

**IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA**

BILLMATRIX CORPORATION,
CHECKFREE SERVICES CORPORATION,
FISERV AUTOMOTIVE SOLUTIONS,
INC., ITI OF NEBRASKA, INC., XP
SYSTEMS CORPORATION, and
CARREKER CORPORATION

Plaintiffs,

CASE NO.: 2020-CA-000435

vs.

STATE OF FLORIDA, DEPARTMENT OF
REVENUE,

Defendant.

_____ /

**ORDER GRANTING DEPARTMENT'S MOTION FOR COMPULSORY
JUDICIAL NOTICE, DENYING PLAINTIFFS' MOTION FOR
ALTERNATIVE SECURITY ARRANGEMENT, AND GRANTING IN
PART, AND DENYING IN PART, DEPARTMENT'S MOTION TO
DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION**

This matter was heard on the Motion for Compulsory Judicial Notice (“Motion for Judicial Notice”) and Motion To Dismiss for Lack of Subject Matter Jurisdiction (“Motion To Dismiss”) served by Defendant, State of Florida Department of Revenue (“Department”), and the Motion for Alternative Security Arrangement (“Motion for Alternative Security”) served by Plaintiffs. The Court considered those Motions, the Responses to those Motions, the Department’s Reply to Plaintiffs’ Response to the Department’s Motion for Judicial Notice and

Motion To Dismiss, reviewed the record of the case, and considered arguments of counsel during the hearing on April 19, 2023.

For the reasons stated below, the Court hereby grants the Department's Motion for Judicial Notice, grants (in part) and denies (in part) the Department's Motion To Dismiss, and denies Plaintiffs' Motion For Alternative Security.

Order Granting the Motion For Judicial Notice

The Department served its Motion for Judicial Notice pursuant to sections 90.202(6) and 90.203, Florida Statutes, requesting determination that Plaintiffs failed to "Tender into the registry of the court with the complaint the amount of the contested assessment complained of," failed to "file with the complaint a cash bond or a surety bond for the amount of the contested assessment ...," and failed to file a motion for an alternative security arrangement with the complaint.

The Department's Motion for Judicial Notice complied with the requirements of sections 90.202(6) and 90.203, Florida Statutes, and Plaintiffs did not object to the Court's taking judicial notice of those facts. See n.1 at page 9 of Plaintiffs' Response to the Department's Motion for Compulsory Judicial Notice and Motion To Dismiss for Lack of Subject Matter Jurisdiction ("Plaintiff's Response").

Accordingly, the Department's Motion for Judicial Notice is hereby **GRANTED.**

Order Granting (in Part) and Denying (in Part), the Motion To Dismiss

Plaintiffs Billmatrix Corporation (“Billmatrix”), Checkfree Services Corporation (“Checkfree”), ITI of Nebraska, Inc. (“ITI”), XP Systems Corporation (“Systems”), and Carreker Corporation (“Carreker”) challenged the Department’s assessment of income taxes and associated penalties and interest reflected in Notices of Proposed Assessment (“NOPAs”) that the Department issued to those taxpayers. The additional Plaintiff, Fiserv Automotive Solutions, Inc. (“Fiserv”), challenged a final assessment determining that it had overpaid tax.

Jurisdictional Requirements for Tax Assessment Challenges

Section 72.011, Florida Statutes, grants Circuit Courts jurisdiction over challenges to tax assessments for various kinds of taxes, including the corporate income taxes that are in issue in this case, provided that taxpayers satisfy certain jurisdictional requirements in that statute. *See* § 72.011(5), Fla. Stat. (“The requirements of subsections (1), (2), and (3) are jurisdictional.”). There is no dispute that Plaintiffs satisfied the requirements of subsections (1) and (2) of section 72.011, Florida Statutes, but the Department asserts that the Plaintiffs failed to comply with section 72.011(3), Florida Statutes, which requires taxpayers challenging tax assessments to:

