STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: January 14, 2016)

LEHIGH CEMENT CO.	:	
	:	
VS.	:	**C.A. NO. PC-2012-6580**
	:	
DAVID QUINN, IN HIS CAPACITY AS TAX ASSESSOR OF THE CITY OF PROVIDENCE, RHODE ISLAND	:	

DECISION

I

Facts & Travel

LANPHEAR, J. Since 2002, Plaintiff Lehigh Cement Co. (Plaintiff or Lehigh) has leased 3.65 acres of land (the leased land) located at the Port of Providence from ProvPort, a nonprofit, tax-exempt, public-private partnership. In 2005, Lehigh and the City of Providence (the City) resolved a dispute regarding whether Lehigh owed property taxes on the leased land. After determining that Lehigh did owe some property taxes, Lehigh paid the property taxes in full on the leased land from 2006-2009. In 2010, Lehigh discovered that the City had erroneously imposed property tax on Lehigh in excess of what it owed for the tax years 2006-2009. Lehigh alleges that the City mistakenly taxed Lehigh as though it leased 16.8 acres of land, rather than 3.65 acres. The City corrected its records in 2010 and has subsequently issued accurate tax bills to Lehigh.

In December 2010, Lehigh met with the Tax Assessor's Office to discuss the overbilling. Lehigh alleges that the then-Tax Assessor stated that he would review the matter and, if an error had occurred, he would "rectify" it. The 2010 Tax Assessor left his position in 2011. During

2011, Lehigh attempted to meet with the Tax Assessor's Office; however, the office did not respond to his efforts. In 2012, the Defendant David Quinn (Defendant or Mr. Quinn) replaced the former Tax Assessor. Lehigh met with the Defendant in 2012 but the parties did not resolve the matter. Lehigh brought the instant suit in Superior Court on December 21, 2012. On August 25, 2015, the City filed a Super. R. Civ. P. 12(b)(6) Motion to Dismiss for failure to state a claim. On November 17, 2015, the Court denied Defendant's Motion. Subsequently, the City filed a Motion for Summary Judgment.

In its Complaint, Lehigh contends that it has been damaged due to the City's mistake and is entitled to the difference between the amount it owed to the City in property taxes and the amount it erroneously paid between the years 2006-2009. In support of its argument, Lehigh contends that the City's mistake in assessing the amount of property tax owed constitutes an illegal assessment. Therefore, Lehigh alleges that it is owed a refund under G.L. 1956 §§ 44-5-23 and 44-5-27, as well as the Rhode Island Constitution article 1, section 2.

II

Standard of Review

It is well settled that "summary judgment is a harsh remedy that must be applied cautiously." DePasquale v. Venus Pizza, Inc., 727 A.2d 683, 685 (R.I. 1999). As such, summary judgment is appropriate when, ""after viewing the admissible evidence in the light most favorable to the nonmoving party, no genuine issue of material fact is evident from the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any . . ."" Holley v. Argonaut Holdings, Inc., 968 A.2d 271, 274 (R.I. 2009) (quoting Smiler v. Napolitano, 911 A.2d 1035, 1038 (R.I. 2006)) (internal quotation marks omitted).

A party opposing a motion for summary judgment has an affirmative duty to prove "the existence of a disputed issue of material fact and cannot rest upon mere allegations or denials in the pleadings, mere conclusions, or mere legal opinions." Santucci v. Citizens Bank of R.I., 799 A.2d 254, 257 (R.I. 2002).

III

Analysis

1

G.L. 1956 § 44-5-27

Turning to its first argument, the City argues that § 44-5-27 does not apply in this situation. The City contends Lehigh bypassed the appellate procedure laid out in § 44-5-26, and instead, brought this case directly in the Superior Court. Therefore, Lehigh must show that the City's tax assessments from the years 2006-2009 were illegal in order to obtain relief under § 44-5-27. The City alleges that because the erroneous tax assessment does not qualify as an illegal tax assessment, Lehigh is barred from claiming relief under § 44-5-27. In response, Lehigh contends that the assessment constitutes an illegal tax because the City erroneously taxed Lehigh on property it does not own.

Normally, an aggrieved party appealing from an assessment of taxes must first proceed through the administrative appeals process set out in § 44-5-26 and cannot appeal directly to the Superior Court. The Rhode Island Supreme Court has stated, "except for cases brought in equity, the only avenue of appeal from an assessment of taxes upon a ratable estate is to file an appeal pursuant to § 44-5-26." Nunes v. Marino, 707 A.2d 1239, 1244 (R.I. 1998). Section 44-5-26 primarily sets forth an administrative appeal process whereby a person aggrieved by a tax assessment first must file an appeal with the local tax assessor. Sec. 44-5-26(a). After the

assessor issues a decision, the taxpayer may appeal that decision to the local tax board of review. See id. From the tax board of review, an aggrieved person may petition the Superior Court for relief. See id. at (b).

