NOT FOR PUBLICATION WITHOUT APPROVAL OF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

MICHAEL T. SHERMAN,	:	TAX COURT OF NEW JERSEY
	:	DOCKET NO: 012930-2017
Plaintiff,	:	
	:	
vs.	:	
	:	
CITY OF VENTNOR,	:	
	:	
Defendant.	:	

Decided: September 13, 2018

Daniel J. Gallagher for Plaintiff.

Edward O. Lind for Defendant.

CIMINO, J.T.C.

I. INTRODUCTION

This matter comes before the court by way of a motion to dismiss for failure to prosecute a tax appeal at the County board of Taxation level. Plaintiff's counsel appeared before the Atlantic County Board of Taxation (the Board) in July 2017, but presented no evidence, nor called any witnesses to testify. Plaintiff's counsel claims that there was an understanding at the hearing that the assessment would be affirmed without prejudice as to plaintiff taking an appeal to the Tax Court. The initial judgment issued by the Board in July 2017 was that the presumption

of correctness was not overturned. Such an outcome does not bar an appeal to the Tax Court. N.J.S.A. 54:51A-1.

In September 2017, plaintiff filed an appeal with the Tax Court. The Board subsequently changed its judgment to dismissed with prejudice. However, the amended judgment was issued after the statutorily mandated time to hear the matter had passed. Defendant then filed a motion to dismiss plaintiff's appeal on the grounds that the Tax Court lacks the jurisdiction to hear appeals dismissed with prejudice at the County board level pursuant to N.J.S.A. 54:51A-1(c)(2). For the following reasons, defendant's motion to dismiss is denied.

II. STATEMENT OF FACTS

Plaintiff timely filed a petition in April 2017 seeking a hearing before the Board to review the existing assessment of his property in Ventnor City for tax year 2017. Plaintiff's property consists of two adjacent lots (Lots 5 and 6) on the same block (Block 75). The hearing before the Board was scheduled for July 6, 2017. On the date of the hearing, plaintiff's counsel appeared on behalf of plaintiff.

Plaintiff in this case is a physician who apparently practices, at least partly, in Florida. Plaintiff's counsel stated that plaintiff was unavailable to appear in person on the date of the hearing because he was in Florida treating patients.

Plaintiff's appraiser was also apparently unavailable to attend the July 6, 2017 hearing before the Board. Plaintiff's counsel stated in his opposition that it was not unusual for the Board to reject requests for adjournment because of the high volume of cases that the Board was required to address, which is presumably why he did not request an adjournment of the hearing before the Board. Plaintiff's counsel claims that he had his client available to testify by telephone if needed, but that he believed that such telephonic testimony was unnecessary because he felt there was an understanding at the hearing that the matter would be affirmed without prejudice as to plaintiff filing an appeal with the Tax Court. Plaintiff's counsel also indicated he would have called the assessor as a witness, if truly faced with a motion to dismiss with prejudice for failure to prosecute.

Defendant claims that the Board asked plaintiff's counsel if he wanted to have his client testify by telephone, but that he declined. Plaintiff's counsel was also allegedly given an opportunity by the Board to call anyone present at the Board hearing as a witness, the implication apparently being that he was expected to call the assessor for the defendant, who was present at the hearing, to testify. It is at this point, according to defendant, that plaintiff's counsel requested that the case be affirmed without prejudice as to any appeal. Defendant claims to

have objected to such a dismissal and requested that the case be dismissed with prejudice for failure to prosecute.

Defendant further claims plaintiff did not submit any evidence to the Board or the assessor prior to the hearing. Plaintiff's counsel contends that he sent a grid which included comparable sales as well as income and expense calculations to defendant. Defendant asserts that plaintiff emailed the grid to the former assessor's now inactive email address.

The Board issued its judgments for Lots 5 and 6 on July 28, 2017 and August 8, 2017, respectively. The judgment code for both lots was listed as 2B, "presumption of correctness not overturned." Such a judgment allows plaintiff to appeal the matter to the Tax Court. N.J.S.A. 54:51A-1. Plaintiff filed a complaint with the Tax Court on September 8, 2017. At that point counsel for defendant, apparently alarmed that the matter had not been dismissed with prejudice by the Board, got in touch with the Board to inquire as to why the case had not been dismissed with prejudice in accordance with counsel for defendant's recollection. After counsel for defendant contacted the Board, a corrected judgment was issued on October 20, 2017 for Lot 5 as Code 5B, dismissal for lack of prosecution. A dismissal for lack of prosecution cannot

be appealed to the Tax Court. N.J.S.A. 54:51A-1(c)(2). The judgment code for Lot 6 remained as Code 2B.[1]

On April 17, 2018, defendant filed the instant motion to dismiss on the grounds that plaintiff failed to prosecute his case at the hearing before the Board and therefore the Tax Court has no jurisdiction to hear plaintiff's appeal. Plaintiff opposes defendant's motion.

