STATE OF VERMONT

SUPERIOR COURT Windsor Unit	CIVIL DIVISION Docket No. 158-3-13 Wrcv
CHRISTOPHER KATUCKI and MARGARET KATUCKI, Plaintiffs v. TOWN OF NORWICH, Defendant	

DECISION

DEFENDANT'S MOTION TO DISMISS;
PLAINTIFFS' MOTION FOR LEAVE TO AMEND; AND
DISCOVERY MOTIONS

There are three issues now before the court: (1) defendant's motion to dismiss plaintiffs' first amended complaint; (2) plaintiffs' motion for leave to amend the first amended complaint; and (3) outstanding matters related to discovery, including a motion to compel filed by plaintiffs and defendant's related motion for a protective order. Throughout the course of this action, plaintiffs Christopher Katucki and Margaret Katucki have proceeded pro se, and defendant Town of Norwhich has proceeded with the representation of Attorney Frank H. Olmstead. Herein, the court disposes of all outstanding issues.

BACKGROUND

In 2008, the appraisal of plaintiffs' property in Norwich was listed on defendant's grand list at $805,800, an increase over the 2007 appraisal of $618,300. Plaintiffs grieved the listers' appraisal pursuant to 32 V.S.A. §§ 4221-4224, resulting in a reduction to $740,800. No further appeal was taken to the board of civil authority, as permitted by *id.* § 4404, and the appraisal of $740,800 remained on the grand list through 2011. In early 2012, plaintiffs claim they became aware of a practice known as "sales chasing," involving the inappropriate adjustment of a property's appraisal to a value reported in a recent sales transaction. Plaintiffs believe this practice was applied to them as their property was listed for sale in 2008 and their 2008 notice of appraisal indicated it was "adjusted per realtor listing."

Plaintiffs first raised their allegation of "sales chasing" in another grievance filed with the listers in June 2012 and, as a result thereof, their property appraisal for 2012 reverted back to its 2007 value of $618,300. Again, no appeal was taken to the board of civil authority. In July

2012, plaintiffs filed a request for $9,297.13 in back taxes with defendant's Board of Abatement. Under 24 V.S.A. § 1535(a)(4), municipal boards of abatement may abate taxes when there is "manifest error or a mistake of the listers." A hearing on plaintiffs' claim was held and, by decision dated February 13, 2013, the Board of Abatement denied plaintiffs request. Specifically, the Board found that the listers had not made a "mistake," as contemplated under the statute, and that even if there was a "mistake" or "manifest error," it would be inequitable to abate four years' worth of taxes under the doctrine of laches, as plaintiffs unreasonably delayed in pursuing their claims and abating nearly $10,000 in tax revenue would be unduly prejudicial to defendant and its other taxpayers.

Plaintiffs then commenced this action under Rule 75 of Vermont Rules of Civil Procedure ("V.R.C.P."), challenging the decision of the Board of Abatement and requesting relief in the form of $9,297.13 in back property taxes. On May 29, 2013, less than three months after commencing this action, plaintiffs moved for summary judgment. By entry order filed on July 5, 2013, this court denied the motion, explaining that abatement is permissive, not mandatory, and that plaintiffs were not entitled to the requested money judgment.

On August 2, 2013, plaintiffs filed another motion for summary judgment, asking that this court reverse the decision of defendant's Board of Abatement and find that the doctrine of laches is inapplicable here. By order filed on November 15, 2013, this court denied that motion, as well. Therein, this court noted that it reviews decisions of boards of abatement for "abuse of discretion" and that the language of the applicable statute, 24 V.S.A. § 1535, grants these boards almost complete discretion in determining whether abatement is appropriate. In other words, "[it] is entirely permissive and allows the Board to abate taxes, but does not require it to do so even if the taxpayer falls within one of the categories allowing for abatement." *Garbitelli v. Town of Brookfield*, 2011 VT 122, ¶14, 191 Vt. 76.

The court's decision would have entirely disposed of this action if not for the fact that contemporaneously to filing their motions for summary judgment, plaintiffs requested leave to file a first amended complaint. Their proposed pleading was effectively limited to adding a claim of what plaintiffs referred to as "unjust enrichment"—to wit, that defendant was unjustly enriched by collecting $9297.13 in property taxes that were based on an appraisal its listers knew or should have known to be unlawful. Defendant did not object to plaintiffs amending their complaint and, by entry order dated November 27, 2013, plaintiffs' motion for leave to amend was granted.

