SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

LORRAINE ASSOCIATES, L.L.C.,	)	
Plaintiff,	)	
vs.	)	**CASE NO. ST-15-CV-438**
GOVERNMENT OF THE VIRGIN ISLANDS and IRA MILLS, in his official capacity as Tax Assessor,	)	
Defendants.	)	

MEMORANDUM OPINION

Pending before the Court is Plaintiff's January 20, 2016, Motion for Expedited Consideration of Request for Partial Preliminary Injunction. The Court will grant Plaintiff's request and schedule an evidentiary hearing on Plaintiff's motion for a partial preliminary injunction.

RELEVANT FACTUAL & PROCEDURAL HISTORY

On September 10, 2015, Plaintiff Lorraine Associates, L.L.C. ("Lorraine") filed a Complaint against Defendants Government of the Virgin Islands ("Government") and Ira Mills, in his official capacity as Tax Assessor ("Tax Assessor"), in connection with Defendants' allegedly unlawful assessment and issuance of property taxes against commercial property owned by Plaintiff. In pertinent part, the Complaint alleges that Plaintiff owns real property located at 20 & 21-A Estate Plessen, Frederiksted, St. Croix, that is operated as "Section 8 low income housing."[1] Plaintiff asserts that the property was assessed at $3,339,300.00 in 2012, but that in 2013 the Tax Assessor assessed the property at $12,344,300.00, thereby increasing the assessed value of the

[1] Compl. ¶¶ 6-7.

property by "roughly 400% . . . in a single year . . . despite the condition of the [property] and its use being materially unchanged between 2012 and 2013" and the decline of St. Croix's real estate market during that year.[2] The assessment of $12,344,300.00 was allegedly "carried over" by the Tax Assessor for the tax years of 2014 and 2015, and Plaintiff did not receive the 2015 tax bill until "late August, 2015."[3]

Plaintiff claims that Defendants have failed to comply with its numerous requests for information regarding the Tax Assessor's methodologies and standards for assessing real property under the International Association of Assessing Officer ("IAAO") standards, *inter alia*, including informal requests made by Plaintiff's attorney and formal requests made under the Open Records Act, 3 V.I.C. § 881 *et seq.*,[4] and through the administrative appeals process.[5] Plaintiff instituted an administrative appeal on December 22, 2014, by filing "a formal Tax Appeal with the Board of Tax Review,"[6] but argues that the appeals process is futile because "the Board of Tax Review is utterly useless as a safety net to correct the Tax Assessor's systemic errors."[7]

Given the foregoing allegations, the Complaint asserts four (4) counts against Defendants: (1) a declaration that Defendants have committed a denial of due process under the Fourteenth Amendment to the Constitution of the United States by failing to disclose, produce, and/or promulgate rules and regulations necessary to implement the standards of the IAAO when

---

[2] Compl. ¶ 8.
[3] *See* Compl. ¶¶ 8, 10.
[4] Compl. ¶¶ 22-33.
[5] Compl. ¶¶ 26-29.
[6] Compl. ¶ 26.
[7] Compl. ¶ 29 (citing *Berne Corp. v. Government of the Virgin Islands*, 262 F. Supp. 2d 540, 555 (D.V.I. 2003). Plaintiff notes, *inter alia*, that the hearing on the real property assessment was not held within the time limit imposed by law, the Tax Assessor has refused to provide adequate information regarding "the methodologies used to create the 2013 assessment," and the Tax Assessor "has not promulgated rules and regulations necessary to implement the IAAO standards," all of which function to deny Plaintiff the ability to meaningfully participate in the administrative appeals process. *See* Compl. ¶¶ 27-32.

assessing property;[8] (2) declaratory judgment establishing that Plaintiff has the right to view, and the Tax Assessor has the obligation to provide and produce, the methodology utilized in assessing Plaintiff's property, including evidences of the Tax Assessor's adherence to the IAAO standards through promulgated rules and regulations. In the absence of adherence, Plaintiff seeks a declaratory judgment that the Tax's Assessor's failure to do so is unlawful and violates Plaintiff's due process rights. Plaintiff also seeks a declaratory judgment against the Tax Assessor that the mailing of the 2015 tax bill after May 15, 2015, is unlawful in violation of 33 V.I.C. § 2412, as amended by Act. No. 7751, and that administrative proceedings before the Board of Tax Review are not an exclusive remedy requiring exhaustion before instituting this suit;[9] (3) injunctive relief enjoining the Tax Assessor from assessing Plaintiff's property beyond the level of 2012 unless and until the Tax Assessor provides the requested information regarding its assessment, as well as an Order staying or relieving Plaintiff from participating in the proceedings before the Board of Tax Review or having to recognize the purportedly untimely 2015 tax bill;[10] and (4) relief to enforce Plaintiff's rights to examine the Tax Assessor's records through its public records requests under 3 V.I.C. § 881, whether it be by way of injunction, writ of mandamus, or other means.[11]

