

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(City of St. Louis)

FILED
NOV 27 2017

22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE

STATE OF MISSOURI ex rel.)
KIEL CENTER PARTNERS, L.P.)
and CITY OF ST. LOUIS,)
)
 Relators,)
)
vs.)
)
DARLENE GREEN, Comptroller of)
the City of St. Louis,)
Missouri, in her official)
capacity,)
)
 Respondent.)

Cause No. 1722-CC11018
Division 31

ORDER AND JUDGMENT IN MANDAMUS

The Court has before it Relator Kiel Center Partners, L.P.'s Motion for Summary Judgment on Count I of the Petition, Relator Kiel Center Partners, L.P.'s Motion to Strike Respondent's Improper Summary Judgment Evidence, and Relator City of St. Louis' Motion to Strike Respondent's Affirmative Defenses. The Court now rules as follows.

On August 15, 2017, Relator Kiel Center Partners, L.P. ("KCP") filed its Petition for Preliminary Order in Mandamus and Permanent Writ of Mandamus and, in the Alternative, for Declaratory Judgment. In its Petition, KCP seeks a permanent writ of mandamus compelling Respondent Darlene Green, the Comptroller of the City of St. Louis ("Comptroller"), to

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countersign the financing agreement for an improvement project for the Scottrade Center.

On August 18, 2017, this Court issued its Preliminary Writ of Mandamus directing and ordering the Comptroller to respond to KCP's Petition. The Comptroller responded and asserted three affirmative defenses. In her first affirmative defense, she alleges that Article XV, Section 2 of the City Charter gives her discretion to refuse to countersign the financing agreement to preserve the credit of the City of St. Louis. The other two affirmative defenses allege constitutional challenges.¹

KCP has filed a Motion for Summary Judgment on Count I of the Petition. KCP argues that it is entitled to judgment as a matter of law because the facts and governing law establish that the Comptroller's countersignature of the financing agreement is a ministerial task and that she has no discretion to refuse to sign the financing agreement. KCP asserts that the Comptroller's affirmative defenses do not negate KCP's right to the requested mandamus relief, as the authority granted to the Comptroller under the City Charter to preserve the City's credit extends only to making payments when necessary to prevent a default and she can only do so

¹ The Comptroller's second affirmative defense was withdrawn by the Comptroller on October 26, 2017.

when those payments have been approved by the Board of Estimate and Apportionment. KCP notes that this is not the situation here because neither the provision, nor any other provision of the City Charter, justifies the Comptroller's refusal to execute the financing agreement. KCP further asserts that the constitutional challenge is not a proper affirmative defense to the mandamus claim. KCP states that while the executed financing agreement remains subject to the determination of any properly asserted constitutional challenges, the mere assertion of those challenges does not justify the Comptroller's refusal to execute the document.

On September 19, 2017, the City of St. Louis ("City") was granted leave to intervene in this action as a relator. On September 20, 2017, the City filed its Petition for Preliminary Order in Mandamus and Permanent Writ of Mandamus, seeking to compel the Comptroller to countersign the financing agreement. The City filed its Motion to Strike Respondent's Affirmative Defenses on October 13, 2017. The City argues that the Court should strike the Comptroller's affirmative defenses pursuant to Rule 55.27(e), as they do not negate her unconditional ministerial duty to sign the financing agreement.

The following material facts are not in dispute in this case:

- 1) KCP, a sublessee of the Scottrade Center, is the operator of the Scottrade Center and the designated redeveloper under the Land Clearance for Redevelopment Authority ("LCRA") redevelopment plan and agreements approved for the original construction of the Scottrade Center and the improvement project.
- 2) The Comptroller is an elected public official.
- 3) The City is the owner of the Scottrade Center.
- 4) KCP constructed the Scottrade Center pursuant to the Amended Plan for the Station East Redevelopment Area and the Amended and Restated Station East Redevelopment Agreement duly approved by City ordinance in 1992.
- 5) On January 6, 2017, Board Bill No. 246AA ("Board Bill") was introduced before the Board of Aldermen of the City of St. Louis ("Board of Aldermen") relating to a financing agreement by and among the City, the 14th and Market Community Improvement District ("CID"), and the LCRA relating to a project for improvement of the Scottrade Center ("Scottrade Center Project").
- 6) The financing agreement calls for the issuance of bonds by LCRA to finance a portion of the Scottrade Center Project and for City payments, subject to annual appropriation, toward repayment of the bonds.

- 7) The financing agreement states that all obligations of the City under the financing agreement are subject to annual appropriation and do not constitute a debt or liability of the City, including the "City Revenues" contemplated for annual payments on the bond debt.
- 8) The Board of Aldermen's Ways & Means Committee reviewed and approved the financing agreement on February 1, 2017.
- 9) The City's Board of Public Service approved the financing agreement on February 7, 2017.
- 10) The Board of Estimate and Apportionment consists of the Mayor of the City of St. Louis, the Comptroller, and the President of the Board of Aldermen.
- 11) The Comptroller participated in the Board of Estimate and Apportionment's review of the financing agreement, and the Board voted to approve the financing agreement over the Comptroller's objection on February 9, 2017.
- 12) On February 15, 2017, the Board of Aldermen duly passed, and the Mayor signed into law, the Board Bill as Ordinance 70473 (the "Ordinance") approving the form of financing agreement attached thereto.
- 13) Section Two of the Ordinance states, in pertinent part:

The Financing Agreement is hereby approved by the Board of Aldermen of the City, and the Mayor and Comptroller of the City are hereby authorized and directed to enter into and execute the Financing Agreement for and on behalf of the City.

