**Superior Court of Connecticut, Judicial District of Ansonia-Milford.**

**Sweet Potatoes, LLC dba v. The Town of Seymour et al.**

**CV146016022S**

**Decided: March 27, 2015**

MEMORANDUM OF DECISION

The defendants, town of Seymour, its board of assessment appeals and tax assessor, move to dismiss the plaintiff's action claiming that the court lacks subject matter jurisdiction because the plaintiff failed to exhaust its administrative remedies. More particularly, the defendants contend that the plaintiff failed to file "a written appeal in proper form" in accordance with General Statutes § 12–111(a).

The facts necessary to the determination of the motion are undisputed. The plaintiff operates a barbeque restaurant at 225 West Street in Seymour, Connecticut. The plaintiff received a "Personal Property Assessment Notice" concerning the restaurant for the assessment year of 2012 by notice issued by the tax assessor's office on February 7, 2013. The notice set forth the then current assessed value of the plaintiff's personal property as $1,050, and noted the prior assessed value as $1,170. Pursuant to § 12–111(a), any appeal of the 2012 assessment to the board of assessment appeals required that the appeal be filed in writing and no later than February 20, 2013. The plaintiff did not appeal the 2012 personal property assessment under that statutory section.

Subsequently, the plaintiff received a letter from the assessor's office concerning a purported prior notice to the plaintiff that it was going to subject its personal property to an audit. The letter, dated April 22, 2013, requested that the plaintiff call the auditor and provided a final response date of May 6, 2013. The plaintiff timely complied with the request.

Thereafter, the plaintiff received a "Personal Property Assessment Notice" concerning the restaurant for the assessment year of 2013 by notice issued by the assessor's office on February 6, 2014. The notice set forth the current assessed value of the plaintiff's personal property as $28,310 and noted the prior assessed value as $26,250. Pursuant to § 12–111(a), any appeal of the 2013 assessment to the board of assessment appeals required that a written appeal be filed no later than February 20, 2014.

The plaintiff filed a written appeal with the board of assessment appeals by document received by the board on February 20, 2014. By letter sent to the plaintiff and dated February 26, 2014, the board notified the plaintiff that it received the plaintiff's appeal, and advised the plaintiff "that no action will be taken due to an invalid appeal." A copy of the written appeal received by the board was submitted by the defendants in support of their motion. The appeal form drafted by the plaintiffs was not prepared on a standard or uniform appeal form. Rather, the appeal form was drafted in the plaintiff's own format. The board made some handwritten notations on the appeal form after having received and reviewed it. The notations are as follows: "rec. 2/30/14"; "invalid"; "not dated"; "no estimate of value"; and "no reason of appeal."

The defendants claim that the notice is statutorily defective and, as a result, the court lacks subject matter jurisdiction to hear the appeal of the 2013 assessment made after an audit.[1] The plaintiff counters that "the written request for an appeal hearing filed with the defendants on February 20, 2014 substantially meets all the requirements in said statute."[2] The court agrees for the reasons hereinafter discussed.

"The standard of review for a court's decision on a motion to dismiss [under Practice Book § 10–30] is well settled. A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo . When a . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader . The motion to dismiss . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone . In undertaking this review, we are mindful of the well established notion that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged.

"Trial courts addressing motions to dismiss for lack of subject matter jurisdiction pursuant to [Practice Book § 10–30] may encounter different situations, depending on the status of the record in the case . [L]ack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts . When a trial court decides a jurisdictional question raised by a pretrial motion to dismiss on the basis of the complaint alone, it must consider the allegations of the complaint in their most favorable light . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader.