On September 11, 2016, the day after filing the Complaint, Plaintiff filed a Motion to Stay Proceedings Before the Board of Tax Review.[12] Defendants filed an Answer on December 16, 2015, but did not respond to Plaintiff's Motion to Stay.[13] Plaintiffs then filed this Motion for

---

[8] Compl. ¶¶ 34-36.
[9] Compl. ¶¶ 37-44.
[10] Compl. ¶¶ 45-49.
[11] Compl. ¶¶ 50-53 (requesting "the Court enter an appropriate method of enforcement of [Lorraine's] right to examine the records by mandamus or injunction or other remedy pursuant to 3 V.I.C. § 881 (e)").
[12] *See* Plaintiff's September 11, 2015, Motion to Stay.
[13] Defendants note in their Opposition that "[o]n January 22, 2016, this Court entered an order directing Defendant to respond to Plaintiff's Motion to Stay Proceedings Before the Board of Tax Review by February 3, 2016. However, by

Expedited Consideration of Request for Partial Preliminary Injunction on January 20, 2016,[14] seeking a preliminary injunction on a portion of the injunctive relief requested in Count III of the Complaint. Specifically, Plaintiff's Motion requests that the Court issue an Order "[s]taying the legal effect of the 2015 real property tax bill and all tax bills issued for its [p]roperty during the pendency of this action to include (1) suspending the accrual of penalties and interest thereon; (2) staying the running of the appeal date thereon, pending final adjudication in this matter; (3) staying all proceedings of the Board of Tax Review on its pending appeals during the pendency of this matter; and (4) set [sic] the most prompt possible hearing date available to the Court."[15]

Defendants filed a timely Opposition to Plaintiff's Motion for Expedited Consideration of Request for Partial Preliminary Injunction on February 9, 2016.[16] On March 1, 2016, Plaintiff filed its reply, a day late, despite the Court granting Plaintiff's Motion for Enlargement of Time and extending the deadline to February 29, 2016.[17]

DISCUSSION

A. Plaintiff may seek injunctive relief under 5 V.I.C. § 80.

Under 5 V.I.C. § 80, "a taxpayer may maintain an action to restrain illegal or unauthorized acts by a territorial officer or employee, or the wrongful disbursement of territorial funds." In circumstances where illegal or unlawful conduct is alleged, Virgin Islands courts have long held

---

that date the Plaintiff's appeal to the Board was concluded." Opp. To Pl.'s Mot. for Expedited Consideration of Request for Partial Prelim. Inj., p. 4 n. 7.

[14] Plaintiff filed Affidavits of L. Stephen Sudhop, the sole member and president of Lorraine Associates, L.L.C., and Steven Jamron, a licensed certified general appraiser and real estate broker in the U.S. Virgin Islands, on January 25, 2016, in support of its Mot. For Expedited Consideration of Partial Prelim. Inj. An original of the affidavit of L. Stephen Sudhop was filed on January 26, 2016.

[15] Mot. for Expedited Consideration of Request for Partial Prelim. Inj., p. 8.

[16] By Order entered on January 22, 2016, Defendants were directed to respond to Plaintiff's Mot. to Stay by February 3, 2016, and to respond to Plaintiff's Mot. For Expedited Consideration of Request for Partial Prelim. Inj. by February 10, 2016. According to the record, no opposition in response to Plaintiff's Motion to Stay was filed.

[17] *See* February 24, 2016, Order.

that, to invoke the Court's jurisdiction and have standing under 5 V.I.C. § 80, all the plaintiff must plead is that (1) he or she is Virgin Islands taxpayer; (2) that defendant is a Territorial officer or employee who engaged in illegal or unauthorized conduct; and (3) the Plaintiff requests relief, whether it be injunctive or declaratory, to compel defendant to refrain from that illegal or unauthorized conduct.[18] In describing Virgin Islands jurisprudence with respect to an action under 5 V.I.C. § 80, the Supreme Court has explained:

