

IN THE IOWA DISTRICT COURT FOR POLK COUNTY


<p>LISA KRAGNES, et al.</p> <p>Plaintiffs,</p> <p>vs.</p> <p>CITY OF DES MOINES, IOWA,</p> <p>Defendant.</p>	<p>Case No. CE 49273</p> <p>PLAINTIFF'S APPENDIX TO RESISTANCE TO MOTION FOR SUMMARY JUDGMENT</p>
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COMES NOW the Plaintiff, Lisa Kragnes, and by way of resistance to Defendant's Motion states to the Court as follows:

1. Ruling on Motion for Partial Summary Judgment in *Mary E. Lindstrom v. City of Des Moines, Iowa*, Case No. CL 103299 1

WHEREFORE, the Plaintiff prays that the Court deny Defendant's Motion for Summary Judgment founded on the immunity granted under Iowa Code Sections 670.4(2) and 670.4(3), assess the costs against the Defendant, and for such other and further relief as the Court deems equitable on the premises.

Respectfully Submitted,

By: 

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FILED IN POLK COUNTY IOWA
MAY 20 2010

ORIGINAL FILED.

CERTIFICATE OF SERVICE:

Copies of the foregoing have been mailed
this 19th day of May, 2008, to the following:

Mark Godwin
Deputy City Attorney
City Hall
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ATTORNEY FOR DEFENDANT

Judge Joel D. Novak
Polk County Courthouse
500 Mulberry Street
Des Moines, IA 50309



By _____

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

MARY E. LINDSTROM, on behalf of
herself and all others similarly situated,

Plaintiff,

vs.

CITY OF DES MOINES, IOWA,

Defendant.

CASE NO. CL 103299

RULING ON MOTION
FOR PARTIAL
SUMMARY JUDGMENT

A contested hearing on the plaintiff's motion for partial summary judgment was held before the undersigned on June 8, 2007 as previously scheduled. Upon consideration of the arguments made at the hearing, and having reviewed the court file and being otherwise duly advised in the premises, the court rules as follows:

This is a putative class action brought on behalf of residents of the city of Des Moines who were assessed cable television franchise fees, seeking a declaration that such imposition amounts to an illegal tax, and further that past fees be refunded and future imposition be enjoined. The plaintiff seeks summary judgment as to the applicability of certain affirmative defenses cited by the defendant in its answer; namely, 1) the plaintiff and the class she purports to represent have no standing; 2) federal law authorizes the assessment of the franchise fee, despite the decision of Kragnes v. City of Des Moines, 714 N.W.2d 632 (Iowa 2006); 3) federal law prohibits an action to recover a refund of such fees; 4) the "voluntary payment" doctrine;" 5) the defendant is immune from liability; and 6) the action is time-barred.¹

¹ The defense of laches, while initially part of the motion, has been withdrawn by the defendant as an affirmative defense.

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The standards regarding summary judgment are well settled in Iowa. It is the plaintiff's burden as the moving party to establish both the absence of any material factual issues, and her entitlement to judgment as a matter of law. IowaR.Civ.P. 1.981(3); Anderson v. Douglas & Lomason Co., 540 N.W.2d 277, 281 (Iowa 1995). An issue of fact is "material" only when the dispute is over facts that might affect the outcome of the litigation, given the applicable governing law. Dickerson v. Mertz, 547 N.W.2d 208, 212 (Iowa 1996). In determining whether this burden has been met, the court reviews the record in a light most favorable to the nonmoving party. Barreca v. Nickolas, 683 N.W.2d 111, 116 (Iowa 2004). The nonmoving party entitled to every legitimate inference that reasonably can be deduced from the evidence, Green v. Racing Assoc. of Central Iowa, 713 N.W.2d 234, 246 (Iowa 2006) and summary judgment is inappropriate if reasonable minds can differ on how the issue should be resolved. K & W Elec., Inc. v. State, 712 N.W.2d 107, 112 (Iowa 2006). However, there is no fact issue if the only dispute concerns the legal consequences flowing from undisputed facts; in that instance, summary judgment would be appropriate. City of West Branch v. Miller, 546 N.W.2d 598, 600 (Iowa 1996).

