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FARMLAND DAIRIES, INC. Plaintiff, v. BOROUGH OF WALLINGTON, Defendant.	TAX COURT OF NEW JERSEY DOCKET NOS. 009501-2014 004801-2015 002499-2016

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Peter L. Davidson for plaintiff
(The Davidson Legal Group, L.L.C., attorneys).

Paul M. Elias for defendant
(Bittinger, Elias & Triolo, P.C., attorneys).

Arthur N. Chagaris for movant
(Beattie Padovano, L.L.C., attorneys).

FIAMINGO, J.T.C.

This is the court's opinion after remand on the motion of Donald Nuckel ("Nuckel") to intervene in the tax appeals filed by Farmland Dairies ("plaintiff") on property owned by it in the Borough of Wallington (the "Borough") for tax years 2014 through 2016. The court denies Nuckel's motion for permissive intervention for the reasons that follow.

Facts and Procedural History

Plaintiff timely filed direct appeals of the assessment on its property known as Lots 1.01, 4.03, and 4.04 in Block 70.01 ("subject property") on the official tax map of the Borough for tax years 2014, 2015, and 2016. The Borough neither filed its own appeal of the assessment of the

subject property, nor filed any counterclaims with respect to the 2014 or 2015 appeals filed by plaintiff. On April 7, 2016 the Borough filed a counterclaim with respect to the 2016 appeal.

Nuckel owns real property located in the Borough. Although Nuckel alleges that he is discriminated against by the underassessment of the subject property, he did not file timely complaints under N.J.S.A. 54:3-21. Additionally Nuckel's motion to intervene in the subject appeals was filed almost two years after plaintiff filed its 2014 appeal, more than one year after plaintiff filed its 2015 appeal, and thirteen days after the expiration of the filing deadline for the 2016 appeal.

This court determined that while Nuckel had standing to contest the assessment of the subject property his attempt to do so via intervention was untimely and barred by the applicable statute of limitations. Farmland Dairies, Inc. v. Borough of Wallington, 29 N.J. Tax 310 (Tax 2016), aff'd in part, remanded in part, _____ N.J. Tax _____ (App. Div. 2017). In doing so the court noted that in tax appeal matters, "[a]n application for intervention is subject to the applicable statute of limitations." Id. at 314 (quoting Mobil Admin.Servs. Co. v. Township of Mansfield, 15 N.J. Tax 583, 590–91 (Tax 1996), aff'd, 17 N.J. Tax 509 (App. Div. 1997)). The applicable statute, N.J.S.A. 54:3-21(a)(1), requires that a complaint contesting the assessment of a property must be filed "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." The court found that Nuckel's failure to take action within the statutory time period constituted a fatal jurisdictional flaw and denied Nuckel's motion under R. 4:33-1 to intervene as of right.

Nuckel moved for leave to appeal which was granted. This court's decision denying Nuckel's motion to intervene as of right under R. 4:33-1 was upheld by the Appellate Division. However, the higher court remanded the matter for a determination on Nuckel's "discrete"

alternative argument for permissive intervention pursuant to R. 4:33-2. In doing so, the court stated that, "[i]n particular, in exercising its discretion under [R. 4:33-2] in light of the current posture of the litigation, the [Tax] court 'shall consider whether [such] intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Farmland Dairies, Inc., _____ N.J. Tax _____, (slip. op. at 2-3).

Analysis

R. 4:33-2 provides that:

> Upon timely application anyone may be permitted to intervene in an action if the claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a state or federal governmental agency or officer, or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the agency or officer upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.
>
> [R. 4:33-2.]

The Appellate Division recently observed that "[u]nder the plain language of these two Rules [R. 4:33-1 and R. 4:33-2], intervention is not appropriate unless the putative intervener can assert its own 'claim or defense.'" N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp., _____ N.J. Super., _____ (App. Div. 2018) (slip op. at 13). "If the moving party must have standing to assert its own claim or defense before the court exercises its discretion and permits intervention, it seems illogical that in some situations a court must grant intervention under Rule 4:33-1, even if the movant cannot assert its own claim or defense." Ibid.

