performed after money has been spent *may* detect or deter theft, or *may* lead to a recovery of misappropriated funds, though the extent to which it will

¹⁴ *Korn v. Wagner*, No. 6149-VCN, 2011 WL 4357244, at *1 n.6 (Del. Ch. Sept. 7, 2011).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See Answer ¶ 4 (“[T]he complaint’s allegations do not concern the defendant’s direct illegal spending . . .”).

¹⁸ *Id.*

succeed in any of these aims is unknowable.”¹⁹ Korn is not asking the Court to compel a retrospective audit of the school districts in order to right some specific wrong; more accurately, Korn is asking the Court to slap Wagner’s wrists for his alleged failure to comply with 29 *Del. C.* § 2906(f) in order to influence Wagner’s compliance with the statute in the future. This, however, would amount to an advisory opinion of the Court, which is an inappropriate response to any request for declaratory judgment.²⁰

Even if these reasons were insufficient to deny Korn standing, Delaware reserves taxpayer standing for “a narrow set of claims involving challenges either to expenditures of public funds or use of public lands.”²¹ This case involves neither; Korn only challenges Wagner’s “jeopardizing the safeguarding of State funds.”²² Further, as previously discussed, Korn concedes that Wagner never

¹⁹ *Korn*, 2011 WL 4357244, at *1 n.6 (Del. Ch. Sept. 7, 2011).

²⁰ See *Ackerman v. Stemerman*, 201 A.2d 173, 175 (Del. 1964) (“[T]he Declaratory Judgment Act is not to be used as a means of eliciting advisory opinions from the courts. There must be in existence a factual situation giving rise to immediate, or about to become immediate, controversy between the parties. The court to entertain jurisdiction of the cause must be convinced that the ‘actual controversy’ in all probability would result in litigation sooner or later.”).

²¹ *Reeder v. Wagner*, No. 435, 2008, 2009 WL 1525945, at *2 (Del. June 2, 2009).

²² Answer ¶ 4. Korn cites *City of Wilmington v. Lord*, 378 A.2d 635, 637 (Del. 1977) to support his argument that a taxpayer has standing to sue when public funds are not properly safeguarded. Korn misreads *Lord*. In *Lord*, the Supreme Court of Delaware only held that a taxpayer has standing “to sue to enjoin the unlawful expenditure of public money . . . regardless of any showing of special damages.” *Id.* Thus, the Supreme Court focused on whether a taxpayer had to show special damages to establish standing and not whether a taxpayer may sue when public funds are not properly safeguarded.

spent public funds in contravention of the law.²³ By Korn’s own admission, therefore, he does not have standing to bring this suit as a plaintiff taxpayer.

*b. Declaratory Judgment Act Standing*²⁴

Because Korn seeks declaratory relief, he must demonstrate that an actual controversy exists to establish standing.²⁵ To do this, Korn must satisfy the following conditions: (1) the complaint must assert a controversy involving Korn’s rights; (2) the controversy must be one asserted against an individual who has an interest in contesting the claim;²⁶ (3) the controversy must be between parties whose interests are real and adverse, and (4) the issue involved must be ripe for judicial determination.²⁷

Here, the issue is whether Wagner’s alleged inaction implicates any of Korn’s rights. Title 29, chapter 29 of the Delaware Code provides that the auditor “shall conduct postaudits of local school district tax funds budget and expenditures annually.”²⁸ In an attempt to frame this duty as one directly involving the Plaintiff, Korn asserts it is “a mandatory right to all school district

²³ See Answer ¶ 4 (“[T]he complaint’s allegations do not concern the defendant’s direct illegal spending . . .”).

²⁴ See Super. Ct. Civ. R. 12(b)(1) (addressing motions to dismiss for lack of subject matter jurisdiction), *Rollins Int’l, Inc. v. Int’l Hydronics Corp.*, 303 A.2d 660, 663 (Del. 1973) (interpreting Declaratory Judgment Act “for jurisdictional purposes”).

²⁵ *Cartanza v. Dep’t of Natural Res.*, No. 2641-MG, 2009 WL 106554, at *2 (Del. Ch. Jan. 12, 2009).

