

**NOT FOR PUBLICATION WITHOUT THE APPROVAL OF
THE TAX COURT COMMITTEE ON OPINIONS**

-----x		
FARMLAND DAIRIES, INC.,	:	TAX COURT OF NEW JERSEY
	:	DOCKET NOS. 009501-2014
	:	004801-2015
Plaintiff,	:	002499-2016
	:	
v.	:	
	:	
BOROUGH OF WALLINGTON,	:	Approved for Publication In the New Jersey Tax Court Reports
	:	
Defendant.	:	
-----x		

Decided: June 21, 2016

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

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

Joseph S. Sherman for movant
(Beattie Padovano, LLC, attorneys).

FIAMINGO, J.T.C.

This is the court’s opinion on the motion of Donald Nuckel (“movant”) to intervene in the tax appeals filed by Farmland Dairies, Inc. (“plaintiff”) on property owned by it in the Borough of Wallington (the “Borough”) for tax years 2014 through 2016. Movant’s cause of action is set forth in N.J.S.A. 54:3-21, which also provides the statute of limitations for the bringing of the claim. Movant neither filed complaints establishing his claim within the applicable statute of limitations, nor filed the motion to intervene in plaintiff’s actions within such time. Movant’s failure to take timely action is a fatal jurisdictional flaw. His motion to intervene is denied.

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 10.01 on the official tax map of the Borough (“subject property”) for tax years 2014, 2015 and 2016.¹

Movant certifies that he is the owner (directly or by virtue of his interests in various entities) of interests in real property located in the Borough, including property which is “immediately adjacent to and abuts the subject property.” He alleges that the subject property is under assessed for each of the years in question; that decisions in the pending appeals “will cause [him] to be aggrieved or to be discriminated against due to the underassessment of the Subject Property;” and that he has a right pursuant to N.J.S.A. 54:3-21 to contest the assessment of the subject property for each of the years under appeal. Movant did not independently file any complaints contesting the assessment of the subject property within the appropriate statute of limitations. Instead, on April 13, 2016, movant filed the within motions to intervene under R.4:33-1 or R. 4:33-2 in each of the referenced appeals.²

Both the plaintiff and the Borough filed opposition to the motion and oral argument was held before this court.

Intervention as of Right

R. 4:33-1, Intervention as of Right, provides:

Upon timely application anyone shall be permitted to intervene in an action if the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

¹ Plaintiff also has tax appeals pending for the years 2012 and 2013. Movant did not move to intervene in these earlier years.

² Included with the motion are proposed complaints wherein the movant alleges that the subject property is under assessed.

In order to grant the application to intervene, the moving party must demonstrate that 1) he has standing to intervene; 2) his intervention does not violate any applicable statute of limitations or filing deadlines; and 3) he satisfies the criteria set forth in R. 4:33-1. Mobil Administrative Services Co. v. Township of Mansfield, 15 N.J. Tax 583, 587 (Tax 1996), aff'd, 17 N.J. Tax 509 (App. Div. 1997).

The determination of the two predicate issues of standing and timeliness are not made with reference to the standards set forth in R. 4:33-1 but are made independent thereof. Id. at 588. That is, movant's standing to bring the underlying action claimed in his proposed complaints and the timeliness of his motion, are determined with reference to the statute that grants the right claimed by him. In this matter, that statute is N.J.S.A. 54:3-21, which provides in pertinent part that

a taxpayer . . . feeling discriminated against by the assessed valuation of other property in the county, . . . 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 \$1,000,000.

[N.J.S.A. 54:3-21(a)(1).]

“[N.J.S.A. 54:3-21(a)] has been part of the real property assessment law since 1906 . . . and in 1908 was construed, in accordance with its plain language, as according standing to a taxpayer to challenge, on discrimination grounds, the alleged underassessment of the property of others in the district.” (citations omitted). Atrium Development Corp. v. Continental Plaza Corp., 214 N.J. Super. 639, 641 (App. Div. 1987); see also Lidell v. Mimosa Lakes Ass'n, 6 N.J. Tax 417 (Tax 1984); Bostian v. Franklin State Bank, 1 N.J. Tax 270 (Tax 1980) (where taxpayers appealed the assessments of property owned by other taxpayers, apparently without objection and without discussion of standing by the court).

Movant has alleged that he is the owner of real property and a taxpayer in the County of Bergen. It is therefore apparent that the movant has standing to contest the underassessment of the subject property in the case at bar pursuant to N.J.S.A. 54:3-21(a)(1). The reliance of the plaintiff and the Borough on Judge Kuskin’s determination that the movant in Mobil lacked standing is misplaced. In that matter, the proposed intervenor moved to intervene in an appeal contesting the alleged over assessment of property that the intervenor purchased after the deadline for filing a tax appeal had expired. The court ruled that the movant lacked standing since it was not a “taxpayer” as of the filing deadline because it had no interest in the subject property and no obligation to pay property taxes assessed to the property. Mobil Administrative Services Co. v. Township of Mansfield, supra, 15 N.J. Tax at 588.