"In contrast, if the complaint is supplemented by undisputed facts established by affidavits submitted in support of the motion to dismiss . other types of undisputed evidence . and/or public records of which judicial notice may be taken . the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts and need not conclusively presume the validity of the allegations of the complaint . Rather, those allegations are tempered by the light shed on them by the [supplementary undisputed facts] . If affidavits and/or other evidence submitted in support of a defendant's motion to dismiss conclusively establish that jurisdiction is lacking, and the plaintiff fails to undermine this conclusion with counter affidavits . or other evidence, the trial court may dismiss the action without further proceedings . If, however, the defendant submits either no proof to rebut the plaintiff's jurisdictional allegations . or only evidence that fails to call those allegations into question . the plaintiff need not supply counter affidavits or other evidence to support the complaint, but may rest on the jurisdictional allegations therein .

"Finally, where a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts . Likewise, if the question of jurisdiction is intertwined with the merits of the case, a court cannot resolve the jurisdictional question without a hearing to evaluate those merits . When the

jurisdictional facts are intertwined with the merits of the case, the court may in its discretion choose to postpone resolution of the jurisdictional question until the parties complete further discovery or, if necessary, a full trial on the merits has occurred . in that situation, [a]n evidentiary hearing is necessary because a court cannot make a critical factual [jurisdictional] finding based on memoranda and documents submitted by the parties. (Internal quotation marks omitted.) Id., 653–54." (Citations omitted; internal quotation marks omitted.) Cuozzo v. Town of Orange, 315 Conn. 606, 614–17 (2015).

Here, in determining the motion to dismiss based on a claim of lack of subject matter jurisdiction, the court will consider the plaintiff's complaint as supplemented by undisputed facts material to the court's decision. The jurisdictional determination is not dependent on the resolution of any disputed facts. The court will refer to the undisputed facts where necessary in this decision.

The appeal process to a municipal board of assessment appeals is governed by General Statutes §§ 12–111 and 112. Section 111(a) provides in relevant part: "Any person . claiming to be aggrieved by the doings of the assessors of such town may appeal therefrom to the board of assessment appeals. Such appeal shall be filed, in writing, on or before February twentieth. The written appeal shall include, but is not limited to, the property owner's name, name and position of the signer, description of the property which is the subject of the appeal, name and mailing address of the party to be sent all correspondence by the board of assessment appeals, reason for the appeal, appellant's estimate of value, signature of property owner, or duly authorized agent of the property owner, and date of signature. The board shall notify each aggrieved taxpayer who filed a written appeal in the proper form and in a timely manner, no later than March first immediately following the assessment date, of the date, time, and place of the appeal hearing . The board shall determine all appeals for which the board conducts an appeal hearing and send written notification of the final determination of such appeals to each such person within one week after such determination has been made." General Statutes §§ 12–111(a).

The time limit for taking appeals is contained in General Statutes § 12–112, which provides in relevant part: "No appeal from the doings of the assessors in any town shall be heard or entertained by the board of assessment appeals . unless written appeal is made on or before February twentieth in accordance with the provisions of section 12–111." General Statutes §§ 12–112.

The narrow issue to be decided within the defendants' lack of subject matter jurisdiction claim is whether the plaintiff's written appeal from the defendants' personal property assessment of the defendants' business in 2013 was filed with the board of assessment appeals in proper form where the appeal failed to contain the plaintiff's "estimate of value" and "date of signature" as mandated by § 12–111(a). The case of Gibbs Oil Co. v. Rocky Hill, Superior Court, judicial district of Hartford at Hartford, Docket No. 14–6050458 (December 17, 2014, Huddleston, J.), although not binding on the court, provides guidance on the issue.

In Gibbs, the plaintiff filed, by way of facsimile transmission, a written appeal of an assessment with the board of assessment appeals for the town of Rocky Hill. Gibbs Oil Co. v. Rocky Hill, Superior Court, judicial district of Hartford at Hartford, Docket No. 14–6050458 (December 17, 2014, Huddleston, J.). Although the board acknowledged receiving the appeal on February 20, 2014 "at closing time," which was the last day it could be filed, the board rejected the appeal contending that "applications received via fax

cannot be accepted since the original signature must be present as stated on the application." The town's assessor established its own standing requirements for filing assessment appeals, including that the written appeal bear an original signature in blue ink, and be received no later than the close of business on February 20 of any given year. The plaintiff faxed the application at 4:32 p.m., two minutes after the close of the official business hours, and, as the board only received a copy of the appeal, the document did not include an original signature in blue ink. Id.