III. LEGAL ANALYSIS

This matter comes before the court by way of defendant's motion to dismiss for failure to prosecute at the Board level. The parties' diverging accounts of what occurred would normally require the court to make factual determinations in order to decide defendant's motion. However, the court need not delve into the morass of disputed facts.

The County Boards in New Jersey are required by statute to expeditiously render judgments on tax appeals. The relevant statute states, "[t]he county board of taxation shall hear and determine all [tax] appeals within three months after the last day for filing such appeals. . ." N.J.S.A. 54:3-26. The last day for filing tax appeals with the county boards is "April 1, or 45 days

[1] There is nothing in the record that gives any indication as to why the Board amended its judgment for Lot 5 and not Lot 6. The court need not speculate as to why this discrepancy occurred to rule on defendant's motion to dismiss.

from the date the bulk mailing of notification of assessment is completed in the taxing district, whichever date is later. . .” N.J.S.A. 54:3-21. A May 11, 2017 letter from the Acting Director of the Division of Taxation (Acting Director) to Margaret Schott, the Tax Administrator of the Board, indicates that the last day for the Board to hear and determine tax appeals in 2017 was initially set for June 30, 2017.

However, if a county board feels that it is unable to hear and determine all of the tax appeals before it by the statutory deadline as outlined above, that county board may apply to the Director of the Division of Taxation (the Director) for an extension. “In the event a county board of taxation cannot hear and determine any one or more appeals within the time prescribed in [N.J.S.A.] 54:3-26, it may at any time apply to the Director of the Division of Taxation for extension of the time within which the appeal or appeals may be heard and determined.” N.J.S.A. 54:3-26.1. The Board applied for such an extension for the 2017 tax year. That application was granted by the Acting Director through the above referenced May 11, 2017 letter, moving the deadline for the Board to hear and determine 2017 tax appeals from June 30, 2017 to September 30, 2017. The Board heard plaintiff’s appeal on July 6, 2017 and it was able to issue judgments for both Lot 5 and Lot 6 by August 8, 2017, well within the extended deadline set by the Acting Director.

However, the Board issued a corrected judgment for Lot 5 on October 20, 2017, well after the expiration of the extension granted by the Acting Director. The result of defendant's motion to dismiss hinges on the following question: is an amended county board judgment valid if issued after the expiration of the deadline for the county board to hear and determine tax appeals for a given year? Judge Lario's opinion in Vicari v. Township of Bethlehem, 8 N.J. Tax 513, 519 (Tax 1986), provides a roadmap for making such a determination.

In Vicari, the plaintiff filed a motion for summary judgment to void corrected judgments made by the Hunterdon County Board of Taxation (the Hunterdon Board) and to reinstate its earlier judgments. Id. at 515. Plaintiff Vicari filed tax appeals with the Hunterdon Board to have his two properties assessed as farmland under the Farmland Assessment Act of 1964. Ibid. The Hunterdon Board heard Vicari's appeals and issued judgments dated September 24, 1985 granting Farmland Assessment status to both lots. Ibid. On November 13, 1985, the Hunterdon Board entered, without notice to Vicari, amended judgments denying the Farmland Assessments of plaintiff's property and reinstating the original assessments on both lots. Ibid. The defendant in Vicari did not deny that it had amended the judgments without any new evidence entertained nor any additional participation of the parties. Id. at 516. The

defendant apparently reexamined its original judgments and determined that they should be amended. Ibid.

Vicari made a number of arguments, but the one that is relevant to the present matter was that county boards lack the authority to amend their judgments. Id. at 517. The court concluded that county boards "in [their] quasi-judicial capacity, similar to our courts, [have] the power and inherent right prior to [their] loss of jurisdiction to amend and revise judgments on [their] own motion." Id. at 518. The court further established that the Hunterdon Board had the jurisdiction to amend its judgments because they "were issued prior to November 15, 1985 and before appeals therefrom were filed with this court. . ." [2] Id. at 519.