²⁶ *Id.*

²⁷ *Id.*

²⁸ 29 Del. C. § 2906(f).

taxpayers that their local district tax funds in each individual school district be audited on an annual basis.” However, the Court is not convinced that the statute creates an obligation owed to an individual taxpayer nor is sufficient to create a private right of action.²⁹

The Court of Chancery’s decision in *O’Neill v. Town of Middletown*³⁰ is instructive. In *O’Neill*, citizen-plaintiffs challenged the decision of the Delaware Department of Transportation not to require a site-specific traffic impact study as purportedly mandated by statute.³¹ Like Korn in this case, the plaintiffs in *O’Neill* argued “in favor of a general right of judicial review enabling private parties to challenge governmental conduct whenever a plaintiff can demonstrate noncompliance with the law.”³² The Court of Chancery addressed this argument in an implied private right of action analysis, asking whether the statutory text evinced a legislative intent to give the plaintiffs a private right and a private remedy against the government.³³ The Court of Chancery noted that it was “especially reluctant to imply causes of actions under statutes that create duties on

²⁹ Pet. ¶ 7.

³⁰ No. 1069-N, 2006 WL 205071 (Del. Ch. Jan. 18, 2006).

³¹ *Id.* at *1.

³² *Id.* at *7.

³³ *Id.* at *19.

the part of persons for the benefit of the public at large.”³⁴ The same is true in this litigation.

Although 29 *Del. C.* § 2906(f) defines the duties of a state office constitutionally³⁵ created for the benefit of Delaware taxpayers, the statute is insufficient to give taxpayers a private cause of action or a private remedy against the auditor. While the Plaintiff may have a general interest in seeing a governmental agency comply with the law, the statute at issue is “far too broad and vague to permit a finding of an implied right of action.”³⁶ The statute Korn seeks to enforce—— a statute under the same title as those discussed in *O’Neill*——is wholly concerned with duties of the auditor and does not directly or by implication create an enforceable right for school district taxpayers or the school districts themselves.³⁷ Because it does not involve Korn’s rights, the action here is without a controversy and cannot stand under the Declaratory Judgment Act.

³⁴ *Id.* at *21 (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 690 n. 13 (1979)).

³⁵ See Del. Const. art. III §21 (establishing office of Auditor of Accounts).

³⁶ *Id.* at *21.

³⁷ See *id.* at *20, 22 (finding 29 *Del. C.* §§ 9103, 9203, and 9204 give plaintiffs neither implied private right of action nor private remedy against government because statutes focus, not on individuals protected or entities regulated, but on agency doing regulating).

3. Sovereign Immunity³⁸

Under the doctrine of sovereign immunity, the state may not be sued without its consent, and the state may only waive or limit its immunity by act of the General Assembly.³⁹ The Defendants insist that the doctrine of sovereign immunity bars Korn's claims because Korn has not demonstrated that the legislature has waived sovereign immunity with respect to the performance of the auditor's duties. Korn insists that sovereign immunity does not shield state officials' "illegal acts impacting the protection of taxpayer funds," and that, furthermore, sovereign immunity is not implicated when the plaintiff brings suit for the benefit of the state.⁴⁰ In making this argument, it appears the Plaintiff's assertion is based upon the Supreme Court decisions which have allowed taxpayer standing in actions involving challenges either to expenditure of public funds or use of public funds. Unfortunately for the Plaintiff, this suit involves neither.

Korn's argument against the application of sovereign immunity is further flawed because, even if Korn prevails, his suit will in no obvious way benefit the state. The Court of Chancery recognized this, finding that "it appears speculative

³⁸ See Super. Ct. Civ. R. 12(b)(1) (addressing motions to dismiss for lack of subject matter jurisdiction); *Janowski v. Div. of State Police Dep't of Safety and Homeland Sec.*, No. 08C-03-037(RBY), 2009 WL 537051, at *2 (Del. Super. Feb. 27, 2009) ("Subject matter jurisdiction includes sovereign immunity cases.").

³⁹ *Doe v. Cates*, 499 A.2d 1175, 1176-77 (Del. 1985).

⁴⁰ Answer ¶ 6.

that the alleged injury would be redressed by a decision in the Plaintiff's favor."⁴¹

There is nothing here to imply—or even suggest—that the State has waived its sovereign immunity status and the Court finds it would shield the state officials and agency from suit.

CONCLUSION

The Court acknowledges the dissonance between Wagner's alleged inaction and 29 *Del. C.* § 2906(f). However, the rules of civil procedure and sovereign immunity do not allow the Court to consider Korn's complaint. Korn's status as a New Castle County taxpayer gives him a voice with which to protest about government officials who neglect their duties, but that voice should be directed to the General Assembly or the electorate and not the courts. Wagner has offended none of Korn's rights; therefore, there is no controversy for the Court to consider in this case.

For the foregoing reasons Wagner's Motion to Dismiss is hereby

GRANTED.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.

⁴¹ *Korn v. Wagner*, No. 6149-VCN, 2011 WL 4357244, at *1 n.6 (Del. Ch. Sept. 7, 2011).