> Section 80 . . . is amongst the original provisions found in the Virgin Islands Code . . . Th[e] statute "is a remedial one, having the salutary purpose of affording to Virgin Islands taxpayers full and adequate relief from illegal actions of the territorial government and its officers." Moreover, the language of [S]ection 80 is intentionally broad — even broader than comparable statutes in other jurisdictions — because at the time of its enactment, "the territorial governor [was] appointed from Washington and neither he nor the executive officers and employees appointed by him [were] answerable to the voters of the territory or subject to impeachment or removal by the elected territorial legislature." Nevertheless, Virgin Islands courts have continued to construe [S]ection 80 as meaning what it says, that any taxpayer may sue the Government or one of its officers or employees to prevent a violation of the law.[19]

Here, Plaintiff alleges in its Complaint that the Tax Assessor wrongfully assessed Plaintiff's property in 2013 in violation of the Tax Assessor's statutory duties under Title 33 of the

---

[18] *See McBean v. Gov't of the V.I.*, 1995 V.I. LEXIS 21, *13 (V.I. Terr. Ct. 1995) (Under 5 V.I.C. § 80, "[t]he court must therefore determine whether the defendants engaged in illegal or unauthorized conduct in effectuating the rollback of the salary increases. If so, a restraining order must be issued. If not, the action must be dismissed"); *Donastorg v. Virgin Islands*, 2003 V.I. LEXIS 8, *20 (V.I. Terr. Ct. 2003) ("The Legislature of the Virgin Islands enacted standing upon taxpayers, without the demonstration of a particularized injury, pursuant to 5 V.I.C. § 80 . . . Here, the plaintiff has invoked jurisdiction pursuant to V.I. Code Ann. tit. 5, § 80; alleged he is a Virgin Islands taxpayer; requested declaratory relief to mandate the Government to perform its statutory duties; and alleged wrongful disbursement of territorial funds. Accordingly, the plaintiff has standing to bring this action") (citing *Smith v. Government of the Virgin Islands*, 329 F.2d 131, 133, 4 V.I. 489 (3d Cir. 1964) ("If there has been a violation or evasion of the law... damage is presumed to result to all taxpayers. The object of the suit is to prevent the violation of the law"); *Olive v. deJongh*, 2012 V.I. LEXIS 39, *21 (V.I. Super. Ct. 2012) ("To sustain a taxpayer suit under Title 5, Section 80, a plaintiff must show: (1) that he is a Virgin Islands taxpayer; and (2) that territorial funds were wrongfully disbursed . . . Plaintiff does not need to show any actual or particularized injury to himself to recover under Title 5, Section 80") (citations omitted).
[19] *Haynes v. Ottley*, 61 V.I. 547, 567 (V.I. 2014) (citations omitted).

Virgin Islands Code and has violated the Due Process Clause of the Fourteenth Amendment[20] and the Virgin Islands Public Records Act under 3 V.I.C. § 881 *et seq.*[21] Because the Complaint alleges that Plaintiff is a Virgin Islands taxpayer[22] and seeks injunctive relief to enjoin the Tax Assessor from assessing property values and issuing tax bills in violation of the Tax Assessor's statutory duties,[23] as well as declaratory relief to mandate compliance therewith,[24] Plaintiff pleads causes of action under 5 V.I.C. § 80.[25] Consequently, the Court has jurisdiction to decide whether to grant or deny Plaintiff's Motion for Expedited Consideration of Request for Partial Preliminary Injunction.

B. An evidentiary hearing on Plaintiff's Motion is warranted.

Plaintiff has requested that the Court hold an evidentiary hearing before deciding whether to grant the request for partial preliminary injunction.[26] "[T]he decision whether to hold a hearing is ordinarily vested in the discretion of the Superior Court."[27] However, "[t]ypically, 'it is appropriate — and necessary — for the trial judge to make findings of fact in deciding a

