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THE TAX COURT COMMITTEE ON OPINIONS

TAX COURT OF NEW JERSEY

Patrick DeAlmeida
Presiding Judge

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Re: Prime Accounting Dept v. Township of Carney's Point
Docket No. 004402-2009

Dear counsel:

This letter constitutes the court's opinion with respect to Bocceli, LLC's motion pursuant to R. 4:9-1 to amend the complaint to remove Prime Accounting Dept, an entity with no interest in the subject property, as plaintiff and to substitute as plaintiff Bocceli, LLC, a sublessee at the property responsible for paying local property taxes. For the reasons stated more fully below, Bocceli, LLC's motion is denied and the complaint will be dismissed for lack of jurisdiction.

I. Findings of Fact and Procedural History

This letter opinion sets forth the court's findings of fact and conclusions of law based on the submissions of the parties, as well as the arguments presented by counsel in court on Bocceli, LLC's motion. R. 1:6-2(f).

On March 24, 2009, a complaint was filed with this court challenging the assessment on real property located in the Township of Carney's Point for tax year 2009. Because the assessment on the property exceeds $750,000, the appeal was filed directly with this court. See N.J.S.A. 54:3-21 (subsequently amended to $1,000,000, L. 2009, c. 251, effective Jan. 16, 2010). The property is designated by the municipality as Block 218, Lot 12 and is commonly known as 517 S. Pennsville-Auburn Road. Prime Accounting Dept is named as the plaintiff. The complaint alleges that Prime Accounting Dept is the owner of the subject property. Complaint ¶1.[1] No other entity is mentioned in the complaint as having an interest in the subject property.

On August 12, 2009, the municipality moved to dismiss the complaint pursuant to N.J.S.A. 54:4-34, commonly known as Chapter 91 (L. 1979, c. 91), alleging that plaintiff failed to respond to a request from the tax assessor for income and expense information associated with the subject property. In the course of reviewing defendant's motion to dismiss it became apparent to the court and counsel that Prime Accounting Dept is neither the owner of the subject property nor liable for the payment of local property taxes on the subject property. The court directed counsel to address the issue of ownership and standing through supplemental filings and argument.

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[1] The court notes that the complaint alleges that Prime Accounting Dept challenges the assessment on the property for tax year 2008. Complaint ¶2. The case information statement indicates that the complaint concerns tax year 2009. Based on representations by counsel, the court finds that the complaint contains a typographical error with respect to the tax year at issue.

In response to that directive, on November 2, 2009, Bocceli, LLC, moved for an Order amending the complaint to remove Prime Accounting Dept as plaintiff and to substitute Bocceli, LLC as plaintiff. The court makes the following findings of fact with respect to the ownership of the property:

January 11, 1988	Penns Grove Associates, owner of the subject property, leased the land and improvements thereon, a hotel, to Prime Management Company, Inc.
July 13, 2007	WIH Hotels, LLC, a successor through a series of transactions to Prime Management Company, Inc., subleased its interest in the subject property to Bocceli, LLC. Pursuant to the sublease, Bocceli, LLC is solely in possession of the subject property and is obligated to pay all the local property taxes. Penns Grove Associates remains the owner of the subject property.

Prime Accounting Dept has never been the owner of the subject property, a lessee or sublessee at the property, or the entity obligated to pay the local property taxes on the subject property. The name Prime Accounting Dept suggests that the entity is an internal unit of Prime Management Company, Inc., the former sublessee. Neither party, however, has provided any evidence suggesting that Prime Accounting Dept is an independent legal entity with any identifiable interest in the subject property or possessing legal authority to commence litigation in New Jersey. See N.J.S.A. 14A:13-15; N.J.S.A. 14A:13-20; First Family Mort. Corp. v. Durham, 108 N.J. 277 (1987).

When the current Carney's Point Township tax assessor took office in 2005 Prime Accounting Dept was listed in the records of the tax assessor as the owner of the subject

property. No deed was subsequently filed with the tax assessor changing this designation. The record is unclear as to how the incorrect notation of ownership came to appear in the tax assessor's records. Counsel suggested that at a point in time during which Prime Management Company, Inc., the previous ground lessee, was responsible for the payment of local property taxes it requested that the tax assessor send notices concerning the subject property to Prime Accounting Dept. How such a request would result in Prime Accounting Dept being listed as the owner of the property has not been adequately explained. However, as explained below in greater detail, the court need not resolve the factual disputes surrounding the listing of Prime Accounting Dept as the owner of the subject property in the tax assessor's records. Resolution of Bocceli, LLC's motion to amend the complaint does not turn on the question of whether the Carney's Point tax assessor was aware of the actual owner of the subject property or the identity of the sublessee at the time that the complaint was filed.