While the movant in this matter is similarly situated in that he neither has an interest in the subject property nor is obligated to pay the taxes thereon, he alleges that he is a taxpayer and that he is aggrieved by an underassessment of “other property in the county.” In those circumstances the statute does not require that he have an interest in the subject property or pay the taxes thereon—it requires only that he allege that he is discriminated against because “another’s assessment is below the common level range . . . when his own is above that range.” Atrium Development Corp. v. Continental Plaza Corp., supra, 214 N.J. Super. at 642. Movant thus satisfies the first prerequisite of standing.

The next question to be resolved is whether movant’s intervention will violate any applicable statute of limitations or filing deadline.

In tax appeal matters, “[a]n application for intervention is subject to the applicable statute of limitations.” Mobil Administrative Services Co. v. Township of Mansfield, supra, 15 N.J. Tax at 590–91. Again the provisions of N.J.S.A. 54:3-21(a)(1) reveal the applicable statute of

limitations. As noted above, that statute requires that a complaint 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.” N.J.S.A. 54:3-21(a)(1). Although no party provided the court with the actual deadlines for the years in question, movant does not contend that his motion was filed within any of the filing deadlines set forth in the statute.³

Compliance with statutory filing requirements in the tax court is an unqualified jurisdictional imperative, long sanctioned by the courts. “It is well established that ‘the courts of this state have traditionally required that taxpayers file timely applications as well as appeals and that they are barred from relief if they fail to do so.’” City of Hackensack v. County of Bergen, 24 N.J. Tax 390, 401 (App. Div. 2009) (citations omitted). “The basis for these decisions has been that statutory tax deadlines are ‘substantive’ or ‘jurisdictional’ statutes of limitation and that courts are without authority to extend such deadlines established by the New Jersey Legislature.” Ibid. (citations omitted). “[T]he statutory time prescription for the filing of an appeal has uniformly been held to constitute a non-relaxable jurisdictional requirement attended by the consequence of preclusion of the action if not complied with.” F.M.C. Stores Co. v. Borough of Morris Plains, 195 N.J. Super. 373, 381 (App. Div. 1984) (citations omitted). Compliance with the filing requirement as set forth in the statute is a necessary predicate to establish jurisdiction in the Tax Court for review of an assessment. See N.J.S.A. 54:3-21; see also Hovbilt, Inc. v. Township of Howell, 138 N.J. 598, 603–04 (1994). Failure to file a pleading until well after the filing deadlines is a “fatal jurisdictional defect.” F.M.C. Stores Co. v. Borough of Morris Plains, 100 N.J. 418, 425 (1985).

³ Movant’s motion to intervene was filed almost two years after plaintiff’s 2014 complaint was filed on April 29, 2014, more than one year after the 2015 tax year complaint was filed on March 24, 2015 and thirteen days after the April 1 deadline for 2016.

Movant did not timely file any complaint for relief under N.J.S.A. 54:3-21 with respect to the underassessment of plaintiff's property. Without doubt, had movant filed complaints on the date he filed his motion, they would have been untimely.

Instead, movant has filed the within motion to intervene, attempting to avoid the applicable statute of limitations. The court notes that it has been held that where it is necessary to make application for leave to amend pleadings in an action, then as "so far as the statute of limitations is concerned, the action is deemed commenced against the new defendant when the motion for leave is made." Ioannou v. Ivy Hill Park Section Four, Inc., 112 N.J. Super. 28, 38 (Law Div. 1970). Similarly, an intervenor's action is considered within the statute of limitations if the motion to intervene is filed within the statutory period, even if leave to intervene and the actual complaint come after the statutory period expires. Ibid.; see also Mobil Administrative Services Co. v. Mansfield, supra, 15 N.J. Tax at 591. However, the within motion to intervene was not filed within the statute of limitations for any of the years in which movant requests intervention.

Movant contends that, notwithstanding the undeniable lateness of his actions, his application is "timely" under R. 4:33-1 because it will not "unduly delay or prejudice" the original parties. See Atlantic Employers Ins. Co. v. Tots & Toddlers Pre-School Day Care Center, 239 N.J. Super. 276, 280 (App. Div. 1990) (whether intervention as of right should be granted may be determined by evaluating the extent to which a grant of the motion will unduly delay or prejudice the rights of the original parties.); American Civil Liberties Union of N.J., Inc. v. County of Hudson, 352 N.J. Super. 44, 69 (App. Div. 2002).

