

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

EMILY LARSON,

Plaintiff,

vs.

STATE OF NEBRASKA, DEPARTMENT
OF REVENUE,

Defendant.

CASE NO. C112-447

ORDER

This matter is before the Court on Defendant's Motion to Dismiss. Hearing on the motion was held on March 21, 2012. Assistant Attorney General L. Jay Bartel appeared on behalf of Defendant. The Plaintiff did not appear. The Defendant's motion alleges: (1) Insufficiency of process and service of process; (2) Lack of personal jurisdiction; and (3) Lack of subject matter jurisdiction.

This is an action pursuant to Neb. Rev. Stat. §§ 77-2708(2)(f) (Supp. 2011), 77-27,127 (2009) and 84-917 (Supp. 2010) seeking review of a decision of Defendant the Nebraska Department of Revenue [the "Department"] denying a claim for refund of Nebraska sales tax filed by Plaintiff Emily Larson ["Plaintiff"]. Plaintiff filed a letter seeking review of the Department's decision in the District Court of Lancaster County, Nebraska, on February 6, 2012.

No praecipe for summons was filed with the Clerk of the District Court pursuant to Neb. Rev. Stat. § 25-502.01 (2008), and no summons was ever issued by the Clerk. No proof of service has been filed as required by Neb. Rev. Stat. § 25-507.01 (2008). Because no proper summons was issued by the Clerk and served on the Department

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with a copy of the petition as required by law, process and service of process are insufficient.

Neb. Rev. Stat. § 77-2708(2)(f) (Supp. 2011) provides: "Within thirty days after the mailing of the notice of the Tax Commissioner's action upon a [sales tax refund] claim. . . , the action of the Tax Commissioner shall be final unless the taxpayer seeks review of the Tax Commissioner's determination as provided in section 77-27,127." Neb. Rev. Stat. § 77-27,127 (2009) provides: "Any final action of the Tax Commissioner may be appealed, and the appeal shall be in accordance with the Administrative Procedure Act." Judicial review of final agency decisions under the Administrative Procedure Act ["APA"] is governed by Neb. Rev. Stat. § 84-917 (Supp. 2010). Subsection (2)(a) of § 84-917 provides, in pertinent part:

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 of the agency. All parties of record shall be made parties to the proceedings. . . .*Summons shall be served within thirty days of the filing of the petition in the manner provided for service of summons in section 25-510.02. . . .* (emphasis added).

Service of process on state agencies or officials is governed by Neb. Rev. Stat. § 25-510.02(1) (2008), which provides:

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 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.

In order to obtain personal jurisdiction over a state agency or official, summons must be served on the Attorney General. *Nebraska Methodist Health System, Inc. v. Dep't of Health*, 249 Neb. 405, 543 N.W.2d 466 (1996); *Becker v. Accountability and Disclosure Comm'n*, 249 Neb. 28, 541 N.W.2d 36 (1995); *Twiss v. Trautwein*, 247 Neb. 535, 529 N.W.2d 24 (1995). Section 25-510.02 is the only statute authorizing service of process on a state agency or official. Not only must service be made on the Attorney General to obtain personal jurisdiction in an action brought under § 84-917, but service must be timely made within thirty days of filing the petition for review. See *Ray v. Nebraska Crime Victim's Reparations Committee*, 1 Neb. App. 130, 487 N.W.2d 590 (1992); *Essman v. Nebraska Law Enforcement Training Center*, 252 Neb. 347, 351, 562 N.W.2d 355, 358 (1997). As the action for review was filed on February 6, 2012, Plaintiff was required to perfect service of summons on the Attorney General in the manner provided in § 25-510.02 within thirty days of the date of filing the action. As Plaintiff has not done so, the Court lacks personal jurisdiction over the Department.

Further, in *Concordia Teachers College v. Nebraska Dep't of Labor*, 252 Neb. 504, 509, 563 N.W.2d 345, 349 (1997), the Nebraska Supreme Court, addressing the effect of a petitioner's failure to properly serve summons within thirty days of filing the action in the manner required by § 25-510.02 on a state agency and official in an action brought under § 84-917, stated:

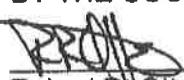
After considering the language of § 84-917(2)(a) in its plain, ordinary, and popular sense, it is apparent that the Legislature intended that a summons be served within 30 days of the filing of the petition for review as a prerequisite to the exercise by the district court of its jurisdiction over the subject matter on an appeal from an adverse decision of an administrative agency. As Concordia failed to invoke the subject matter jurisdiction of the district court in that it failed to serve the proper summons within 30 days of filing its 'Amended Petition', the district court did not acquire authority to review the Commissioner's ruling under the APA.

Plaintiff did not validly serve the Department within thirty days of filing the petition for review. Accordingly, the Court lacks subject matter jurisdiction.

IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss is granted. As no action can be taken at this time to enable the Court to acquire subject matter jurisdiction, the case is dismissed, at Plaintiff's cost.

Dated: March 21, 2012.

BY THE COURT:



Robert R. Otte
District Judge

cc: L. Jay Bartel, Assistant Attorney General
Emily A. Larson