- “Tender into the registry of the court with the complaint the amount of the contested assessment complained of, including penalties and accrued interest, unless this requirement is waived in writing by the executive director” or
- “File with the complaint a cash bond or a surety bond for the amount of the contested assessment ... or by any other security arrangement as may be approved by the court ... unless this requirement is waived in writing by the executive director”

Despite the fact that the Department did not raise the issue of subject matter jurisdiction until more than three years after this case was filed, it is undisputed that Plaintiffs did not fulfill these requirements at the beginning of the case, , and Plaintiffs did not request judicial approval of an alternative security arrangement until a few minutes before the hearing on their Motion for Summary Judgment, nearly three years after they filed the Complaint, but less than 24 hours after the Department filed its Motion to Dismiss. In *Department of Revenue v. Nu-Life Health and Fitness Center*, 623 So. 2d 747, 751 (Fla. 1st DCA 1992) (“*Nu-Life*”), the First District Court of Appeal held that the failure to comply with the requirements of section 72.011(3), Florida Statutes, deprived the court of subject matter jurisdiction and required dismissal of the complaint. (“As provided in section 72.011(5), the requirements of section 72.011(3) are jurisdictional. Since

Nu-Life has not satisfied any of the requirements of section 72.011(3) and did not attempt to obtain a written waiver from the director or file a motion for a court-approved security arrangement, the final judgment must be reversed and the case remanded with directions to dismiss the complaint for lack of subject matter jurisdiction.”). The court specifically held that satisfaction of these requirements was required at the beginning of the case. *See* 623 So. 2d at 752 (“Under the statute, Nu-Life cannot, by actions taken subsequent to the filing of the lawsuit, cure the jurisdictional defects raised by the Department.”). This Court declines Plaintiffs’ request that it follow the contrary authority from the Fifth District Court of Appeal in *Don’s Sod Co., Inc. v. Department of Revenue, State of Florida*, 661 So. 2d 896 (Fla. 5th DCA 1995) (“*Don’s Sod*”), because the First District’s holding in *Nu-Life* is controlling upon trial courts in this district.

Plaintiffs filed an extensive affidavit detailing all facts upon which they relied to contend that the Court has subject matter jurisdiction in this case but neither that affidavit, nor statements of Plaintiffs’ counsel during the hearing, showed that Plaintiffs satisfied the statutory requirements of section 72.011(3), Florida Statutes, at the beginning of the case. Instead, Plaintiffs argued alternatively that those requirements did not pertain to subject matter jurisdiction, that the Department waived the jurisdictional requirements, or that the Department was estopped from disputing jurisdiction.

The Jurisdictional Requirements Cannot Be Waived.

The Florida Supreme Court has held that equitable considerations, like those that Plaintiffs have asserted here, cannot create subject matter jurisdiction. See *Polk County v. Sofka*, 702 So. 2d 1243, 1245 (Fla. 1997) (“*Sofka*”), adopting the language of *Snider v. Snider*, 686 So. 2d 802, 804 (Fla. 4th DCA 1997) (“Subject matter jurisdiction is conferred upon a court by a constitution or statute, and cannot be created by waiver, acquiescence or agreement of the parties.”), and elaborating, “Thus, the fact that the parties stipulated to the ... court’s jurisdiction has no bearing on whether, in fact, such jurisdiction existed.” *Sofka* at 1245.

Similarly, the First District held in *FCCI Mutual Insurance Company v. Cayce’s Excavation, Inc.*, 675 So. 2d 1028, 1029 (Fla. 1st DCA 1996):

It is well settled that subject matter jurisdiction cannot be conferred by estoppel. [Citation omitted.] Indeed, neither consent, acquiescence, nor waiver can confer jurisdiction of the subject matter, which is not within the power of the court to adjudicate. [Citation omitted] “[D]efendant cannot confer jurisdiction on court by waiver, acquiescence, estoppel, or consent, since jurisdiction is established solely by general law;” [citation omitted] “estoppel does not operate to confer authority or power.”

