DOCKET NO. KNL-CV22-5023563-S	:	**SUPERIOR COURT**
ADAM MCNIECE	:	**JUDICIAL DISTRICT OF**
V.	:	**NEW LONDON**
TOWN OF MONTVILLE	:	**APRIL 24, 2024**

MEMORANDUM OF DECISION RE: MOTION FOR SUMMARY JUDGMENT

The issue presented is whether the court should grant or deny the defendant's motion for summary judgment on the grounds that the court does not have subject matter jurisdiction over the plaintiff's claims, and even if it does there is no genuine issue of material fact over the plaintiff's claims. For the reasons that follow, the defendant's motion for summary judgment is granted.

FACTS AND PROCEDURAL HISTORY

On September 9, 2022, the plaintiff, Adam McNiece, filed a nine count complaint against the defendant claiming "injury and aggrievement resulting from actions, errors, and omissions by the Town of Montville employees, who have adversely and without cause affected the use and enjoyment of his property at 1446 RT 85, and 178 Ridge Hill Road." In particular, he claims that the Montville Tax Assessor "nearly doubled" his property taxes without prior notice, thereby denying him the right of appeal (Count One); that the Assessor's denial of his farm exemption was arbitrary and capricious (Count Two); that he was not permitted to "access

Copies sent 4/24/24

appeal hearings"[1] remotely, in violation of his right to due process (Count Three); that the comparable used by the assessor in appraising the value of the plaintiff's properties were improper (Count Four); that the Town of Montville refused to exempt his property at 178 Ridge Hill Road from "new zoning requirements" so as to permit him to build a barn on that property (Count Five); that the Town of Montville required the posting of a $2000 bond in connection with the plaintiff's application for a zoning permit when no bond was required and then refused to refund the bond (Count Six); that Montville Building Official Dave Jensen failed to grant or deny an application for a building permit within thirty days of its filing, in violation of General Statutes § 29-263 and Section 105.3.1 of the Montville Building Code (Count Seven); that Montville building Official Dave Jensen made an unlawful warrantless entry onto the plaintiff's property (Count Eight); and that Inspector Jensen imposed on him a condition not mandated by law or code (Count Nine).

On December 16, 2022, the defendant filed its answer and special defenses. On December 12, 2023, the defendant filed its motion for summary judgment. The defendant argues that the court does not have subject matter jurisdiction over the plaintiff's claims, and, if subject matter jurisdiction were to be found, there is not genuine dispute of material fact over the plaintiff's claims and, therefore, it is entitled to judgment as a matter of law. The defendant's motion was accompanied by a memorandum of law in support and numerous exhibits. On December 20, 2023, the plaintiff filed an objection to the defendant's motion

[1]He does not claim that he was denied to remotely attend the hearing of his appeal. Indeed, he does not allege that he appealed the denial of a tax assessment.

arguing that there are many genuine issues of material fact in dispute. The matter was heard at short calendar on March 18, 2024.

DISCUSSION

"Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." (Internal quotation marks omitted.) *Graham* v. *Commissioner of Transportation*, 330 Conn. 400, 414–15, 195 A.3d 664 (2018). "The test [for summary judgment] is whether a party would be entitled to a directed verdict on the same facts." (Internal quotation marks omitted.) *Fernandez* v. *Mac Motors, Inc.*, 205 Conn. App. 669, 673, 259 A.3d 1239 (2021). "[T]he genuine issue aspect of summary judgment requires the parties to bring forward before trial evidentiary facts, or substantial evidence outside the pleadings, from which the material facts alleged in the pleadings can warrantably be inferred. . . . A material fact has been defined adequately and simply as a fact which will make a difference in the result of the case." (Citation omitted; internal quotation marks omitted.) *Buell Industries, Inc.* v. *Greater New York Mutual Ins. Co.*, 259 Conn. 527, 556, 791 A.2d 489 (2002).