While normally § 44-5-26 does provide an exclusive remedy for appealing a tax assessment, an aggrieved party may bring a case alleging an illegal tax assessment under § 44-5-27. Narragansett Elec. Co. v. Minardi, 21 A.3d 274, 276 (R.I. 2011). Thus, in order to bypass the procedures set out in § 44-5-26 and appeal a tax assessment directly to the Superior Court, a plaintiff must prove that the tax assessment was illegal. Here, it is uncontested that Lehigh has bypassed the procedures laid out under § 44-5-26 and appealed its tax assessment directly to the Superior Court. Thus, in order to bring this appeal directly in the Superior Court, Lehigh must show that the City's tax assessments from 2006-2009 were illegal.

In its Complaint, Lehigh argues that the City "erroneously assessed" Lehigh's taxes in an amount larger than what it should have paid in the years 2006-2009. However, the fact that a tax assessment is wrong or is excessive is not sufficient to prove that the assessment was illegal. In Narragansett Elec. Co., the Rhode Island Supreme Court held that simply stating that a tax assessment is excessive in a complaint does not prove illegality under § 44-5-27 and will not defeat a 12(b)(6) motion to dismiss. 21 A.3d at 278.

Similar to Narragansett Elec. Co., Lehigh's Complaint does not allege that the assessment was so excessive as to amount to constructive fraud. Nor does Lehigh's Complaint allege that the City assessed exempt property or conducted the assessment in a discriminatory manner. Rather, Lehigh simply claims that the City's assessment was "erroneous." Therefore, Lehigh offers no support for its conclusory allegation that it was assessed an illegal tax and cannot avail itself of a direct appeal to the Superior Court under § 44-5-27.

2

Timeliness

The City also argues that Lehigh cannot bring this suit because Lehigh filed its Complaint several years after it discovered the assessment error, in violation of the period of limitations contained in § 44-5-27. Section 44-5-27 provides that,

> "[A] taxpayer may invoke the equity jurisdiction of the superior court; provided, that the complaint is filed within three (3) months after the last day appointed for the payment, without penalty, of the tax, or the first installment of the tax, if it is payable in installments."

In this case, Lehigh did not file a Complaint until 2012, two years after it discovered the tax assessment error. Section 44-5-27 provides that a plaintiff file a complaint "within three (3) months after the last day appointed for the payment." Therefore, the time limitation contained in § 44-5-27 bars Lehigh from seeking relief in equity. See Wickes Asset Management, Inc. v. Dupuis, 679 A.2d 314, 320 (R.I. 1996) (holding that a plaintiff had failed to toll the limitations period under § 44-5-27); Northgate Associates v. Shorey, 541 A.2d 1192, 1193 (R.I. 1988) (holding that plaintiff could not bring suit under § 44-5-27 because it had not complied with the timing requirements of § 44-5-27); Ferland Corp. v. Bouchard, 626 A.2d 210, 217 (R.I. 1993) (holding that plaintiff could not seek relief pursuant to § 44-5-27 because it had not complied with the three month timing limitation).

In response, Lehigh argues that it had no knowledge that it had a claim under § 44-5-27 until after the limitation period had run. Thus, Lehigh alleges that the discovery rule applies in the instant case, rather than the limitation period contained in § 44-5-27. The Rhode Island Supreme Court has stated that it is proper for a trial court to determine whether the discovery rule applies on a motion for summary judgment. Benner v. J.H. Lynch & Sons, Inc., 641 A.2d

332, 335 (R.I. 1994). The "discovery rule applies in narrowly circumscribed factual situations where the injury suffered is unknown to a plaintiff." Moore v. Rhode Island Bd. of Governors for Higher Educ., 18 A.3d 541, 544 (R.I. 2011) (internal citation omitted). Assuming the discovery rule applies in this tax appeal, Lehigh still has not met its burden. In a case filed under § 44-5-27, application of the discovery rule would toll the accrual of the three-month limitations clause only until Lehigh had knowledge of the wrongful conduct by the City. See Mills v. Toselli, 819 A.2d 202, 205 (R.I. 2003) ("'[T]he heart of the discovery rule is that the statute of limitations does not begin to run until the plaintiff discovers, or with reasonable diligence should have discovered, the wrongful conduct of the [defendant].'") (quoting Supreme Bakery, Inc. v. Bagley, 742 A.2d 1202, 1204 (R.I. 2000)) (internal quotations omitted). Here, Lehigh did not file a complaint until two years after it discovered the assessment error.