Vicari gives this court two factors to consider when determining whether or not an amended judgment issued by a county board is valid. The first factor is the date on which the amended judgment was issued; any amended judgments must be issued by a county board no later than the statutory deadline, which is typically June 30th of a given tax year. Alternatively, if the county board has obtained an extension of the statutory deadline

[2] In 1995, the Legislature amended N.J.S.A. 54:4-23.13b to substitute the date of April 1 for August 15 for farmland assessment appeals. L. 1995, c. 276, § 6. Parenthetically, in 1991, the Legislature amended N.J.S.A. 54:3-21 which applies to most other assessment appeals to substitute the date of April 1 for August 15. L. 1991, c. 75, § 28.

from the Director, any amended judgments must be issued prior to the end date of the extension. The second factor for consideration is whether or not the amended judgment was issued prior to any appeal being filed with the Tax Court.[3]

In the present case, the Board emailed the Division of Taxation on May 4, 2017 to request an extension of the statutory deadline to hear and determine tax appeals. In the May 11, 2017 letter referenced above, the Acting Director granted the extension to the Board which extended the deadline from June 30, 2017 to September 30, 2017.

The Board's corrected judgment was not within the chronological bounds of the first Vicari factor outlined above. The Board issued its corrected judgment for the plaintiff's Lot 5 on October 20, 2017, twenty days after the extension granted by the Acting Director.

The court understands that county boards often have a tremendous number of cases to address in a relatively short period

[3] The court need not consider the second factor since the amendment was outside the jurisdictional time requirement. The circumstances, if any, in which a county board can amend a judgment post-appeal need not be decided in this case. This is especially so since the parties disagree whether there was an error by the board versus a change of position by the board. Compare, McNair v. McNair, 332 N.J. Super. 195, 199 (App. Div. 2000)(correction per R. 1:13-1 allowed pending appeal to correct calculation error), with DialAmerica Marketing, Inc. v. KeySpan Energy Corp., 374 N.J. Super. 502, 505-06 (App. Div. 2005)(matter previously remanded when judge changed pre-judgment interest rate post appeal).

of time. As such, clerical errors on judgments issued by county boards are bound to occur from time to time. Courts in New Jersey are able to correct errors caused by mistake in issued judgements at any time. Vicari, 8 N.J. Tax at 518 (citing King v. Ruckman, 22 N.J.Eq. 551 (E. & A. 1871); State v. Conners, 129 N.J. Super. 476 (App. Div. 1974)). As observed by the court in Vicari, county Boards are similar to courts in that they operate in a quasi-judicial capacity and as such should be free to amend judgments as necessary prior to their loss of jurisdiction. Vicari, 8 N.J. Tax at 518.

However, while courts generally have flexibility with regards to the timing of court matters, county boards must complete their business within a statutorily defined time period each year. Greate Bay Hotel and Casino v. City of Atlantic City, 16 N.J. Tax 486, 495 (Tax 1997), aff'd o.b., 304 N.J. Super. 457, 17 N.J. Tax 101 (App. Div. 1997). The time period is jurisdictional. Ibid.; Danis v. Middlesex Cty. Bd. of Tax'n, 113 N.J. Super. 6, 9 (App. Div. 1971); Vicari, 8 N.J. Tax at 517. See also Union City Assoc. v. City of Union, 115 N.J. 17, 27 n. 5 (1989). A judgment rendered after the deadline is void. Brookview Gardens, Inc. v. Borough of Bergenfield, 4 N.J. Tax 625, 626 (Tax 1982), aff'd o.b., 6 N.J. Tax 253 (App. Div. 1983). County boards must entirely dispose of their cases either by June 30th of a given year or by a later date as provided by the Director, in this case September 30, 2017. The

New Jersey Supreme Court has previously held that compliance with statutory tax deadlines is critical to the continued functioning of government: "Strict adherence to statutory time limitations is essential in tax matters, borne of the exigencies of taxation and the administration of local government." F.M.C. Stores Co. v. Borough of Morris Plains, 100 N.J. 418, 424 (1985). It is by extension critical that there be a definitive cutoff event for county boards to issue any corrections to their judgments. That cutoff event here is the expiration of the statutory period within which the county boards may address their cases.