II. Conclusions of Law

R. 4:9-1 provides that:

> A party may amend any pleading as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is to be served, and the action has not been placed upon the trial calendar, at any time within 90 days after it is served. Thereafter a party may amend a pleading only by written consent of the adverse party or by leave of court which shall be freely given in the interest of justice.

In local property cases, every defendant may, but need not file an answer. R. 8:3-2(b). Thus, plaintiff may, without leave of court, amend its complaint within 90 days of its service on defendant. The complaint was served on defendant on March 23, 2009. Prime Accounting Dept's ability to amend the complaint without the consent of defendant or leave of court expired on June 22, 2009, long before Bocceli, LLC's November 2, 2009 motion was filed.

Because defendant does not consent to the amendment of the complaint and, in fact, opposes the motion on jurisdictional grounds, Bocceli, LLC may amend the complaint only with leave of court. According to the rule, such leave "shall be freely given in the interest of justice." As a general matter, motions to amend are liberally granted, without consideration of the merits of the amendment. Notte v. Merchants Mut. Ins. Co., 185 N.J. 490, 500-501 (2006). However, permitting an amendment remains a matter addressed to the court's discretion. Kernan v. One Washington Park Urban Renewal Assocs., 154 N.J. 437, 457 (1998); Fisher v. Yates, 270 N.J. Super. 458 (App. Div. 1994). Where a proposed amended pleading sets forth allegations that would be subject to dismissal under R. 4:6-2, permitting the amendment would be futile and the court may exercise its discretion to deny leave to amend. Notte, supra, 185 N.J. at 501; Interchange State Bank v. Rinaldi, 303 N.J. Super. 239, 256-57 (App. Div. 1997). In making that determination, the court applies the same standard applicable to a motion to dismiss under R. 4:6-2. Maxim Sewerage Corp. v. The Monmouth Ridings, 273 N.J. Super. 84, 90 (Law Div. 1993). "More specifically, 'courts are free to refuse leave to amend when the newly asserted claim is not sustainable as a matter of law. In other words, there is no point to permitting the filing of an amended pleading when a subsequent motion to dismiss must be granted.'" Notte, supra, 185 N.J. at 501 (quoting Interchange State Bank, supra, 303 N.J. Super. at 256-57).

Bocceli, LLC's motion suffers from such a defect. Because jurisdiction in this court to review the assessment on the subject property for tax year 2009 was never established, the requested amendment to the complaint would be futile and readily subject to dismissal.

This court's jurisdiction to review assessments on real property is established by statute. N.J.S.A. 54:3-21 provides in relevant part that:

> [A] taxpayer feeling aggrieved by the assessed valuation of the taxpayer's property . . . may on or before April 1, or 45 days from the date the bulk mailing of notification of assessment is completed in the taxing district, whichever is later, . . . file a complaint directly with the Tax Court, if the assessed valuation of the property subject to the appeal exceeds $750,000. In a taxing district where a municipal-wide revaluation or municipal-wide reassessment has been implemented, a taxpayer or a taxing district may appeal before or on May 1 to the county board of taxation by filing with it a petition of appeal or, if the assessed valuation of the property subject to the appeal exceeds $750,000, by filing a complaint directly with the State Tax Court.

This statute is incorporated in R. 8:4-1(a)(4). The statute was amended effective January 16, 2010 to raise direct appeal threshold to $1 million. L. 2009, c. 251.

Compliance with the filing requirement is a necessary predicate to establish jurisdiction in this court for review of an assessment. As our Supreme Court explained, "failure to file a timely appeal is a fatal jurisdictional defect." F.M.C. Stores v. Borough of Morris Plains, 100 N.J. 418, 425 (1985). Strict adherence to statutory filing deadlines is of particular concern in tax matters, given "the exigencies of taxation and the administration of local government." Id. at 424 (citing Princeton Univ. Press v. Borough of Princeton, 35 N.J. 209, 214 (1961)). A failure to file a timely complaint divests this court of jurisdiction even in the absence of harm to the defendant municipality. Lawrenceville Garden Apartments v. Township of Lawrence, 14 N.J. Tax 285 (App. Div. 1994).