[20] *See* U.S. Const. amend. XIV, § 1; *Rivera-Moreno v. Government of the Virgin Islands*, 61 V.I. 279, 315, n. 11 (V.I. 2014) ("[T]he Due Process Clause of the Fourteenth Amendment is applicable to the Virgin Islands by virtue of section 3 of the Revised Organic Act") (citing 48 U.S.C. § 1561) ("The following provisions of and amendments to the Constitution of the United States are hereby extended to the Virgin Islands to the extent that they have not been previously extended to that territory and shall have the same force and effect there as in the United States or in any State of the United States ... the first to ninth amendments inclusive [and] the second sentence of section 1 of the fourteenth amendment.").
[21] *See* Compl. ¶¶ 34-36, 50-53.
[22] Compl. ¶¶ 4, 8.
[23] Compl. ¶¶ 45-49. For example, Plaintiff alleges the Tax Assessor has failed to "promulgate[ ] rules and regulations as necessary to implement the IAAO standards to commercial real property" as required under 33 V.I.C. § 2404(a). *See* Compl. ¶ 29(b). 33 V.I.C. § 2404(a) provides: "In assessing the fair market value of real property, the Tax Assessor shall use the applicable standards promulgated by the International Association of Assessing Officers ("IAAO"), and shall promulgate such rules and regulation as necessary to implement the IAAO standards for all classifications of property set forth in section 2301(b) of this title."
[24] Compl. ¶¶ 37-44. *Olive*, 2012 V.I. LEXIS 39, at *21 ("Normally, relief under Title 5, Section 80 takes injunctive form, but a court may also issue a declaratory judgment and/or coercive order as a remedy") (citing *Holmes v. Gov't of the V.I.*, 370 F. Supp. 715, 717, 10 V.I. 365 (D.V.I. 1974)).
[25] *See* Compl. ¶ 4 (invoking the Court's jurisdiction under 5 V.I.C. § 80).
[26] Mot. for Expedited Consideration of Request for Partial Prelim. Inj., p. 8 & Proposed Order.
[27] *Moorhead v. Mapp*, 62 V.I. 595, 599 (V.I. 2015) (citing *Yusuf*, 59 V.I. at 861 n.13).

preliminary injunction' . . . [which,] of course, requires the Superior Court to hold an evidentiary hearing."[28] "[I]t is a rare preliminary injunction that can correctly be denied without a hearing . . . [because i]f witnesses are not heard[,] the trial court will be left in the position of preferring one piece of paper to another."[29] But, "where the moving party rests on allegations alone without submitting sufficient supporting evidence with its moving papers, it fails to 'present[ ] a colorable factual basis to support [its] claim' for a preliminary injunction, and the Superior Court is not required to hold a hearing on the motion before summarily denying it."[30] "In going beyond the allegations of the complaint, a party moving for a preliminary injunction typically submits things such as documentary evidence and affidavits 'stat[ing] the facts supporting the [moving party's] position clearly and specifically' from those witnesses who would testify at the preliminary-injunction hearing."[31]

Here, the only evidence initially submitted by Plaintiff in support of its Motion was one piece of documentary evidence, "a copy of redacted 2015 real property tax bill for [Plaintiff's] property."[32] However, five days later, Plaintiff filed two affidavits in support of its Motion, one by L. Stephen Sudhop, the sole member and President of Plaintiff, and the other by Steven Jamron, a certified general appraiser and real estate broker licensed in the United States Virgin Islands.[33] Plaintiff's counsel certifies that these affidavits were provided to opposing counsel on January 22, 2016, two days after the Motion was filed.[34] On February 9, 2016, Defendants filed their

[28] *3RC & Co.*, 2015 V.I. Supreme LEXIS 22, at *19 (citing *Yusuf*, 59 V.I. at 853).
[29] *Id.* (citations omitted).
[30] *Id.* (citing *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1175-76 (3d Cir. 1990)).
[31] *Id.* at *24-25 (citing 11A CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE & PROCEDURE — CIVIL § 2949 (3d ed. 2013)).
[32] Mot. for Expedited Consideration of Request for Partial Prelim. Inj., p. 3 n. 3.
[33] *See* Plaintiff's January 25, 2016, Notice of Filing.
[34] *Id.* (certificate of service indicating a copy of the affidavits were hand delivered to opposing counsel on January 22, 2016).

Opposition and submitted five exhibits: (1) a copy of the mortgage, dated March 22, 2006, given to Plaintiff by Love Funding Corporation with respect to the property (Exhibit A); (2) "[s]elected pages from a copy of a mortgage," dated September 19, 2012, "given to Plaintiff by Oppenheimer Multifamily Housing & Healthcare Finance, Inc." with respect to the property (Exhibit B); (3) an Affidavit of Tax Assessor Ira Mills (Exhibit C); (4) a "Calculation Approach Memorandum" for the 2013 assessment of Plaintiff's property (Exhibit D); and (5) a copy of the Board of Tax Review's September 14, 2015, final determination letter on the assessment value of the property (Exhibit E).[35] With its Reply, Plaintiff submitted four additional exhibits, two of which were the same documents submitted as Defendants' Exhibits D and E.[36] The new exhibits submitted by Plaintiff consist of a document indicating Plaintiff's proof of payment on the 2015 tax bill and excerpts of transcripts from the 31st Legislature session on July 30, 2015, regarding the proposed amendments to provisions of Title 33 of the Virgin Islands Code, which became law through the enactment of Act. No. 7751 on July 31, 2015.[37]