Thereafter, on May 20, 2014, defendant filed a motion to dismiss plaintiffs' claim of "unjust enrichment." By this motion, defendant characterizes plaintiffs' allegations as a challenge to the listers' actions and appraisals between 2008 and 2011, and argues that in order to raise such claims, it was incumbent upon plaintiffs to exhaust administrative relief available to them by statute. Plaintiffs' opposed defendant's motion and it is currently pending before the court.

Also pending before the court is plaintiffs' second motion for leave to amend, filed on June 17, 2014. Annexed to their motion is a proposed second amended complaint, which

incorporates the claims of the first amended complaint, proffers a number of new factual allegations, and sets forth new claims challenging the listers' actions and appraisals as violations of the Equal Protection Clause of the U.S. Constitution, and the Common Benefit Clause and Proportional Contribution Clause of the Vermont Constitution. Plaintiffs further request that this court treat its action "as if" it were an appeal to the board of civil authority and otherwise requests what it deems to be "equitable relief," alleging that they do not otherwise have an adequate remedy to recover the "overpaid taxes." Defendant opposed plaintiffs' motion, incorporating the failure-to-exhaust argument from its motion to dismiss.

The third issue pending before the court involves outstanding discovery matters. By motion dated June 25, 2014, plaintiffs seek to compel defendants to respond to a number of discovery requests served in or about April 2014. Defendant filed an objection to this motion and seeks a protective order.

ANALYSIS

Defendant's Motion to Dismiss

Plaintiffs' first amended complaint sets forth two claims: first, a direct challenge to the decision of defendant's Board of Abatement, which this court already addressed in disposing of plaintiffs' motion for summary judgment; and second, a claim for what plaintiffs refer to as "unjust enrichment," which defendant now moves to dismiss. In setting forth this "unjust enrichment" claim, plaintiffs allege, in summary, that the listers knew or should have known that their appraisal of plaintiffs' property in 2008 was unlawful. Defendant, in its motion, interprets plaintiffs' claim as addressing the actions of the listers and argues that such a challenge requires exhaustion of administrative remedies, leaving this court without subject matter jurisdiction and requiring dismissal under V.R.C.P. 12(b)(1).

The court first focuses on the relief sought under this claim—to wit, the "[r]ecovery of the overpayment of $9297.13." Effectively, plaintiffs appear to be merely dressing their claim for abatement in different clothing. Plaintiffs already raised their abatement claim before defendant's Board of Abatement, its decision to deny the request was already reviewed by this court, and findings were made that abatement is discretionary, not mandatory, and that the Board did not abuse its broad discretion. See *Garbitelli v. Town of Brookfield*, 2011 VT 122, ¶14, 191 Vt. 76. Whereas this argument is not raised in defendant's motion to dismiss, the court, accepting all of the allegations of the first amended complaint as true, will still not disturb the proper exercise of the Board of Abatement's discretion. See *Ondovchik Family Ltd. Partnership v. Agency of Transp.*, 2010 VT 35, ¶¶ 7-8, 187 Vt. 556 (whereas defendant did not raise failure to state a cause of action in its motion to dismiss, the court's dismissal on that ground was proper where "no facts or circumstances, however differently alleged, would entitle Plaintiff to any legal relief.") (quotation omitted) (citing *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) ("When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law."). Here, "it appears beyond doubt that there exist no facts or circumstances that would entitle the

plaintiff[s] to relief." *Alger v. Dep't of Labor & Indus.*, 2006 VT 115, ¶ 12, 181 Vt. 309 (quotations omitted). As such, plaintiffs' first amended complaint should be dismissed for failing to state a claim upon which relief can be granted. See V.R.C.P. 12(b)(6).