Lehigh also claims that the limitations period was extended by the theory of equitable tolling. Equitable tolling is a "sparingly invoked doctrine," which suspends the running of a limitations period if a plaintiff "in the exercise of reasonable diligence, could not have discovered information essential to [his claim]." Ortega Candelaria v. Orthobiologics LLC, 661 F.3d 675, 679-80 (1st Cir. 2011). Moreover, "[e]ven where available, equitable tolling is normally appropriate only when circumstances beyond a litigant's control have prevented him from filing on time." Delaney v. Matesanz, 264 F.3d 7, 15 (1st Cir. 2001); see also Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005) ("Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way.").

Here, Lehigh contends it relied on Defendant's statements that it was "working on the problem" as evidence that there is a genuine issue of material fact as to whether Lehigh's delay

in filing a claim pursuant to § 44-5-27 was reasonable. It relies on Rivera v. Employees' Retirement System of Rhode Island, 70 A.3d 905 (R.I. 2013); however, Rivera is distinguishable from the facts in this case. In Rivera, an administrative agency gave incorrect information to the plaintiff regarding the deadline to appeal a decision verbally and in writing. Id. at 913. The trial justice in the case ruled that her reliance on the statements was unreasonable. Id. However, on appeal, the Supreme Court determined that due to the agency's "authoritative misstatements," the trial justice incorrectly determined that her reliance was unreasonable. Id. Thus, circumstances beyond the litigant's control, namely the misstatements by the agency, prevented the plaintiff from filing on time. See Delaney, 264 F.3d 7.

Here, however, Lehigh raises no question of fact as to circumstances beyond its control which prevented it from filing on time. Here, unlike Rivera, the Plaintiff was not provided with "authoritative misstatements" regarding its ability to file suit against the Defendant for an alleged illegal tax. To the contrary, Lehigh admits it knew of the City's erroneous assessment in 2010 and did not file a claim against the City under §§ 44-5-26 or 44-5-27. Given that Lehigh knew of the information essential to its claim in 2010 and did not diligently pursue its rights, Lehigh has not provided evidence that circumstances beyond its control prevented it from filing a complaint. See Delaney, 264 F.3d at 15.

Thus, because Lehigh has not alleged sufficient facts that it was assessed an illegal tax, and Lehigh has not complied with the period of limitations contained in § 44-5-27, it cannot avail itself of a direct appeal to the Superior Court under § 44-5-27.

3

G.L. 1956 § 44-5-23

Next, the City argues that § 44-5-23[1], entitled "Assessment of back taxes on real estate," does not apply here because the statute does not create a private cause of action for which Lehigh can seek relief. Citing to McCanna v. Board of Assessors of Narragansett, 48 R.I. 396, 137 A. 694 (1927), Lehigh contends that § 44-5-23 does create a private cause of action. Further, without citing any case law, Lehigh contends that § 44-5-23 offers it remedial relief in the form of a monetary refund.

Lehigh's reliance on McCanna is misplaced. In McCanna, the plaintiffs brought a suit in equity to restrain the City from assessing real property that the City claimed had escaped taxation from the years 1922-1925. Id. The plaintiffs claimed that under R.I.G.L. 1923, ch. 60 § 25[2]—

[1] Section 44-5-23 provides in pertinent part that:

> "If any real estate liable to taxation in any city or town has been omitted in the assessment of any year or years and has thereby escaped taxation, or if any tax has been erroneously or illegally assessed upon any real estate liable to taxation in any city or town in any year or years, and because of the erroneous or illegal assessment the tax cannot be collected, or if paid has been recovered, the assessor of taxes of the city or town in the next annual assessment of taxes after the omission or erroneous or illegal assessment is known to him or her shall assess or reassess, as the case may be, a tax or taxes against the person or persons who were the owner or owners of the real estate in the year or years, to the same amount to which the real estate ought to have been assessed in the year or years." Id.

