STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

(FILED: June 19, 2014)

COMMERCE PARK ASSOCIATES 1, LLC, ET AL.	:	
VS.	:	**C.A. No. KC 07-1433**
TED PRZYBYLA, In His Official Capacity As Finance Director of THE TOWN OF COVENTRY, ET AL.	:	

DECISION

K. RODGERS, J. The instant matter is before this Court for decision on cross motions following arguments while this Court was sitting in Kent County.[1] Commerce Park Associates 2, LLC (Commerce Park 2) and Commerce Park Associates 13, LLC (Commerce Park 13, and collectively, Plaintiffs), just two of seventeen named plaintiffs, seek partial summary judgment on Count I of the Second Amended Complaint. Defendant Town of Coventry (the Town) seeks dismissal of the Second Amended Complaint for failure to state a claim upon which relief may be granted. For the reasons that follow, both motions are denied.

I

Facts and Travel

This controversy is one of a number of cases filed in Kent County Superior Court by Nicholas Cambio (Cambio), the manager of several related business entities which currently manages and largely owns the Centre of New England, a mixed-use development in the Town. The various related business entities (collectively, Commerce Park) have repeatedly challenged

[1]This Court presently sits in Washington County.

the Town's sewer tax assessments and contend that they are exempt from paying sewer tax assessments. A brief synopsis of the tortured history of litigation between Commerce Park and the Town, as well as the facts of the instant case, are summarized below.

The sewer assessment directed at Commerce Park 2 at issue here dates back to 1999. Commerce Park 2 owned the commercial building at 80 Centre of New England Boulevard. The Town imposed a sewer assessment in the amount of $49,875 on that building. Commerce Park 2 made two initial payments totaling $3,855.68, but then ceased payments. The Town has charged interest and penalties on the assessment amounting to over $115,000.

In 2006, the Town imposed a sewer assessment of $49,082 on a strip of retail shops located at 710-720 Centre of New England Boulevard owned by Commerce Park 13. Commerce Park 13 has failed to pay any amount of that sewer assessment which is at issue in this case. The Town has charged interest and penalties on the assessment amounting to over $75,000.

The instant case was filed in December 2007, seeking declaratory judgment regarding the parties' rights and obligations under certain agreements reached between Commerce Park and the Town. Within two months thereafter, another lawsuit was filed by eight of the same Commerce Park entities named in this action, including Commerce Park 2 and Commerce Park 13, seeking relief from the Town's sewer assessments pursuant to 1997 R.I. Pub. Laws 330 and Art. V, Sec. 19 of Part II of the Town's Code of Ordinances. See Commerce Park Associates I, LLC, et al. v. Town of Coventry Sewer Assessment Board of Review, et al., C.A. No. KM 08-0262 (the 2008 Action). The 2008 Action remains pending.

In April 2011, Plaintiffs and others in the instant action filed a Second Amended Complaint. Count I, as amended, seeks declaratory relief declaring that the Town's sewer assessments against Plaintiffs' property are unlawful. Second Am. Compl., Count I. Plaintiffs

offer nine bases upon which they seek declaratory relief in Count I: the parcels assessed are connected to sewer mains in West Warwick and not connected to sewer mains or interceptors in the Town; the sewer assessments violate state public laws by recovering maintenance and operations costs rather than construction costs; the parcels assessed receive no benefit from the sewer infrastructure; the sewer assessment recovers the cost of sewer infrastructure in other municipalities which was built years before the subject sewer assessments were imposed; the amount of the sewer assessments is disproportionate to any benefit conferred and therefore is inequitable; the sewer assessments violate state and local laws; the sewer assessments are, in fact, ad valorem real property taxes and have been imposed in violation of local laws governing procedure for such taxes; the sewer assessments bear no reasonable relationship to the cost to the Town of constructing sewer infrastructure; and the sewer assessments violate certain agreements, contracts, consent judgments and treaties between Plaintiffs and the Town. Id. at ¶ 155(a)-(i). It is Count I that is the subject of Plaintiffs' Motion for Partial Summary Judgment.[2]