In response to the board's rejection of its appeal, the plaintiff commenced a mandamus action in superior court. In considering the plaintiff's request for a mandamus, the court noted that pursuant to § 12–111 "[i]t is undisputed that the board would have been required to afford the plaintiff a hearing if it received the plaintiff's application 'in the proper form and in a timely manner.' " The plaintiff claimed that the written appeal contained the information required by § 12–111(a) and was received by the board on February 20, 2014. The defendants countered that "they properly exercised their discretion to construe and apply the requirements of § 12–111." The court noted the issue to be resolved as "whether a faxed form actually received on February 20 while the office was still open, albeit two minutes after its official closing time, satisfied the requirements of the statute when it contains all the information required by the statute, including the signature of the owner, but does not bear an original handwritten signature in blue ink, as required by the Rocky Hill Assessor." The court noted the narrower issue as whether "an original signature on the form submitted to the board of assessment appeals is required by § 12–111." Id.

In construing the statute, the court found that § 12–111 "is silent as to the meaning of the term signature." Consequently, the court looked to other statutes and case law in determining the meaning of the word. The court concluded that the statute "does not require an 'original' signature." In reaching its conclusion, the court found persuasive cases where our Supreme Court held that substantial compliance, as opposed to strict compliance, with the statutory provisions is required. See In re Election of the United States Representative for the Second Congressional District, 231 Conn. 602, 651–52, 653 A.2d 79 (1994); Deep River National Bank's Appeal, 73 Conn. 341, 341, 47 A.2d 675 (1900).

Here, the defendants' claim is that the written appeal form filed by the plaintiff with the board of assessment appeals does not adequately or sufficiently comply with the statutory provisions concerning specific information required to be set forth in the appeal form. Although the appeal form contains the plaintiff's reasons for appeal and signature, it fails to state the plaintiff's estimate of value and date of signature.

Substantial compliance with the provisions of a statute has been found sufficient where the challenge is not to a specific time limitation within a statute that creates a cause of action that did not exist at common law.[3] For example, courts have found substantial compliance with the notice provisions in cases brought under the Dram Shop Act, General Statutes § 30–102. see, e.g., (Internal quotation marks omitted.) Tomczak v. The Groggy Froggy, LLC, Superior Court, judicial district of New Britain, Docket No. HHBCV–14–6024618S (July 29, 2014, Young, J.) [58 Conn. L. Rptr. 621] ("Likewise, our trial courts have considered the issue of defects in complying with the Dram Shop Act's notice requirement, liberally construing the adequacy or sufficiency of the written notice, but strictly construing the statute's time limitation. The trial courts have consistently determined, in the context of adequacy or sufficiency, that [s]ubstantial compliance so as to effectuate [the] purpose of the statute is sufficient." (Internal quotation

marks omitted.) Lizotte v. Perkins, Superior Court, judicial district of New London, Docket No CV–11–6007989–S (November 17, 2011, Cosgrove, J.) (52 Conn. L. Rptr. 880) (notice that did not contain time and date of plaintiff's injury held sufficient); see also Kulla v. Maroney, Superior Court, judicial district of Waterbury, Docket No CV–13–6020354–S (April 23, 2014, Shapiro, J.) [58 Conn. L. Rptr. 64] (notice that did not list time alleged drunk driver was served held sufficient); Benedict v. Gillette, Superior Court, judicial district of Tolland, Docket No. 46849 (October 1, 1991, McWeeny, J.) (5 Conn. L. Rptr. 102) (notice that omitted address of injured person and time, date, and place of injury held sufficient); Cruz v. Wice, 40 Conn.Sup. 48, 49–50, 479 A.2d 1249 (1984) (notice that gave time of day as evening and stated that injury was caused by patron of defendant held sufficient); accord Schena v. Torres, Superior Court, judicial district of New Britain, Docket No. CV–116008837–S (June 5, 2012, Sheridan, J.) (otherwise timely notice delivered to wrong address substantially complied with statute when [t]he only 'defect' . was that [the notice] failed to find its way into the hands of the seller because the residence address to where it was delivered was out-of-date)."