Prime Accounting Dept clearly did not satisfy the statutory requirements to establish jurisdiction in this court when it filed its complaint. Prime Accounting Dept, which has no identifiable legal interest in the subject property and was not responsible for the payment of local property taxes for tax year 2009, is neither a "taxpayer" nor "aggrieved" within the meaning of N.J.S.A. 54:3-21. See Aperion Enterps., Inc. v. Borough of Fair Lawn, 25 N.J. Tax 70 (Tax

2009)(holding that tenant responsible for paying local property taxes under lease has standing to control tax appeal); Ewing Township v. Mercer Paper Tube Corp., 8 N.J. Tax 84, 91 (Tax 1985)(holding that "the Legislature intended to include within the class of 'aggrieved taxpayers,' given the right to appeal tax assessments [under N.J.S.A. 54:3-21], any lessee whose lease covers the full tax year and requires him to pay the full assessment of the taxes levied."); accord Village Supermarkets, Inc. v. Township of West Orange, 106 N.J. 628, 630-32 (1987). Because Prime Accounting Dept has no interest in the property nor an obligation to pay local property taxes with respect to the subject property it also does not have standing to challenge the 2009 assessment at issue here. The original complaint, therefore, is a nullity which did not establish jurisdiction in this court.

Bocceli, LLC contends that the proposed amendment to the complaint should relate back to the filing date of the original complaint under R. 4:9-3, thereby establishing jurisdiction in this court. That rule provides:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading; but the court, in addition to its power to allow amendments may, upon terms, permit the statement of a new or different claim or defense in the pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment, that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party to be brought in by amendment.
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> [R. 4:9-3.]

The rule has two parts. The first, which is not applicable here, concerns the amendment of pleadings to add new claims. The second "is intended to deal only with a problem of misidentification of a party and authorizes the court, in its discretion, to permit relation back of an amendment changing or correcting a party's name if, in addition to the general criteria of the rule for relation back, (1) the new party had such notice, albeit informal, of the action prior to the running of the statute of limitations that he would not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that but for an error of identification, the action would have been brought against him." Pressler, Current N.J. Court Rules, Comment R. 4:9-3 (Gann 2010).

The rule quite plainly addresses only those circumstances in which a plaintiff who has initiated a timely complaint seeks to add a defendant not named in the original complaint. Application of the unequivocal text of the rule would preclude the relief Bocceli, LLC seeks. One published appellate precedent, however, applies the rule in the context of an amended pleading changing the name of the plaintiff.

In Siligato v. State, 268 N.J. Super. 21 (App. Div. 1993), the State Police, pursuant to a search warrant, excavated under the concrete foundations of two commercial establishments, the Silly Gator bar and the Elm Deli, for the remains of two murder victims. At the time of the searches, which revealed no evidence of murder, the State believed the buildings to be owned by Samuel Siligato. Id. at 24. Mr. Siligato subsequently brought an action for damages under 42 U.S.C. §1983, alleging the warrant was issued on knowingly false representations by a State Police detective. Ibid. During the course of litigation, the State searched relevant title records and discovered that the owner of the Silly Gator bar was not Mr. Siligato, but his corporation, Silly Gator, Inc. Id. at 27. Based on that information, the State moved to dismiss the complaint

for lack of standing. Id. at 28. The trial judge denied the motion and directed amendment of the complaint to add Silly Gator, Inc. as a plaintiff in addition to Mr. Siligato. Ibid.

The Appellate Division affirmed the trial court's decision. The court reasoned that "[u]nder the circumstances here, the amendment was the functional equivalent of a routine substitution pursuant to R. 4:34-3 (transfer of interest)." Ibid. R. 4:34-3 provides that "[i]n the case of any transfer of interest, the action may be continued by or against the original party, unless the court on motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party." The Siligato court continued,"[w]e also point out that R. 4:9-3 expressly provides for relation back of a germane claim. . . . While we understand that that rule applies, in terms, to parties-defendant, we are satisfied that its rationale applies equally to parties-plaintiff. Obviously, an error made by plaintiff in identifying itself should be no less curable than an error in identifying the adversary." Id. at 28-29.