With respect to Plaintiff's untimely Reply, the Court will extend the deadline for one day *nunc pro tunc* because Plaintiff's Motion for Enlargement of Time indicates that "the failure to act was the result of excusable neglect."[38] In the Motion, Plaintiff's counsel explains he was unable to prepare the Reply brief within the initial deadline set by the Court because he was traveling off island to speak at two legal conferences and preparing for deadlines set for that same day in two

[35] *See* Opp. To Pl.'s Mot. for Expedited Consideration of Request for Partial Prelim. Inj. (attaching Exhibits A – E).
[36] *See* Reply Brief to Def.'s Opposition to Pl.'s Mot. for Expedited Consideration of its Request for Partial Prelim. Inj. (attaching Exhibits A – D, where Exhibits B and C are the same documents submitted by Defendants as Exhibits D and E).
[37] *Id.* (attaching proof of payment as Exhibit A and excerpts of the transcript from the 31st Legislature session on July 30, 2015, as Exhibit D).
[38] Super. Ct. R. 10(a)(2).

other cases.[39] Plaintiff's counsel further represented that opposing counsel did not object to the extension.[40] Although a busy schedule does not, by itself, justify a failure to comply with an order,[41] in this instance, the Court finds Plaintiff's inadvertence constitutes excusable neglect. Consequently, the Court will permit Plaintiff to file its Reply brief out of time and deem it filed as of March 1, 2016.[42]

A separate issue is posed by the new exhibits accompanying Plaintiff's Reply brief and the untimely affidavits. Much like raising new arguments for the first time in a reply brief, attaching new exhibits to a reply brief is a troubling practice because it potentially deprives the opposing party of their right to be heard.[43] Indeed, the Supreme Court has held that "[t]he requirement that . . . evidence [in support of a motion for preliminary injunction] be submitted with the moving papers serves the purpose of giving the nonmoving party notice of what evidence will be presented at the hearing, which is necessary in light of the fact that a preliminary injunction is typically sought at the beginning of the litigation, long before discovery has even started."[44]

Notwithstanding, the Court finds the precepts of fundamental fairness and notice are not violated by Plaintiff's late submission of the exhibits and affidavits in this case, particularly given that the Court's findings of fact will be only "for the purposes of the injunction, and . . . [will] not

---

[39] Plaintiff's February 22, 2016, Mot. for Extension of Time, ¶¶ 2-4.
[40] *Id.* at ¶ 5.
[41] *Barshinger*, 2014 V.I. LEXIS 99, at *7 (citations omitted).
[42] *See* Super. Ct. R. 10.
[43] *See Der Weer v. Hess Oil Virgin Island Corp.*, 2014 V.I. LEXIS 109, *10 (V.I. Super. Ct. 2014)) ("The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion") (citing *Dannasch v. Bifulco*, 184 A.D.2d 415, 585 N.Y.S.2d 360, 362 (App. Div. 1992); *Lawson v. Mahoning Cty. Mental Health Bd.*, 2010-Ohio-6389 (Ohio Ct. App. 2010) ("The problem with allowing a new argument to be asserted in a reply in support of the original motion is that it does not give the party opposing the motion the opportunity to respond"); *See Mike v. Dymon, Inc.*, 1996 U.S. Dist. LEXIS 10799, 1996 WL 427761, at *2 (D.Kan. July 25, 1996) ("In pursuit of fairness and proper notice, the court generally summarily denies or excludes all arguments and issues first raised in **reply** briefs").
[44] *3RC & Co.*, 2015 V.I. Supreme LEXIS 22, at *25 (citing *Operation Save Am. v. City of Jackson*, 2012 WY 51, 275 P.3d 438, 455 (Wyo. 2012)).

bind the [trier of fact at a trial on the merits]."[45] Because the Supreme Court has made clear that hearings on preliminary injunctions should be bypassed only in the rarest of cases,[46] the Court will schedule an evidentiary hearing on Plaintiff's Motion. In doing so, Defendants will have been provided time to review the new exhibits and copies of the affidavits prior the Court ruling on the merits of the Motion, thus giving Defendants sufficient notice of their contents. Notwithstanding, the Court cautions Plaintiff against continuing its pattern of blatantly disregarding Court imposed deadlines, which, if continued, may warrant an imposition of sanctions against Plaintiff in the future.

An Order consistent with this Opinion shall follow.

Dated: March 18, 2016

HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

ATTEST: Estrella George
Acting Clerk of Court
by:
Donna D. Donovan
Court Clerk Supervisor 3/22/16

---

[45] *Yusuf*, 59 V.I. at 853 (citations omitted).
[46] *See 3RC & Co.*, 2015 V.I. Supreme LEXIS 22, at *19 (citations omitted).