Moreover, to the extent plaintiffs are, in fact, challenging any acts of the listers, defendant is correct in noting that any such claims may only come before this court after the exhaustion of administrative relief: first, by filing grievances with the listers under 32 V.S.A. §§ 4221-4224; second, by appealing any decision of the listers to the board of civil authority pursuant to *id.* § 4404; and then, finally, by appealing any decision of the board of civil authority to this court by the procedures outlined in *id.* § 4461. See *Town of Bridgewater v. Department of Taxes*, 173 Vt. 509, 510 (2001) ("Where a statute creates administrative remedies, 'a party must pursue, or 'exhaust,' all such remedies before turning to the courts for relief.'") (quoting *Rennie v. State*, 171 Vt. 584, 585, 762 A.2d 1272, 1274 (2000)). Review of a motion to dismiss under V.R.C.P. 12(b)(1) requires that all uncontroverted factual allegations be accept as true and construed in the light most favorable to the nonmoving party. See *Jordan v. State Agency of Transp.*, 166 Vt. 509, 511 (1997). Here, plaintiffs admit that they grieved their 2008 and 2012 appraisals, but did not appeal any decisions to the board of civil authority. No other acts of the listers were grieved, including the appraisals for 2009, 2010 and 2011. Because their administrative remedies are not exhausted, plaintiffs may not challenge any acts of the listers before this court, which is without subject matter jurisdiction. See *id.* ("A party's failure to exhaust administrative remedies permits a court to dismiss the action for lack of subject matter jurisdiction.") (citing V.R.C.P. 12(b)(1)).

In opposition to defendant's motion to dismiss, plaintiffs argue that defendant should be "equitably estopped" from raising a failure-to-exhaust defense. However, in order to estop defendant, plaintiffs must show they relied on defendant's misstatements or conduct to their prejudice. See *Ploof v. Village of Enosburg Falls*, 147 Vt. 196, 202 (1986) ("Since plaintiff can show no prejudice resulting to him from defendant's actions, defendant is not estopped from raising the defense of exhaustion of administrative remedies."). "While the representations relied upon need not be fraudulent in a strict legal sense, generally a defendant is not estopped from raising a statute-of-limitations defense absent either a promise or some sort of misrepresentation or concealment of a fraudulent character." *Town of Victory v. State* 174 Vt. 539, 540 (2002) (quotation omitted). Here, plaintiffs' claims are based on the contention that in 2008, the listers inappropriately adjusted plaintiffs' appraisal to a price based on the property's sale listing. The basis for the 2008 appraisal was in no way concealed or misstated by defendant—in fact, plaintiffs were informed by their 2008 notice of appraisal that it was "adjusted per realtor listing." As plaintiffs themselves state, the improper practice of "sales chasing" was not a "novel concept" in 2008. Although plaintiffs claim they were unaware of its unlawfulness, this court will not invoke the doctrine of equitable estoppel in favor of a party "whose own omissions contributed to the problem." *Town of Victory*, 174 Vt. at 540-41; see also *Town of Bennington v. Hanson-Walbridge Funeral Home, Inc.*, 139 Vt. 288, 294 (1981) ("Courts will not predicate an estoppel in favor of one whose own omissions or inadvertence contributed to the problem."). The alleged "problem" at issue here is the approximately $10,000 in property taxes that plaintiffs chose to pay over a period of four years,

notwithstanding the fact that they were fully aware that their appraisals were based, at least in part, on the property's prior sale listing. Under these circumstances, defendant may not be estopped from arguing that plaintiffs failed to exhaust their administrative remedies.[1]

In sum, for the reasons set forth above, plaintiffs may not pursue a challenge to the denial of their abatement request, and any challenge to the acts of the listers is otherwise precluded by plaintiffs' failure to exhaust. As this disposes of all claims raised in the first amended complaint, it must be dismissed in its entirety.

Plaintiffs' Motion for Leave to Amend

The dismissal of plaintiffs' first amended complaint does not dispose of this action, however, because also pending before the court is a motion for leave to amend and a proposed second amended complaint. Therein, plaintiffs include all claims from the first amended complaint in addition to challenging the acts of the listers on constitutional grounds.

In determining whether to allow a party to amend its complaint, the court should consider four factors: "(1) undue delay; (2) bad faith; (3) futility of amendment; and (4) prejudice to the opposing party." *Hickory v. Morlang*, 2005 VT 73, ¶ 5, 178 Vt. 604 (2005). An assessment of "futility," in particular, requires a review of "whether a complaint can survive a motion to dismiss." *Colby v. Umbrella, Inc.*, 2008 VT 20, ¶ 5, 184 Vt. 1. Therefore, preliminarily, the incorporation of any claims from the first amended complaint is futile for the same reasons warranting the granting of defendant's motion to dismiss.