The rationale supporting the holding in Siligato does not apply here. First, substitution of Bocceli, LLC in place of Prime Accounting Dept as plaintiff is not the equivalent of a routine substitution pursuant to R. 4:34-3. Prime Accounting Dept was never the owner or lessee of the subject property and it did not transfer its interest to Bocceli, LLC. There having been no transfer of interest between the current plaintiff and the plaintiff proposed to be added through amendment, such an amendment would not be the equivalent of a routine substitution under R. 4:34-3. The proposed amended complaint would add a third party, unrelated to the original parties to the action, as the sole plaintiff.

In addition, relation back under R. 4:9-3 would not be appropriate here because there was no error made by plaintiff in identifying itself in the original complaint. Unlike Mr. Siligato, who may have lacked precision in allowing his counsel to name him personally as plaintiff rather

than naming Mr. Siligato's corporation as plaintiff, Prime Accounting Dept is in no way related to Bocceli, LLC. It is not the case that plaintiff's counsel mistakenly named one entity as plaintiff when, in fact, a related entity was the title owner of the property. Instead, Prime Accounting Dept was represented in the complaint as the owner of the subject property, even though it has never been the owner or had any identifiable interest in the subject property. Allowing Bocceli, LLC to be named as plaintiff in place of Prime Accounting Dept would effectuate a complete abrogation of the original complaint by removing the only named plaintiff, who clearly did not have standing to initiate this action, with an unrelated entity who acquired an interest in the subject property almost two years prior to the day on which the complaint was filed. R. 4:9-3 was not intended to be stretched that far.

Moreover, applying R. 4:9-3 in the fashion requested by Bocceli, LLC would run counter to the limited nature of this court's statutory jurisdiction. As our Supreme Court recently reiterated, the "Tax Court is vested with limited jurisdiction" defined by statute. McMahon v. City of Newark, 195 N.J. 526, 546 (2008)(citing N.J.S.A. 2B:13-2 and Union City Assocs. v. City of Union City, 115 N.J. 12, 23 (1989)). "'The right to appeal a real property assessment is statutory, and the appellant is required to comply with all applicable statutory requirements.'" Macleod v. City of Hoboken, 330 N.J. Super. 502, 505 (App. Div. 2000)(quoting F.M.C. Stores Co. v. Borough of Morris Plains, 195 N.J. Super. 373, 381 (App. Div. 1984), aff'd, 100 N.J. 418 (1985)). The statutory scheme establishing this court's jurisdiction is "one with which continuing strict and unerring compliance must be observed . . . ." McMahon, supra, 195 N.J. at 543.

As noted above, in order to establish jurisdiction in this court to review an assessment on real property for tax year 2009, an aggrieved taxpayer must file a complaint in accordance with

the time limits prescribed in N.J.S.A. 54:3-21. Bocceli, LLC, the aggrieved taxpayer in this case, failed to meet that statutory mandate. It did not file a timely complaint challenging the assessment on the subject property. As a result, jurisdiction in this court to review the assessment was not established. Bocceli, LLC cannot, through an amendment to the complaint and the relation back mechanism of R. 4:9-3 create jurisdiction where it previously did not exist. Use of the relation back theory here, unlike in Siligato, supra, is not merely a question of effectively extending the statute of limitations on plaintiff's claim. Bocceli, LLC seeks instead to override the statutory limits on this court's jurisdiction.

It is of no consequence that the municipality had by virtue of the complaint notice prior to the filing deadline that the assessment on the subject property was being challenged, see Freehold Office Park, Ltd v. Township of Freehold, 12 N.J. Tax 433, 440-41 (Tax 1992)(holding that local property taxes are assessed against the property, not the property owner). As noted above, a failure to file a timely complaint divests this court of jurisdiction even in the absence of harm to the defendant municipality. Lawrenceville Garden Apartments, supra. Bocceli LLC's motion, therefore, will be denied. In light of the fact that this court lacks jurisdiction over the claims raised in the complaint, the court will direct the Tax Court Clerk to enter judgment dismissing the complaint.[2]

An Order effectuating the court's decision is enclosed.

Very truly yours,

Patrick DeAlmeida

Patrick DeAlmeida, P.J.T.C.

[2] It is not, therefore, necessary to resolve defendant's motion to dismiss pursuant Chapter 91.