In late October 2011, the Town undertook the process of conducting tax sales for the various properties owned by the Commerce Park entities based upon the nonpayment of sewer assessments. Commerce Park filed another suit seeking declaratory and injunctive relief, challenging the legality of the sewer assessments and enjoining the Town from selling the

[2]The remaining sixteen counts of the Second Amended Complaint assert the following specific claims for declaratory relief against the Town: that the Town has violated public laws and Town Ordinances; that public laws authorizing the Town to impose sewer assessments are unconstitutional; and seeking to declare the parties' rights pursuant to certain agreements, a consent judgment and zoning permits. See Second Am. Compl., Counts II-VI. Additionally, the Second Amended Complaint includes counts against the Town for breach of contract; unjust enrichment; and equal access to justice. Id. at Counts VII, X, XII. A close reading of the allegations within the remaining claims reveals that the following claims are brought against all defendants: interference with prospective advantage; fraud; detrimental reliance; slander of title; violation of substantive and due process rights under both the United States and Rhode Island Constitutions; and usury. Id. at Counts VIII-IX, XI, XIII-XVII. The Town's Motion to Dismiss is directed to all named plaintiffs and all counts in the Second Amended Complaint.

properties for nonpayment of the allegedly unlawful sewer assessments. See Commerce Park Associates 1, LLC, et al. v. Monique Houle, in her capacity as Tax Collector of the Town of Coventry, et al., C.A. No. KB 11-1434 (the 2011 Action). As in the instant case, Commerce Park alleged that they are exempt from paying the disputed assessments on the Centre of New England properties based upon various agreements and a certain consent judgment entered into between Commerce Park and the Town. The Town moved to dismiss that action based upon plaintiffs' failure to exhaust their administrative remedies. Another justice of this Court issued a bench decision on December 15, 2011, and granted the Town's motion to dismiss. That decision specifically found that the appeal process set forth in G.L. 1956 § 44-5-26 applies to all tax assessment cases, including the subject sewer assessments, and that Commerce Park's failure to adhere to that process warranted dismissal of the plaintiffs' complaint. That decision was appealed to the Supreme Court.

Prior to the Supreme Court's decision on appeal from the 2011 Action, the instant cross motions were presented to this Court. Plaintiffs continued to argue that they are exempt from paying the disputed assessments on the Commerce Park properties based upon various agreements and a certain consent judgment entered into between Commerce Park and the Town. Plaintiffs also maintained that, in any event, they did exhaust their administrative remedies before the Town's Sewer Assessment Board of Appeals (the Board of Appeals), which denied them relief. In support thereof, Plaintiffs submitted an Affidavit of Cambio and a February 25, 2008 decision by the Board of Appeals, see Cambio Aff., at Ex. 6, and further rely upon their timely appeal of the 2008 Action in challenging the Board of Appeals' decision. The Town, for its part, relied upon the same argument that had been accepted by another justice of this Court in the 2011 Action and its conclusive effect on this matter pursuant to the doctrine of res judicata.

On March 13, 2014, the Rhode Island Supreme Court issued its decision vacating the trial court's dismissal of the 2011 Action. Commerce Park Associates 1, LLC, et al. v. Monique Houle, in her capacity as Tax Collector of the Town of Coventry, et al., No. S.U. 12-207 (R.I., filed Mar. 31, 2014). The Court found:

> "We conclude that the sewer assessments at issue in the instant matter are not taxes and that, accordingly, the tax appeal process in chapter 5 of title 44 is inapplicable. We therefore hold that the hearing justice erred in granting defendants' motion to dismiss on the grounds that plaintiffs had not followed the § 44-5-26 tax appeal process. We further hold that the appeal process set forth in § 19 of P.L. 1997, ch. 330 is the only process by which residents of Coventry may appeal any sewer assessments or charges levied by the town pursuant to its authority under the enabling act, including the assessments being challenged by plaintiffs here." Id., slip op. at 10.