- 14) Section Three of the Ordinance further states, in pertinent part:

The Mayor and Comptroller of the City, or their designated representatives, are hereby authorized and directed to take any and all actions and to execute and deliver for and on behalf of the City any and all additional certificates, documents, agreements or other instruments as may be necessary or appropriate in order to carry out the matters herein authorized or required by the Financing Agreement.

- 15) Article XXV, Section 9 of the City Charter states, in pertinent part:

All contracts relating to city affairs shall be in writing, signed and executed in the name of the city. In cases not otherwise provided by law or ordinance, [contracts] shall be made by the comptroller, . . . Contracts not made by the comptroller shall be countersigned by him.

- 16) The LCRA, the CID, and the Mayor on behalf of the City have executed the financing agreement.

- 17) The Comptroller has refused to sign the financing agreement.

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to

judgment as a matter of law. Larabee v. Eichler, 271 S.W.3d 542, 545 (Mo. banc 2008); Rule 74.04(c)(6). A movant's right to judgment as a matter of law differs significantly depending upon whether that movant is a "claimant" or a "defending party." ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 381 (Mo. banc 1993). A claimant must establish that there is no genuine dispute as to those material facts upon which the claimant would have had the burden of persuasion. Id. at 381. Additionally, where the defending party has raised affirmative defenses, a claimant's right to judgment depends just as much on the non-viability of those affirmative defenses as it does on the viability of the claimant's claim. Id.

A writ of mandamus shall issue where there is 1) an existing, clear legal right in the relator, 2) a corresponding present, imperative unconditional duty upon respondent, and 3) a default by respondent in meeting that duty. State ex rel. Kiely v. Schmidli, 583 S.W.2d 236, 237 (Mo.App. W.D. 1979). A writ of mandamus may be used to compel performance of a ministerial duty by a public officer. Furlong Companies, Inc. v. City of Kansas City, 189 S.W.3d 157, 166 (Mo. 2006). A ministerial act is clerical in nature, requiring a public officer "to perform upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal

authority, without regard to his own judgment or opinion concerning the propriety of the act to be performed." State ex rel. Hill v. Baldrige, 186 S.W.3d 258, 259-60 (Mo. 2006). See also Bosley v. Berra, 688 S.W.2d 353 (Mo. 1985); Arkansas-Missouri Power Corp. v. City of Kennett, 159 S.W.2d 782 (Mo. 1942). Whether a task is ministerial such that it requires mandatory execution is appropriately resolved on summary judgment. See State ex rel. Menkhus v. City of Pevely, 865 S.W.2d 871, 874 (Mo.App. E.D. 1993).

Preliminarily, the Court notes that KCP has filed a Motion to Strike Respondent's Improper Summary Judgment Evidence, arguing that the Comptroller, in an attempt to avoid summary judgment, has presented improper affidavits and other documents in support of her opinion in her affirmative defense that the financing agreement could harm the City's credit. The Court agrees with KCP's argument that these documents are unrelated to the issue before the Court as to whether the Comptroller has any discretion to refuse to sign the financing agreement and that they are immaterial to the summary judgment proceedings. KCP's Motion to Strike Respondent's Improper Summary Judgment Evidence is therefore granted.

Article XXV, Section 9 of the City Charter provides that all City contracts must be signed by the Comptroller. Article XXV, Section 9 of the City Charter further provides that

"contracts not made by the comptroller shall be countersigned by him." The Comptroller is responsible for assuring that no contract is executed "without previous authority of law or ordinance." Charter Art. XV, Section 2.

Here, the Comptroller does not contest the fact that all of the necessary approvals required by law or ordinance have occurred. The Comptroller, as a member of the Board of Estimate and Apportionment, participated in the Board's review of the financing agreement. The Board of Estimate and Apportionment by majority vote approved the financing agreement over the Comptroller's objection. The City Charter vests in the Board of Aldermen the legislative power to approve the financing agreement, and the Board of Alderman properly exercised its legislative power when it approved the Board Bill, and the Mayor signed the bill into law, approving the form of the financing agreement attached thereto. All proper procedures were followed. Further, the financing agreement explicitly provides that the City's bond payments are subject to appropriation and do not constitute a debt or liability of the City.

In addition to Article XXV, Section 9 of the City Charter, the Ordinance itself contains a directive for the Comptroller to sign the financing agreement:

The financing agreement is hereby approved by the Board of Aldermen of the City, and the Mayor and Comptroller of the City are hereby authorized and directed to enter into and execute the Financing Agreement for and on behalf of the City.