If the motion is properly supported, the nonmoving party may not merely rely upon its pleadings; it "must set forth specific facts showing that there is a genuine issue for trial," or summary judgment would be appropriate. IowaR.Civ.P. 1.981(5); Weinzetl v. Ruan Single Source Transport Co., 587 N.W.2d 809, 810 (Iowa Ct.App. 1998). This applies both to operative facts and any inferences sought to be drawn to defeat a motion for summary judgment. Green, 713 N.W.2d at 246. However, the converse is also true—"When the evidentiary matter tendered in support of the motion does not

affirmatively establish uncontroverted facts that sustain the moving party's right to judgment, summary judgment must be denied even if no opposing evidentiary matter is presented." Griglione v. Martin, 525 N.W.2d 810, 813 (Iowa 1994).

Standing. The defendants argue that the plaintiff and the class she represents do not have standing to pursue their claim. The most recent Iowa Supreme Court to address standing, Alons v. Iowa Dist. Court for Woodbury County, 698 N.W.2d 858, 864 (Iowa 2005), summarized the doctrine as follows:

Standing is a doctrine courts employ to refuse to determine the merits of a legal controversy irrespective of its correctness, where the party advancing it is not properly situated to prosecute the action. When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue and not whether the controversy is otherwise justiciable, or whether, on the merits, the plaintiff has a legally protected interest that the defendant's action has invaded.

The Iowa courts have consistently utilized a two-part test to determine whether a litigant has standing: a party must demonstrate 1) a specific, personal and legal interest in the litigation, and 2) be injuriously affected. Id.; Citizens for Responsible Choices v. City of Shenandoah, 686 N.W.2d 470, 475 (Iowa 2004). These are separate requirements, and both must be satisfied to establish standing. Id.

Not only are these two components of standings separate from each other, they stand apart from a discussion of the potential merits of the claim. "In short, the focus is on the party, not on the claim....Even if the claim could be meritorious, the court will not hear the claim if the party bringing it lacks standing." Alons, 698 N.W.2d at 864 (citations omitted). Standing does not depend upon the legal merit of the litigants' claims, "but rather whether, if the wrong alleged produces a legally cognizable injury,

they are among those who have sustained it.” Citizens, 686 N.W.2d at 475 (quoted in Alons, 698 N.W.2d at 864)).

There is no dispute that the plaintiff is a resident of the city of Des Moines and, as a subscriber to the cable television franchise at issue, was imposed the franchise fee she now challenges. This is sufficient in the court’s mind to establish standing under the authorities quoted earlier. The defendant’s position on this issue; namely, that there has been no injury due to the plaintiff’s receipt of municipal services financed through the imposition of the fee will be addressed in a later portion of this ruling dealing with the application of the “voluntary payment” doctrine. The plaintiff is entitled to summary judgment on the purported affirmative defense of lack of standing.

Applicability of Kragnes to cable franchise fees. The plaintiff contends that the case of Kragnes v. City of Des Moines, 714 N.W.2d 632 (Iowa 2006), provides the roadmap to liability in this case, in that it holds that a franchise fee is an illegal tax to the extent it is not “reasonably related to the reasonable costs of inspecting, licensing, supervising, or otherwise regulating the activity that is being franchised.” Id. at 643. The defendant does not dispute this general proposition, but wishes to distinguish Kragnes (which dealt with a franchise fee imposed on customers of an electrical utility) from the present case as a result of federal legislation pertaining to cable television fees.

Specifically, the defendant urges that §542(b) of the Federal Cable Act authorizes the imposition of a cable franchise fee of up to five percent of gross revenue and preempts the application of Kragnes to such fees. While the federal statute does limit cable franchise fees to “5 percent of [a] cable operator’s gross revenues derived in [any twelve-month] period from the operation of the cable system to provide cable services,”

47 U.S.C.A. §542(b), it does not independently serve as the justification for the imposition of the fee to begin with. “All §542(b) does is limit authority that has some other source.” City of Chicago v. Comcast Cable Holdings, L.L.C., 384 F.3d 901, 905 (7th Cir. 2004). That source is the same as in Kragnes—the home rule authority imposed upon municipalities and the concomitant prohibition against imposition of a fee that exceeds the amount necessary to inspect, license, supervise, or otherwise regulate the activity associated with the fee. Kragnes, 714 N.W.2d at 641. Comcast remains the most persuasive authority on this issue,² and will be followed by this court. The plaintiff is entitled to judgment as a matter of law on this issue.