However, where, as here, the underlying action is barred by the statute of limitations, even an amendment to a timely filed pleading is not permitted. See Hackensack Water Company v. Township of North Bergen, 8 N.J. Super. 139, 142 (App. Div. 1950). Granting movant's request

to intervene in this action would be tantamount to extending the statute of limitations. This court has no power to do so. See F.M.C. Stores, *supra*, 100 N.J. 418.

While not addressed by any of the parties to this motion, the court has reviewed the provisions of R. 8:3-8(c) to determine whether the relation-back doctrine applies to the movant's application and finds that it does not.⁴ R. 8:3-8 provides general requirements for the amendment to pleadings filed in the Tax Court. Subsection (c) of the rule provides that an amendment will relate back to the date of the original pleading provided that no party is significantly prejudiced by said amendment. Subsection (c) was implemented in response to the Supreme Court's decision in Prime Accounting Dept. v. Township of Carney's Point, 212 N.J. 493 (2013), which permitted the amendment of a complaint to correct the misidentification of the plaintiff and the relation back of the amendment to the date of filing of the initial complaint. The Supreme Court specifically invited the Supreme Court Committee on the Tax Court "to consider whether a specific rule applying to the relation-back doctrine in the setting of tax appeals would address considerations unique to" tax appeal litigation. *Id.* at 517.

Prior to the amendment of R. 8:3-8, determination of whether an amended pleading would relate back in Tax Court was made with reference to R. 4:9-3. Prime Accounting Dept. v. Township of Carney's Point, *supra*, 212 N.J. at 512–13. Indeed, R. 8:3-8(c)(2) provides that "[t]o the extent that R. 8:3-8 and R. 4:9-3 are not consistent, R. 8:3-8 governs."

No reported decision has yet to interpret R. 8:3-8(c). Decisions under R. 4:9-3 are clear that that rule is to be liberally applied, especially "[w]here the amendment constitutes the same matter more fully or differently laid, or the gist of the action or the basic subject of the controversy

⁴ See, e.g., Mobil Administrative Services Co. v. Township of Mansfield, *supra*, 15 N.J. Tax at 592–94, where Judge Kuskin, in *dicta*, discussed the application of the relation back doctrine of R. 4:9-3 to intervention where the proposed intervenor's claim is identical to that alleged in the plaintiff's complaint.

remains the same.” Prime Accounting Dept. v. Township of Carney’s Point, *supra*, 212 N.J. at 512 (quoting Harr v. Allstate Ins. Co., 54 N.J. 287, 299 (1969)). Despite its liberal application, it does not save claims or defenses that are distinctly new or different from those previously asserted. See Notte v. Merchants Mut. Ins. Co., 185 N.J. 490, 499 (2006).

This is not a matter of allowing a current party to litigation to amend an already pending, timely-filed pleading. Instead, movant asks to be permitted to intervene in a matter in which he is not a party and to assert a new claim, out of time. “The relation-back Rule ‘does not authorize amendment of the pleading to allege a new cause of action against another party to the litigation [that] is barred by the running of the statute of limitations.’” Molnar v. Hedden, 138 N.J. 96, 104 (1994) (quoting Pressler, Current N.J. Court Rules, comment 1 on R. 4:9-3 (1994)). “That is because ordinarily, after the statute of limitations has run, the opposing party ‘acquire[s] a vested right to be forever free of [the relevant claim].’” *Id.* at 104 (citing McGlone v. Corbi, 59 N.J. 86, 94 (1971)).

In the case before this court, the movant has filed no pleadings that he seeks to amend and is instead attempting to file pleadings alleging a new cause of action for the first time. Movant seeks to avoid the application of the appropriate statute of limitations through the guise of intervening in plaintiff’s complaints.

The court finds that movant’s failure to timely file any complaints contesting the alleged underassessment of the plaintiff’s property deprives this court of jurisdiction to hear that claim. Permitting movant to intervene at this late date and to file complaints would allow the prosecution of a cause of action barred by the statute of limitations.⁵

⁵ The court notes that no timely filed counterclaim alleging an underassessment was filed for any of the years in question. Although the Borough filed an Answer and Counterclaim to plaintiff’s 2016 tax appeal, it was filed some 28 days after service of the Complaint and is therefore untimely. See R. 8:4-3(a); N.J.S.A. 54:3-21. Being untimely,

Conclusion

Movant's motion to intervene is denied.

it is outside the jurisdiction of this court and is not a valid claim. See F.M.C. Stores Co. v. Borough of Morris Plains, supra, 100 N.J. 418.