The Court went on to consider and direct as follows:

> "The plaintiffs argue that they have, in fact, already followed the correct procedure by bringing their claims to the Coventry Sewer Assessment Board of Review, as provided for in § 19 of P.L. 1997, ch. 330, and then by filing an appeal to the Kent County Superior Court in a petition docketed as C.A. No. KM 08-262. Because we conclude that the hearing justice erred in finding that the process set forth in § 44-5-26 applied, we need not, and do not, reach the issue of whether plaintiffs' prior actions in filing suit in the Superior Court satisfied the requirements of the appeal process of § 19 of the enabling act, P.L. 1997, ch. 330. On remand, we direct the Superior Court to conduct a hearing as to whether plaintiffs had already followed the correct procedure in their 2008 complaint and to determine what effect, if any, the pendency of the 2008 complaint should have on the disposition of the instant case." Id. (emphasis added).

II

Standard of Review

In reviewing a motion to dismiss, this Court is mindful that '"[t]he sole function of a motion to dismiss is to test the sufficiency of the complaint."' Palazzo v. Alves, 944 A.2d 144,

149 (R.I. 2008) (quoting R.I. Affiliate, ACLU, Inc. v. Bernasconi, 557 A.2d 1232, 1232 (R.I. 1989)). In making its Rule 12(b)(6) determination, this Court '"assumes the allegations contained in the complaint to be true and views the facts in the light most favorable to the plaintiffs."' Giuliano v. Pastina, 793 A.2d 1035, 1036 (R.I. 2002) (quoting Martin v. Howard, 784 A.2d 291, 297-98 (R.I. 2001)). "[A] Rule 12(b)(6) motion to dismiss is [only] appropriate 'when it is clear beyond a reasonable doubt that the plaintiff would not be entitled to relief from the defendant under any set of facts that could be proven in support of the plaintiff's claim.'" Barrette v. Yakavonis, 966 A.2d 1231, 1234 (R.I. 2009). In making such a determination, this Court may not look to matters outside of the pleadings; and, if it does, must automatically convert the motion into a motion for summary judgment with its distinct standard of review. See Coia v. Stephano, 511 A.2d 980 (R.I. 1986).

In reviewing a motion for summary judgment, the preliminary question before this Court is whether there is a genuine issue as to any material fact which must be resolved. R.I. Hosp. Trust Nat'l Bank v. Boiteau, 119 R.I. 64, 376 A.2d 323 (1977); O'Connor v. McKanna, 116 R.I. 627, 359 A.2d 350 (1976). If an examination of the pleadings, affidavits, admissions, answers to interrogatories, and other similar matters reveals no such issue and the moving party is entitled to judgment as a matter of law, then the suit is ripe for summary judgment. Super. R. Civ. P. 56(c); see also Neri v. Ross-Simons, Inc., 897 A.2d 42, 47 (R.I. 2006); Casey v. Town of Portsmouth, 861 A.2d 1032, 1036 (R.I. 2004). In ruling upon a motion for summary judgment, this Court must review such evidence in the light most favorable to the nonmoving party. Casey, 861 A.2d at 1036 (quoting Duffy v. Dwyer, 847 A.2d 266, 268-69 (R.I. 2004)). In the face of summary judgment, the party who opposes the motion "carries the burden of proving by competent evidence the existence of a disputed material issue of fact and cannot rest on allegations or

denials in the pleadings or on conclusions or legal opinions." Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1225 (R.I. 1996); see also McAdam v. Grzelczyk, 911 A.2d 255, 259 (R.I. 2006).

III

Analysis

The Supreme Court's recent decision clearly dictates that the Town's Motion to Dismiss must be denied. Moreover, that decision reveals—and this Court agrees—that further proof is required to determine if Commerce Park 2 and Commerce Park 13, as well as the other named plaintiffs herein and in both the 2008 Action and the 2011 Action, satisfied the requirements of the appeal process set forth in § 19 of P.L. 1997, ch. 330, and what effect, if any, the 2008 Action should have on the disposition of this action as well as the 2011 Action. See Houle, slip op. at 10. Section 19 of the enabling legislation creating the Town's Sewer Authority governs appeals from any assessments or charges levied by the Town for the sewer system, and states in pertinent part:

> "Within sixty (60) days after mailing of notice of an assessment or charges [for construction and maintenance of the sewer system] * * *, any person aggrieved by such assessment, charge or order may appeal to the sewer board of review.
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> * * *
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> "If the board determines that such assessment[,] charge or order is unwarranted in whole or in part, it shall annul or modify the same and make such order as justice may require. Otherwise, it shall affirm the same. Within thirty (30) days after the decision of the sewer board of review, any party aggrieved, which may include the council, may appeal to the superior court which shall have the same powers to annul, modify, enter further orders or affirm as the sewer board of review." P.L. 1997, ch. 330, § 19.