The facts in this case, as presented by the parties, surrounding whether or not plaintiff failed to prosecute this case at the Board level are contradictory. However, the court need not resolve that factual disparity because the October 20, 2017 corrected judgment issued by the Board regarding plaintiff's property is void. This is because the corrected judgment was issued after the statutory deadline for the Board to render its decisions had passed. In light of the invalidity of the Board's October 20, 2017 corrected judgment, coupled with the plaintiff's understanding that the original judgments were without prejudice as to filing a Tax Court appeal, it is determined that this court has jurisdiction to hear the plaintiff's appeal.

Defendant asserts that Ganifas Trust v. City of Wildwood, 15 N.J. Tax 722 (App. Div. 1996) is controlling since the factual

pattern is identical. In Ganifas, the taxpayer's counsel appeared without a client or appraiser. Id. at 724. He presented no proof but a list of comparables. Ibid. The municipality moved to dismiss and the plaintiff's counsel countered by arguing he was entitled to per se relief based upon the Chapter 123 ratio. Ibid. The county board entered judgments denying the petitions for "insufficient evidence." Ibid. Below, Judge Rimm determined that the fact that the county board gave "insufficient evidence" and not lack of prosecution as the reason for the dismissal is insignificant since the Tax Court judge is vested with the power to determine, de novo, whether there has been a failure to prosecute. Id. at 725. The Appellate Division agreed. Ibid.

There is a subtle but important distinction in the case now before the court. This is not the situation where the plaintiff failed to put on an adequate case and lack of prosecution is squarely the issue. The actual issue is whether the Board felt the matter was better suited for the Tax Court and later had second thoughts, or instead, simply made a mistake in the judgment which was subsequently corrected.

The Appellate Division has plainly stated that "what may form a basis for a dismissal for lack of prosecution is entirely consistent with our view that dismissals of actions in general is a drastic remedy. Normally, such dismissals should not be invoked in the absence of prejudice and unless the plaintiff's behavior is

deliberate and contumacious." VSH Realty, Inc. v. Township of Harding, 291 N.J. Super. 295, 300, 15 N.J. Tax 653, 658 (App Div. 1996). There is no showing that plaintiff's actions were deliberate or contumacious. To the contrary, plaintiff's actions coupled with the initial judgments demonstrate otherwise.

Here, a code of 2B was entered which is "presumption of correctness not overturned" which plaintiff's counsel understood to be an affirmance without prejudice. Ostensibly, defendant's counsel had the same impression since he sought to have the judgment amended to a dismissal with prejudice. The parties do not dispute that a county board can, without a full hearing, effectively opt to send a matter to the Tax Court through a disposition that is without prejudice. "County boards of taxation are ideally suited to the quick and efficient review of assessments . . . [which] generally do not require extensive discovery or involve complicated testimony." Greate Bay Hotel and Casino, Inc., 16 N.J. Tax at 495. Allowing a difficult or complicated matter to proceed to the Tax Court without a hearing before a county board fosters the quick and efficient review of the remaining cases on an often overburdened county board docket.

This court is reluctant to make credibility determinations regarding the thought processes of Board members as to whether the initial outcome constituted a without prejudice disposition or a mistake. An effective resolution of the issue would necessarily

involve testimony of the Board members. While there is a strong policy to encourage taxpayers to engage in county board hearings in good faith, there is a countervailing policy that the Board members sitting in a quasi-judicial capacity not be subject to interrogation concerning their dispositions.[4] Without interrogation of the Board members, we are left with the initial judgement representing the collective determination of the Board. As already stated, that initial judgment, coupled with the assertion of plaintiff's counsel that he understood the matter could go to this court for a hearing, satisfies this court that it has jurisdiction to hear the merits of the matter.

Practically speaking, the determination of this motion only guarantees that plaintiff gets a hearing. The plaintiff must still prove his case and overcome the presumption of correctness that attaches to the determination of the assessor's determination of value. Pantasote Co. v. City of Passaic, 100 N.J. 408, 412 (1985). Moreover, the defendant has not ceded its right to continue collecting taxes based upon the assessment set by the assessor.

[4] The other countervailing policy which should not be forgotten is that "the court system exists to administer justice, not merely to satisfy the court's desire to dispose of cases on its calendar. The administration of the court's calendar with blind rigidity cannot take priority over a party's constitutional right to contest its assessment." VSH Realty, Inc., 291 N.J. Super. at 301, 15 N.J. Tax at 659.

IV. CONCLUSION

For the reasons stated above, the defendant's motion to dismiss is hereby DENIED.