Section 555(a) of the Federal Cable Act. The defendant urges as an affirmative defense the statutory prohibition against actions for money damages contained at 47 U.S.C.A. §555(a). That statute states as follows:

In any court proceeding pending or initiated after the date of enactment of this section involving any claim against a franchising authority or other governmental entity, or any official member, employee or agent of such authority or entity, arising from the regulation of cable service...any relief...shall be limited to injunctive relief and declaratory relief.

The defendant argues that this action comes within the scope of the statute as “arising from the regulation of cable service.” As used in the statute, the phrase “arising from” would require a causal connection between the claim and the regulation of cable service. See Cubit v. Mahaska County, 677 N.W.2d 777, 784 (Iowa 2004). However, based on plaintiff’s theory of the case and the application of the Kragnes case, it is clear that any recovery of money damages is not connected to the regulation of cable services.

² The defendant’s position that Comcast has been superseded by a later state court decision following remand, City of Chicago v. Comcast Cable Holdings, L.L.C., 2007 WL 1453055 (Ill.App. 1st Dist., No. 1-05-3566, filed May 17, 2007) is not supported by a reading of that decision.

To the contrary, it is the very disconnect between the assessment of the franchise fee and the regulation of the cable franchise that makes the collection of the fee illegal and potentially recoverable. There is no causal connection between the regulation of cable service and the plaintiff's claim for money damages. Therefore, her claim is not prohibited by §555(a) of the Federal Cable Act. Plaintiff's motion for summary judgment on this point is granted.

"Voluntary payment" doctrine. The defendant strenuously argues that the plaintiff and her class have no entitlement to a refund of any illegally-assessed cable franchise fees, as a result of the voluntary payment of those fees. It cites to the case of Kraft v. City of Keokuk, 14 Iowa 86, 1862 WL 275 *1 (1862) in this regard. Kraft involved the efforts of a liquor licensee to recover the \$200 he paid for his liquor license pursuant to a municipal ordinance, after the law which had enabled the ordinance was declared unconstitutional. The trial court was affirmed in its denial of the relief sought, on the basis that the plaintiff had received the benefit of his license (it was in effect at all times prior to the statute being held unconstitutional) and that he had acted voluntarily in obtaining the license. Id.

The defendant is correct that Kraft has never been overruled, and has been cited favorably through the years. See, e.g., Gronstal v. Van Druff, 219 Iowa 1385, 261 N.W. 638, 640 (1935) ("It has been the settled law of this state for over seventy years that where money is paid voluntarily, without any compulsion and without any promise to repay, it cannot be recovered by the payor."). However, Kraft and its progeny never addressed the issue of the due process considerations involved when a taxing authority seeks to assess an illegal tax. That issue was squarely addressed by the United States

Supreme Court in McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990), which held that “[i]f a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax’s legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.” Id. at 31, 110 S.Ct. at 2247. This holding was reaffirmed in the decision of Harper v. Virginia Department of Taxation, 509 U.S. 86, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993), which held that a meaningful opportunity for taxpayers to withhold contested tax assessments and to challenge the validity of those assessments in a pre-deprivation hearing would satisfy the Due Process Clause. Id. at 101, 110 S.Ct. at 2519.

Both McKesson and Harper were relied upon by the Iowa Supreme Court in its decision in Hagge v. Iowa Department of Revenue and Finance, 504 N.W.2d 448 (Iowa 1993). Hagge allowed refunds to taxpayers improperly taxed on their federal pensions, since the state failed to establish the existence of a meaningful pre-deprivation remedy. Id. at 452. In so doing, it concluded that the payment of taxes under the statutory scheme in question “continues to be less ‘voluntary’ than ‘under duress,’” and that no meaningful pre-deprivation remedy was afforded the taxpayers. Id. at 451. As to the latter point, the court seriously questioned whether the mere availability of injunctive and declaratory relief would qualify as “meaningful” under a McKesson analysis. Id. at 450.