Plaintiffs rely upon Cambio's Affidavit and a Board of Appeals decision dated February 25, 2008, as evidence that they fully exhausted their proper administrative remedies in contesting the Town's sewer assessments. While the 2008 Action appears to have been filed within the required thirty days following the Board of Appeals' February 25, 2008 decision, there has been no evidence presented upon which this Court could find that Commerce Park 2 and Commerce Park 13 appealed to the Board of Appeals within the required sixty days after their respective assessments were mailed to them. Furthermore, the February 25, 2008 decision by the Board of Appeals references the commercial property at issue here as owned by Commerce Park 2, among other properties owned by Commerce Park entities, but does not reference the commercial property at issue here as owned by Commerce Park 13, to wit, 710-720 Centre of New England Boulevard. The evidence, then, fails to establish that Plaintiffs are entitled to judgment as a matter of law on Count I as there remains an issue of fact whether Plaintiffs satisfied the requirements of the appeal process set forth in P.L. 1997, ch. 330, § 19.

Finally, contrary to Plaintiffs' assertion in their recent Supplemental Memorandum dated June 13, 2014, the Town's failure to come forward with evidence to demonstrate that there exist any genuine issues of material facts in response to Plaintiffs' Motion for Partial Summary Judgment on Count I of the Second Amended Complaint does not warrant judgment in Plaintiffs' favor as a matter of law. As demonstrated, there are issues of fact that exist concerning Plaintiffs' adherence to the strict time periods set forth in § 19 of the enabling legislation. Additionally, to rule now, as Plaintiffs request, would defeat the remand order of the Supreme Court directing that the Superior Court conduct a hearing as to whether all the Commerce Park plaintiffs satisfied the requirement of the appeal process in § 19, and to determine what effect, if any, the 2008 Action has on the various claims for declaratory relief seeking to declare the sewer

assessments unlawful. Clearly, this action is one of "the various cases pending" which should be consolidated with the 2011 Action and the 2008 Action into one action, in order to resolve all outstanding issues between the parties, in the interest of judicial economy. Houle, slip op. at 10, n.12. Indeed, Commerce Park's claims in the 2011 Action are substantially similar, if not identical, to the issues raised by all the plaintiffs in the instant action. Accordingly, this is but one of the several actions that requires further hearing as to whether these Plaintiffs and the other fifteen plaintiffs in this case satisfied the requirement of the appeal process in § 19.

For all these reasons, Plaintiffs' Motion for Partial Summary Judgment on Count I of the Second Amended Complaint is denied.

IV

Conclusion

For the foregoing reasons, the Town's Motion to Dismiss is denied, and the Motion for Partial Summary Judgment on Count I of the Second Amended Complaint filed by Commerce Park 2 and Commerce Park 13 is denied. This matter shall be returned to Kent County for consolidation with the 2008 Action and the 2011 Action, and any other matters the sitting justice in Kent County deems appropriate, as directed by the Supreme Court in Commerce Park Associates 1, LLC, et al. v. Monique Houle, in her capacity as Tax Collector of the Town of Coventry, et al., No. S.U. 12-207, slip op. at 10, n.12 (R.I., filed Mar. 31, 2014).

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Commerce Park Associates 1, LLC, et al. v. Ted Przybyla, et al.
CASE NO:	C.A. No. KC 07-1433
COURT:	Washington County Superior Court
DATE DECISION FILED:	June 19, 2014
JUSTICE/MAGISTRATE:	Kristin E. Rodgers
ATTORNEYS:	
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