[2] R.I.G.L. 1923, ch. 60, § 25 provided that:

> "If any real estate liable to taxation has been omitted in the assessment of any year and has thereby escaped taxation, or if any tax has been erroneously assessed thereon in any year and as a consequence cannot be collected, or, if paid, has been recovered back, the assessors, in the next annual assessment of taxes after

which was the predecessor statute to § 44-5-23—the real property had not been "'omitted in [previous tax] assessment[s]' within the meaning of those words in the statute." Id. at 396, 137 A. at 695. Rather, the property had been listed on the assessment roll when the City had assessed the taxes for the property in 1926, and the City had simply overlooked it. Id. Therefore, the plaintiffs alleged the City had merely missed its opportunity to collect the taxes in 1926, and was thereafter barred from reassessing the taxes as an omitted tax under ch. 60, § 25. Id. The Court ultimately found that under the statutory provisions of ch. 60, § 25, the City had to wait to reassess the plaintiffs' taxes until the following year in 1927. Id. Therefore, the Court granted the plaintiffs injunctive relief until such time as the City could appropriately pursue a reassessment under the timing constraints in the statute. Id.

That decision does not support Lehigh's argument that § 44-5-23 creates a private cause of action. Rather, in McCanna, the Court examined whether the defendants had complied with the timing requirements of § 44-5-23's predecessor. See id. Nowhere in the case did the Court suggest that the statute created a private cause of action. Moreover, in cases decided after McCanna, the Rhode Island Supreme Court has explicitly stated that "except for cases brought in equity [under § 44-5-27], the only avenue of appeal from an assessment of taxes . . . is to file an appeal pursuant to § 44-5-26. Nunes, 707 A.2d at 1244. Therefore, it does not appear that § 44-5-23 creates a private cause of action.

> such omission or erroneous or illegal assessment is known to them, shall assess a tax on such real estate to the same amount it should have been assessed in such year; that such assessment shall be in addition to any assessment against the owner for the current year, and shall be placed on a special tax roll and annexed to the general tax roll for the current year, and shall be made within six years of the date of assessment from which such real estate was omitted or erroneously assessed."

See McCanna, 48 R.I. 396, 137 A. at 695 (citing R.I.G.L. 1923, ch. 60, § 25).

Lastly, this Court cannot find any support —nor does Lehigh provide any case law—for the argument that § 44-5-23 allows Lehigh to collect a refund for the taxes it paid in excess of the amount it owed. Rather, previous cases have analyzed § 44-5-23 to determine whether a *city's* reassessment and imposition of back taxes on a private citizen were valid under the language of the statute. See Capital Properties, Inc. v. State, 749 A.2d 1069, 1085 (R.I. 1999) (holding that a city could not impose back taxes on a private entity under § 44-5-23 because "the tax assessments were neither omitted in the assessment nor erroneously assessed"). Moreover, as the City points out, Lehigh's property was subsequently assessed in 2010 and has since been taxed correctly.[3] Therefore, § 44-5-23, which relates to the assessment of back taxes on real estate, does not apply here, nor does it create a private right of action.

4

Rhode Island Constitution Article I, Section 2

Additionally, the City argues that because the City's error does not amount to an illegal assessment, the fair-distribution clause of article 1, section 2 of the Rhode Island Constitution does not create a private cause of action. The Rhode Island Supreme Court has assessed the fair-distribution clause in the context of illegal taxation cases. See Picerne v. DiPrete, 428 A.2d 1074, 1076 (R.I. 1981). However, because Lehigh has not alleged any facts—other than a bare assertion—sufficient to support its argument that it was assessed an illegal tax, the Court need not address Lehigh's argument that the City violated the fair-distribution clause.

[3] In Capital Properties, the high Court did not hold that § 44-5-23 created an independent cause of action, as Lehigh suggests. The statute describes how certain new assessments will be imposed. Hence, the Capital Properties Court applied the statute's rationale, but did not rely upon the statute as an independent action. (In Capital Properties, the Decision of the Superior Court was adopted by reference and is completely set forth in the Supreme Court Opinion.)

IV

Conclusion

Here, Lehigh bypassed the appeals procedure laid out in § 44-5-26 and has not sufficiently demonstrated that the erroneous tax assessments from 2006-2009 were illegal as required for a suit in equity under § 44-5-27. Therefore, Lehigh cannot claim relief under § 44-5-27 or article 1, section 2 of the Rhode Island Constitution. Further, Lehigh has not provided any support—nor can this Court find any support—for its argument that it is entitled to relief under § 44-5-23.

The City's motion for summary judgment is granted.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Lehigh Cement Co. v. Quinn**
CASE NO:	**PC-2012-6580**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**January 14, 2016**
JUSTICE/MAGISTRATE:	**Lanphear, J.**
ATTORNEYS:	
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