This court now finds that because Nuckel's claim is barred by the applicable statute of limitations, there is no basis upon which Nuckel's affirmative claim can be brought through

permissive intervention. If an action is barred as untimely under the applicable statute of limitations, the court cannot, and should not, revive such an action through intervention under either R. 4:33-1 or R. 4:33-2.

The court's conclusion is informed by the plain language of the referenced rules themselves, both of which require that an application for intervention be timely. The issue of timeliness has largely been measured with respect to the lapse of time between bringing a motion for intervention and institution of the original action. See eg. A.C.L.U. of N.J. Inc. v. County of Hudson, 352 N.J. Super. 44 (App. Div. 2002) (motion to intervene granted where sought thirty-five days after filing of complaint); Clarke v.Brown, 101 N.J. Super. 404 (Law Div. 1968) (motion to intervene denied where brought after judgment entered); but see Government Sec. Co. v. Waire, 94 N.J. Super. 586 (App. Div. 1967), certif. denied, 50 N.J. 84 (1967) (assignee of real property subject to tax lien has right to intervene as defendant up to the time of final judgment); see also Allan-Deane Corp. v. Bedminster, 63 N.J. 591 (1973) (Petitioners allowed to intervene in prerogative writ action nine months after action commenced.)

"An application for intervention is subject to the applicable statute of limitations." Mobil Admin. Services Co., 15 N.J. Tax at 590-91. Moreover, it is axiomatic that the statutory time periods incorporated in the New Jersey Court Rules are jurisdictional. McMahon v. City of Newark, 195 N.J. 526, 530 (2008). They are not within the "relaxation power of the Tax Court." Pressler & Verneiro, Current N.J. Court Rules, cmt. 1 on R. 8:4-1 (2015) (internal citations omitted). A "failure to file a timely appeal is a fatal jurisdictional defect" and if a plaintiff fails to file within the prescribed time frame, that plaintiff is proscribed from an appeal in the Tax Court and any consideration of its case on the merits. F.M.C. Stores Co. v. Borough of Morris Plains, 100 N.J. 418, 425 (1985). The burden of timely filing falls squarely and solely upon the taxpayer.

Slater v. Dir., Div. of Taxation, 26 N.J. Tax 332, 334 (Tax 2012) (citing Dougan v. Dir., Div. of Taxation, 17 N.J. Tax 110 (App. Div. 1997)).

Our Supreme Court has noted that "[s]trict adherence to statutory time limitations is essential in tax matters, borne of the exigencies of taxation and the administration of . . . government." F.M.C. Stores Co., 100 N.J. at 424. Such time limitations "in tax statutes are strictly construed in order to provide finality and predictability of revenue to state and local government." Bonanno v. Dir., Div. of Taxation, 12 N.J. Tax 552, 556 (Tax 1992) (citing Pantasote, Inc. v. Dir., Div. of Taxation, 8 N.J. Tax 160, 164-166 (Tax 1985)). These dictates apply equally to taxpayers and municipalities. F.M.C. Stores Co., 100 N.J. at 425. ("[B]oth appealing taxpayers and taxing districts must adhere strictly to the deadlines prescribed by statute."). Thus, in F.M.C. Stores Co. the New Jersey Supreme Court interpreted N.J.S.A. 54:3-21 as requiring a municipality to file a counterclaim to a taxpayer's direct appeal prior to the April 1 filing deadline regardless of when the complaint was served.[1] 100 N.J. 425.

Neither a taxpayer's claim of right to proceed under N.J.S.A. 54:3-21, nor a taxing district's affirmative attempt to raise an assessment by way of complaint or counterclaim, may be brought outside the confines of the statute of limitations.[2] To do so would offend well-settled principles of law. There is a "strong public policy that actions contesting the assessment of taxes

[1] N.J.S.A. 54:3-21 was subsequently amended to permit the filing of a counterclaim within twenty days after service of the complaint when the complaint is filed on April 1 or during the nineteen days preceding April 1. See also R. 8:4-3(a).