The defendants do not claim that the appeal was not timely filed. Admittedly, it was filed within the statutory time frame. Therefore, the court holds that the plaintiff's appeal form substantially complied with the requirements of § 12–111(a) despite not including the plaintiff's estimate of the property value or date of signature.

The defendants are not prejudiced by this finding because § 12–111(a) further provides for an appeal hearing before the board, held shortly after the filing of the appeal, in which involves the issue of the value of the assessed property. Because the appeal was timely filed, the lack of a date of the plaintiff's signature also does not result in any prejudice to the defendants. Under the factual circumstances of this case, a hearing is warranted where the plaintiff's personal property assessment in 2013 represented a substantial increase from its assessment in the 2012 tax year, and the plaintiff timely pursued its appeal remedy. In view of the foregoing, the defendants' motion to dismiss is denied.

TYMA, J.[4]

FOOTNOTES

1. FN1. The defendants indicated at oral argument that they are not challenging the plaintiff's appeal from the board to the extent that it is being brought pursuant to General Statutes § 12–117a. Section 12–117a regulates filing an appeal in superior court from a decision of a board of assessment appeals. "Any person . claiming to be aggrieved by the action of the . board of assessment appeals . in any town or city may, within two months from the date of the mailing of notice of such action, make application, in the nature of an appeal therefrom . to the superior court for the judicial district in which such town or city is situated, which shall be accompanied by a citation to such town or city to appear before said court." General Statutes § 12–117a."Section 12–117a . provide[s] a method by which an owner of property may directly call in question the valuation placed by assessors upon his property . In a § 12–117a appeal, the trial court performs a two step function. The burden, in the first instance, is upon the plaintiff to show that he has, in fact, been aggrieved by the action of the board in that his property has been overassessed . In this regard, [m]ere overvaluation is sufficient to justify redress under [§ 12–117a], and the court is not limited to a review of whether an assessment has been unreasonable or discriminatory or has resulted in

substantial overvaluation . Whether a property has been overvalued for tax assessment purposes is a question of fact for the trier . The trier arrives at his own conclusions as to the value of land by weighing the opinion of the appraisers, the claims of the parties in light of all the circumstances in evidence bearing on value, and his own general knowledge of the elements going to establish value including his own view of the property." (Citation omitted.) Redding Life Care, LLC v. Redding, 308 Conn. 87, 99–100 (2013).

2. FN2. The plaintiff's memorandum in opposition to the defendants' motion was essentially bereft of any legal analysis, and offered no legal support for its position that the written appeal substantially complied with the statutory requirements.

3. FN3. "Where . a specific time limitation is contained within a statute that creates a right of action that did not exist at common law, then the remedy exists only during the prescribed period and not thereafter . In such cases, the time limitation is not to be treated as an ordinary statute of limitation, but rather is a limitation on the liability itself, and not of the remedy alone . [U]nder such circumstances, the time limitation is a substantive and jurisdictional prerequisite, which may be raised [by the court] at any time, even by the court sua sponte, and may not be waived." Ambrose v. William Raveis Real Estate, Inc., 226 Conn. 757, 766–67, 628 A 2d 1303 (1993). Section 12–112(a), governing appeals to boards of assessment appeals contains a statutory time period for taking an appeal with regard to a statutory remedy that did not exist at common law. The right to take such an appeal is purely a creature of statute.

4. FN4. The defendants conceded at oral argument that the written appeal form properly included the plaintiff's reasons for appealing the 2013 personal property assessment. Therefore, they do not claim this ground as a basis for their motion.

Tyma, Theodore R., J.