What the court takes from these cases is that Kraft remains good law, but it says only what it says. If a tax is truly voluntarily paid and not under duress, then a refund will not be allowed. However, if it is paid in order to avoid financial sanction or seizure

of real or personal property, see id. at 451 (citing McKesson, 496 U.S. at 38 n. 21, 110 S.Ct. at 2251 n. 21, the taxing authority must either provide a meaningful pre-deprivation remedy or face the possibility of a post-deprivation refund.³

That all being said, the factual record before this court is inadequate to allow it to conclude whether the cable franchise fees were paid voluntarily or under duress, and whether the plaintiff was afforded a meaningful pre-deprivation remedy. The parties should be allowed to flesh out these issues. Therefore, this aspect of the plaintiff's motion for summary judgment will be denied at this time.

Applicability of Iowa Code Chapter 670. The defendant argues that it is afforded statutory immunity under chapter 670 of the Iowa Code, and that the limitations period contained therein at §670.5 bars the present action. As both defenses assume the applicability of the chapter 670 to this proceeding, the court will address them together in that context.

In order for chapter 670 to apply to any claim made against a municipality, it must come within the statutory definition of "tort." See Iowa Code §670.2 (2007). "Tort" is defined in this statute as "every civil wrong which results in wrongful death or injury to person or injury to property or injury to personal or property rights and includes but is not restricted to actions based upon negligence; error or omission; nuisance; breach of duty,

³ The argument urged by the defendant that a refund would have disastrous financial consequences for the city rings particularly hollow in light of the rejection of that very argument by the Iowa Supreme Court in Hagge:

The department also tries to avoid its refund obligation by arguing the alleged inequity of imposing an onerous fiscal burden on the state in order to remedy the relatively modest deprivations suffered individually by Iowans who are also federal retirees. But equity cannot override the clear commands of the Due Process Clause outlined in Harper and McKesson. Because the state has exacted taxes from its citizens pursuant to an unconstitutional tax scheme, it must afford taxpayers a meaningful opportunity to secure postpayment relief.

whether statutory or other duty or denial or impairment of any right under any constitutional provision, statute or rule of law." Iowa Code §670.1(4) (2007).

The court agrees with the plaintiff that its cause of action is premised upon the theory of unjust enrichment, or that "one shall not be permitted to unjustly enrich oneself at the expense of another or to receive property or benefits without making compensation for them." West Branch State Bank v. Gates, 477 N.W.2d 848, 852 (Iowa 1991). Such a claim is the modern designation for the doctrine of quasi contracts or contracts implied in law. Iowa Waste Systems, Inc. v. Buchanan County, 617 N.W.2d 23, 29 (Iowa 2000). Such claims have long been allowed against municipalities, and are not subject to the provisions of what is now chapter 670 of the Iowa Code. Dolezal v. City of Cedar Rapids, 326 N.W.2d 355, 358-59 (Iowa 1982) (citations omitted). This is because they do not arise from a statutory or common-law duty, which is at the heart of what constitutes a "civil wrong." Id. at 357; see also Jahnke v. City of Des Moines, 191 N.W.2d 780, 783, 787 (Iowa 1971).

Since chapter 670 is not applicable to the plaintiff's claim, the immunity provided for at §670.4(2) has no application. Further, the claim would not be subject to the two-year statute of limitation contained within Iowa Code §670.5 (2007), but rather a five-year statute of limitations, pursuant to Iowa Code §614.1(5) (2007). Dolezal, 326 N.W.2d at 360. As this is the period of time over which plaintiff seeks a refund of the illegal portion, if any, of the cable franchise fee, the defendant's statute of limitations defense must fail as a matter of law. The plaintiff's motion for summary judgment related to statutory immunity and statute of limitations is granted.

The court believes it has addressed all the issues raised in the plaintiff's motion for partial summary judgment. That motion will be granted to all of the affirmative defenses pled in the defendant's answer, with the exception of the voluntary payment doctrine and estoppel (which appears to be related to that doctrine, and was not directly addressed in plaintiff's motion).

IT IS THEREFORE ORDERED that the plaintiff's motion for partial summary judgment is granted in part and denied in part, as more specifically set forth in this ruling.

Dated this 13th day of July, 2007.



Michael D. Huppert
Judge, Fifth Judicial District of Iowa

Copies to:

Thomas Waterman
Mark Godwin