[2]In this regard, the court notes that plaintiff's 2016 direct appeal was filed March 9, 2016. The Borough's counterclaim was filed twenty-nine days later on April 7, 2016 and appears to be untimely and subject to dismissal. See R. 8:4-3(a)("In a direct appeal of a local property tax matter pursuant to N.J.S.A. 54:3-21, a counterclaim may be filed within twenty days from the date of service of the complaint even if the counterclaim is filed after the deadline for filing the complaint provided by N.J.S.A. 54:3-21.")

should be brought promptly within the specified periods of time. Having failed to take appropriate and timely action, plaintiff has forfeited any right it may have had to relief." Suburban Dep't Stores v. City of East Orange, 47 N.J. Super. 472, 480 (App. Div. 1957).

Here Nuckel neither filed a timely complaint to contest the tax assessment on the subject property nor filed his motions to intervene in plaintiff's appeals prior to the expiration of the statute of limitations. To allow Nuckel to intervene and prosecute an affirmative appeal of the tax assessments on the subject property through permissive intervention would offend the clear and well-settled principles of timely filing. Accordingly, the court denies his request for permissive intervention as to the affirmative claim he sought to raise in his pleadings.[3]

The court next considers whether Nuckel should be permitted to intervene in the defense of the action. A brief explanation of tax court proceedings may be helpful in this regard. Pleadings in the Tax Court do not follow the general process established in the Superior Court. In Superior Court, the rules anticipate and indeed require the filing of responsive pleadings in order to avoid default. See R. 4:5-4 (responsive pleading to include affirmative defenses); R. 4:5-5 (allegations not denied in an answer are deemed admitted). In Tax Court, the rules specifically provide that "[i]n local property tax cases, every defendant may *but need not* file an answer." R. 8:3-2(b) (emphasis added).

In appeals of tax assessments, a municipality may elect not to file a responsive pleading because "[o]riginal assessments and judgments of county boards of taxation are entitled to a presumption of validity." MSGW Real Estate Fund, L.L.C. v. Borough of Mountain Lakes, 18

[3] The court acknowledges, but rejects, Nuckel's contention that the remand of the issue of permissive intervention to this court meant that the Appellate Division considered and rejected the application of the statute of limitations to the bringing of an affirmative claim for permissive intervention.

N.J. Tax 364, 373 (Tax 1998). It is "the appealing taxpayer [who] has the burden of proving that the assessment is erroneous." Pantasote Co. v. City of Passaic, 100 N.J. 408, 413 (1985) (citing Riverview Gardens v. Borough of North Arlington, 9 N.J. 167, 174 (1952)). "The presumption of correctness . . . stands, until sufficient competent evidence to the contrary is adduced." Township of Little Egg Harbor. v. Bonsangue, 316 N.J. Super. 271, 285–86 (App. Div. 1998). A taxpayer can only rebut the presumption by introducing "cogent evidence" of true value. That is, the evidence must be "definite, positive and certain in quality and quantity." Pantasote, 100 N.J. at 413 (quoting Aetna Life Ins. Co. v. Newark, 10 N.J. 99, 105 (1952)).

If the court concludes that the taxpayer has not proffered evidence sufficient to overcome the presumption of validity attached to the tax assessment, judgment must be entered affirming the assessment. Ford Motor Co. v. Township of Edison, 127 N.J. 290, 311 (1992). "[O]nly when the presumption is overcome" is it "incumbent upon the Tax Court to appraise the testimony, make a determination of true value and fix the assessment." Rodwood Gardens, Inc. v. City of Summit, 188 N.J. Super. 34, 38 (App. Div. 1982).

Thus, strategically, after the close of a taxpayer's case, a taxing district may rely on the presumption of validity and move to dismiss the complaint without presenting any evidence of value. Alternatively, the taxing district may present evidence of value notwithstanding the fact that it did not file an answer or counterclaim.