See also *United States v. Cotton*, 122 S. Ct. 1781, 1785 (2002) (Because subject matter jurisdiction “involves a court’s power to hear a case, [it] can never be forfeited or waived. Consequently, defects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court.”).

While the Court expresses consternation with the actions of the Department, which appear to have led both this Court and the Plaintiffs astray and resulted in needless expense to the various parties, because the Court concludes that the provisions of section 72.011(3) relate to subject matter jurisdiction, the Court finds that such provisions are not subject to waiver, estoppel, or cure. Accordingly, despite the actions of the Department in this case, this Court is constrained to dismiss this case as to all Plaintiffs other than Fiserv based on the requirements of section 72.011(3).

In contrast to the remainder of the Plaintiffs, Fiserv did not fail to comply with the section 72.011(3) security requirements, because the tax assessment issued to Fiserv indicated it had overpaid tax due, and therefore there were no associated security requirements. Accordingly, this Court has subject matter jurisdiction over Fiserv's challenge pursuant to sections 72.011 and 86.011, Florida Statutes.

Consequently, the Department's Motion To Dismiss is hereby **DENIED** with respect to Fiserv, and **GRANTED** with respect to the claims of the other Plaintiffs

Order Denying Plaintiffs' Request for Alternative Security.

Plaintiffs submitted their Motion for Alternative Security Arrangement on February 23, 2023, shortly before the hearing on Plaintiffs' Motion for Summary

Judgment, less than 24 hours after the Department filed its Motion to Dismiss, and approximately three years after Plaintiffs filed the Complaint. As discussed above, taxpayers who are challenging tax assessments pursuant to section 72.011, Florida Statutes, generally must either tender the contested amount into the court registry “with the complaint,” file a cash bond “with the complaint,” or show that the Department’s executive director waived these requirements “in writing,” and Plaintiffs did not comply with any of those alternatives.

Section 72.011(3)(b)2., Florida Statutes, authorizes the court to approve an alternative security arrangement. Because such an order is an alternative to the financial arrangements that must be perfected “with the complaint,” such alternative security also must be requested at the beginning of the case. *See, e.g., PageNet, Inc. v. State of Florida Dep’t of Revenue*, 896 So. 2d 824, 825 (Fla. 1st DCA 2005) (“At the time it filed its complaint, PageNet filed a motion for alternative security arrangement.”); *see also Dep’t of Revenue v. Swago T-Shirts, Inc.*, 877 So. 2d 761, 762 (Fla. 4th DCA 2004) (“Swago filed a three count complaint At the same time, it filed a motion with the court to approve an alternative security arrangement”).

The First District held in *Nu-Life, supra*, “Under the statute, Nu-Life cannot, by actions taken subsequent to the filing of the lawsuit, cure the jurisdictional defects raised by the Department.” Thus, the Plaintiffs were required to satisfy the

jurisdictional requirements of section 72.011(3), Florida Statutes, by tendering the contested amounts, posting a bond, presenting the written waiver by the Department's executive director, or by filing a Motion for Alternative Security Arrangement at the time they filed the Complaint.


Because the Plaintiffs did not submit the Motion for Alternative Security Arrangement when they filed their Complaint, the request for alternative security is hereby denied as untimely.

Conclusion

For the reasons stated above, it is hereby **ORDERED AND ADJUDGED:**

1. The Department's Motion for Compulsory Judicial Notice is **GRANTED;**
2. Plaintiffs' Motion for Alternative Security Arrangement is **DENIED;** and
3. The Department's Motion To Dismiss for Lack of Subject Matter Jurisdiction is **GRANTED IN PART AND DENIED IN PART.**

DONE AND ORDERED on this Tuesday, July 11, 2023 in Leon County, Florida.

2020-CA-000435 07/11/2023 10:13:41 AM

Lee Marsh, Circuit Judge
37-2020-CA-000435 07/11/2023 10:13:41 AM

Copies furnished through e-portal