Ordinance 70473, Section Two.

The Comptroller argues, however, in her first affirmative defense that she has the discretion to refuse to sign the financing agreement pursuant to her general supervisory responsibilities and duty to preserve the City's credit under Article XV, Section 2 of the City Charter.

The City Charter clearly delineates only two circumstances wherein the Comptroller may act to preserve the credit of the City. Article XV, Section 2 of the City Charter provides:

[The Comptroller] shall preserve the credit of the city, and for that purpose, or in case of any extraordinary emergency of any kind, he may, with the approval of the board of estimate and apportionment, and with or without any ordinance or other authority or appropriation therefor, draw warrants on the treasurer or effect temporary loans to pay debts and judgments and other liabilities of the city, or to meet any such emergency, charging such warrants to any excess balances in appropriations made by the general annual appropriation bill and specifically reporting his action to the board of aldermen at its first meeting thereafter.

Under this Section, the Comptroller may therefore draw warrants on the treasurer or effect temporary loans to pay debts and judgments and other liabilities of the City. Those

situations are not at issue here. The Comptroller is not seeking to prevent a default or preserve the City's credit rating by drawing warrants or obtaining temporary loans, and significantly, the Comptroller is not acting with the concurrence of the Board of Estimate and Apportionment as required under Article XV, Section 2. The Comptroller cannot act unilaterally under Article XV, Section 2.

In a similar case analyzing the comptroller's duties, Kirby v. Nolte, 164 S.W.2d 1 (Mo. 1942), the Supreme Court of Missouri held that the City Charter did not permit the City comptroller to exercise his general power as a supervisor over the City's fiscal affairs to control the policy making powers of the Department of Personnel. In Kirby, the comptroller challenged the Civil Service Commission's right to employ nonresident experts to assist with the formulation of competitive examinations for the position of director of personnel. The comptroller argued that the commissioners had no right to pay appropriated funds without first demonstrating to him that such action was properly within the purposes of appropriation. Id. at 4. The Supreme Court of Missouri rejected the comptroller's argument, stating that while the comptroller may challenge contracts made by other departments for illegality, i.e. contracts that lack prior authority of law or ordinance, this does not mean that the

comptroller's discretionary powers are "coordinate with or superior to those of the Department of Personnel in its sphere." Id. at 6. The Supreme Court further explained:

The Comptroller cannot control the policy making powers or the normal functioning of that Department. The fact that contracts (of that character) must be countersigned by him under Sec. 9, Art. XXV of the Charter, does not give him the right to make them. . . . [T]o hold otherwise would be to say that the people of St. Louis have committed to the Comptroller the power of suspending important functions of the Civil Service Commission.

Id.

Based on the foregoing, this Court concludes that the Comptroller's first affirmative defense, asserting that she has the discretion to refuse to countersign the financing agreement pursuant to her general supervisory responsibilities and duty to preserve the City's credit under Article XV, Section 2 of the City Charter, fails as a matter of law. There is no language contained in Article XV, Section 2 that gives the Comptroller the discretion to refuse to countersign the financing agreement based on her belief that the expenditure is imprudent. The Comptroller has a ministerial duty to countersign the financing agreement.

As for the Comptroller's remaining affirmative defense asserting that the sales tax is unconstitutional, the Court need not reach the merits of this challenge because as a

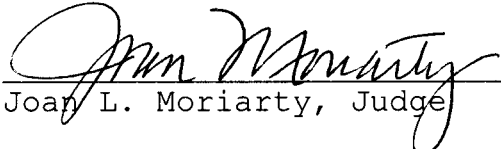
matter of law, it cannot defeat the right to the requested mandamus relief. A proper affirmative defense prevents the claimant's recovery on the grounds that, even if the allegations in the petition are established, additional facts exist that allow the defending party to avoid legal responsibility. Young v. Kansas City Power & Light Co., 773 S.W.2d 120, 126 (Mo.App. W.D. 1989). The constitutional challenge to the sales tax is not a proper affirmative defense in this mandamus action because even if the Comptroller can establish her constitutional challenge to the sales tax imposed by the 14th and Market CID, that claim does not validate the Comptroller's refusal to countersign the financing agreement. The CID sales tax is not imposed by the financing agreement; a separate ordinance was passed approving the amendment to the CID petition and granting the CID the power to approve a sales and use tax. The only issue raised in the mandamus action is whether the Comptroller has a ministerial duty to countersign the financing agreement. The constitutionality of the sales tax has no bearing on that single, discrete issue and is not a proper affirmative defense to the mandamus action.

The Court, therefore, holds that KCP's Motion for Summary Judgment on Count I of the Petition is hereby granted. The

City's Motion to Strike Respondent's Affirmative Defenses is also hereby granted.

The Court hereby issues a permanent writ of mandamus directing Darlene Green, in her official capacity as Comptroller of the City of St. Louis, to countersign the financing agreement for the Scottrade Center Project within five (5) days of the date of this Order.

SO ORDERED:


Joan L. Moriarty, Judge

Date: November 27, 2017