If a municipality does present evidence of value it may attempt to demonstrate that the tax assessment does not reflect true value but instead falls below that mark. The court is then charged with determining the true value of the subject property even if that value exceeds the assessed value. "In the valuation of real property for local taxation, '[t]he search, of course, is for the fair value of the property, the price a willing buyer would pay a willing seller.'" Glen Wall Assocs. v.

Township of Wall, 99 N.J. 265, 281-82 (1985) (citation omitted). "The Tax Court has not only the right, but the duty to apply its own judgment to valuation data submitted by experts in order to arrive at a true value and find an assessment for the years in question." Id. at 280 (quoting New Cumberland Corp. v. Borough of Roselle, 3 N.J. Tax 345, 353 (Tax 1981)). In such case the court may find value that could result in an increase, a decrease or the affirmance of the tax assessment at issue based on the evidence before it.

The court emphasizes that at no time has Nuckel indicated an interest in defending the assessments on the subject property. The only motion made by Nuckel was to be permitted to intervene by the filing of a complaint alleging that the subject property was under-assessed and demanding that judgment be entered to increase the assessed value. Indeed, N.J.S.A. 54:3-21 does not afford taxpayers a right to defend the tax assessment of a taxing district. Instead, Nuckel, as a taxpayer feeling discriminated against by the assessed valuation of other property in the county is granted the right to file an appeal of that assessment, which is inapposite to any intent to defend a taxing district's tax assessment. In fact, the pleading submitted by Nuckel in accord with R. 4:33-3 sets forth only a claim for affirmative relief under N.J.S.A. 54:3-21, and Nuckel does not now argue that he is seeking to intervene in the defense of the tax assessment in this matter.

Furthermore, it appears clear that the only party with standing to defend an assessment and the manner in which that defense is to proceed is the taxing district in which the property is located. A municipality or a state agency has an overriding interest in the collection of taxes and defending its tax base. See, F.M.C. Stores Co., 100 N.J. 418; Pantasote, Inc., 8 N.J. Tax 164-65. "The freedom to determine whether or not to participate or to authorize technical assistance [in a tax appeal] is consistent with a municipality's sole power to manage, regulate and control its finances. N.J.S.A. 40:48-1." Jeffers v. City of Jersey City, 8 N.J. Tax 313, 318 (Law Div. 1986), aff'd, 214

N.J. Super. 584 (App. Div. 1987). "It necessarily follows that the authority to withdraw or settle litigation also lies in the governing body." Clinton Twp. Citizen's Comm. v. Mayor & Council of the Twp. of Clinton, 185 N.J. Super. 343, 352 (Law Div. 1982).

The court also finds that permissive intervention would unduly prejudice the original parties to this action. Plaintiff filed its appeals of the tax assessments timely and with the expectation that its matters would proceed in the normal course. Nuckel did not attempt to intervene until well after any responsive pleading was due. Plaintiff has prosecuted its appeals accordingly.

Moreover, if permitted to intervene, Nuckel would have the ability to reject a settlement or withhold his consent to a stipulation of dismissal. Nuckel's assertion that the governing body will enter into an unfavorable settlement of the tax appeals is speculative at best. The "good faith of public officials is to be presumed; their determinations are not to be approached with a general feeling of suspicion." City of Asbury Park v. Asbury Park Towers, 388 N.J. Super. 1, 11 (App. Div. 2006) (citation omitted and internal quotation marks omitted). Permitting Nuckel to intervene would interfere with the Borough's sole power to defend the cases and determine the course of the litigation. Id. at 12-13; Jeffers, 8 N.J. Tax at 318.

Conclusion

Nuckel's assertion of an affirmative claim is beyond the statute of limitations and may not be brought by way of permissive intervention. Further, Nuckel has no standing to defend the assessments. Moreover, permitting Nuckel to intervene would unduly prejudice the rights of the original parties to the litigation, including the Borough's exclusive right to defend and/or settle the assessments.

For the reasons set forth above, the court denies Nuckel's motion for permissive intervention in the instant actions.