As for the additional claims proposed by plaintiffs, they all address the appraisals and other actions of the listers. Again, such claims require exhaustion of administrative remedies. See *Town of Bridgewater*, 173 Vt. at 510. It is of no matter that plaintiffs now attempt to raise their challenge on constitutional grounds, even if the administrative decision makers did not have the authority to strike down the listers' acts as unconstitutional. See *id.* at 511. As is further set forth in the *Town of Bridgewater* matter:

> Administrative processes serve vital functions more substantial than mere adjudication of the dispute. Primarily, administrative processes develop the record 'according to the more informal procedures of the administrative procedure act ... rather than through the more formal procedures and rules of evidence applicable in court proceedings.' [*Stone v. Errecart*, 165 Vt. 1, 5

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[1] In their objection, plaintiffs also make reference to the doctrine of "equitable tolling." It is not for this court, though, to determine whether plaintiff may file untimely claims with applicable administrative entities. Additionally, even when the time in which to file a claim before this court may be tolled, "[c]ourts apply the doctrine only when the defendant actively misled the plaintiff or prevented the plaintiff in some extraordinary way from filing a timely lawsuit." *Town of Victory*, 174 Vt. at 541. As above, these facts are not present here.

> (1996)]. This function is especially valuable in a case such as this that will likely involve detailed findings regarding property values. ... Thus, "[t]he Legislature may decide that even in a constitutional challenge, the relevant facts should be determined by the [administrative agency]." *Id.* If administrative hearings could be circumvented every time a complaint raises a constitutional issue, the public would lose the benefit of agency expertise, undermining the goal of agency review.

Town of Bridgewater, 173 Vt. at 511-12; see also *Brueckner v. Town of Morristown*, No. 2008-054 (Nov. 2008) (unpublished mem.) ("exhaustion is required even if the administrative decision maker lacks the power to invalidate or refuse to enforce a tax statute on constitutional grounds."). Plaintiffs' failures to first bring their claims to the listers as a grievance, or to the board of civil authority on an appeal, render their proposed constitutional claims futile.

Notwithstanding plaintiffs' request, there is no mechanism by which this court may treat this matter "as if" if it were a tax appeal. As outlined above, "the Legislature has established a clear route by which plaintiffs' appeal may be raised, and the superior court has no jurisdiction to consider this suit before that route has been traveled." *Town or Bridgewater*, 173 Vt. at 511. Similarly, although sought by plaintiffs, this court may not "reopen" this matter for administrative review, including by, but not limited to the utilization of Rule 60 of the V.R.C.P., which is solely limited to relief from this court's judgments and orders, not the decision-making processes of other entities.

The court has considered plaintiffs' additional claims for equitable relief and finds them to be unavailing. For the reasons discussed in the context of defendant's motion to dismiss the first amended complaint, the facts presented here do not warrant the rare exercise of equitable estoppel or equitable tolling. Plaintiffs allege they are without an adequate remedy, but this is simply not the case. Plaintiffs grieved their 2008 appraisal and obtained a reduction—if they were still displeased with their appraisal, they could have appealed that to the board of the civil authority and then, if necessary, to this court. Plaintiffs also could have filed additional grievances in 2009, 2010 and 2011, but chose to pay their taxes instead. Moreover, plaintiffs exercised their right to a hearing before defendant's Board of Abatement. Whereas they may be unhappy with the result, this court is unable to grant the relief requested and any action to that end is an exercise in futility. Accordingly, plaintiffs' motion for leave to amend must be denied.

Discovery Motions

The granting of defendant's motion to dismiss the first amended complaint and the denial of plaintiffs' proposed amendment leaves no matters ripe for discovery. The court is troubled by the allegations raised by plaintiffs regarding defendant's failure to properly respond to their multiple discovery requests. However, it is unnecessary to address the merits of the outstanding motions.

ORDER

Defendant's motion to dismiss is **GRANTED**.

Plaintiffs' motion for leave to amend is **DENIED**.

This decision and order disposes of all claims raised in this matter; defendant is entitled to judgment in its favor and is instructed to submit a proposed judgment order within 5 days of the filing of this decision and order.

Dated this 13th day of August, 2014.

Harold E. Eaton, Jr.
Superior Court Judge

FILED

AUG 25 2014

VERMONT SUPERIOR COURT
WINDSOR UNIT