"It is axiomatic that in order to successfully oppose a motion for summary judgment by raising a genuine issue of material fact, the opposing party cannot rely solely on allegations that contradict those offered by the moving party, whether raised at oral argument or in written

pleadings; such allegations must be supported by counteraffidavits or other documentary submissions that controvert the evidence offered in support of summary judgment." *GMAC Mortgage, LLC* v. *Ford*, 144 Conn. App. 165, 178, 73 A.3d 742 (2013). "Mere statements of legal conclusions . . . and bald assertions, without more, are insufficient to raise a genuine issue of material fact capable of defeating summary judgment." (Internal quotation marks omitted.) *Citimortgage, Inc.* v. *Coolbeth*, 147 Conn. App. 183, 193, 81 A.3d 1189 (2013), cert. denied, 311 Conn. 925, 86 A.3d 469 (2014). "Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § [17-45]" (Internal quotation marks omitted.) *Ferri* v. *Powell-Ferri*, 317 Conn. 223, 228, 116 A.3d 297 (2015). "Although the court must view the inferences to be drawn from the facts in the light most favorable to the party opposing the motion . . . a party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment. . . . A party opposing a motion for summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue." (Internal quotation marks omitted.) *Perez* v. *Metropolitan District Commission*, 186 Conn. App. 466, 476, 200 A.3d 202 (2018).

In the present case, the defendant argues that the court lacks subject matter jurisdiction for the plaintiff's claims in counts one, two, three, four, seven, and nine because the defendant failed to exhaust his administrative remedies, and in counts five, six, and eight because those

claims are moot. Additionally, the defendant argues that even if the court finds it has jurisdiction, there are no genuine issues of material fact in dispute and they are entitled to judgment as a matter of law. In response, the plaintiff argues that there are many genuine issues of material facts in dispute.

I. Subject Matter Jurisdiction

"Under our exhaustion of administrative remedies doctrine, a trial court lacks subject matter jurisdiction over an action that seeks a remedy that could be provided through an administrative proceeding, unless and until that remedy has been sought in the administrative forum. . . . In the absence of exhaustion of that remedy, the action must be dismissed." (Internal quotation marks omitted.) *D'Eramo* v. *Smith*, 273 Conn. 610, 616, 872 A.2d 408 (2005). "Although the proper way to challenge subject matter jurisdiction is by a motion to dismiss, rather than a motion for summary judgment . . . it is not improper to treat a motion for summary judgment as a motion to dismiss." (Citation omitted; internal quotation marks omitted.) *J.P. Alexandre, LLC* v. *Egbuna*, 137 Conn. App. 340, 345 n.5, 49 A.3d 222, cert. denied, 307 Conn. 913, 53 A.3d 1000 (2012).

"Nevertheless, because [a]ny claim of lack of jurisdiction over the subject matter cannot be waived, and because subject matter jurisdiction may be raised by a party . . . at any stage of the proceedings, including on appeal, it is appropriate to consider the exhaustion doctrine by way of a motion for summary judgment." (Citations omitted, emphasis omitted, internal quotation marks omitted.) *Caldwell* v. *Area Cooperative Educational Services, Educational*

Center for the Arts, Superior Court, judicial district of New Haven, Docket No. CV12-6030392-S (February 14, 2014, *Vitale, J.*) [57 Conn. L. Rptr. 736, 2014 Conn. Super. LEXIS 376]. Thus, the defendant's use of a motion for summary judgment on exhaustion grounds is procedurally proper.

"When a taxpayer is aggrieved by the assessment of his property, there are statutory procedures in place for the taxpayer to challenge the assessment. The legislature has established two primary methods by which taxpayers may challenge a town's assessment or revaluation of their property. First, any taxpayer claiming to be aggrieved by an action of an assessor may appeal, pursuant to General Statutes § 12-111, to the town's board of [assessment appeals]. The taxpayer may then appeal, pursuant to . . . [General Statutes § 12-117a], an adverse decision of the town's board of [assessment appeals] to the Superior Court. The second method of challenging an assessment or revaluation is by way of [General Statutes] § 12-119." (Footnote omitted; internal quotation marks omitted.) *Interlude, Inc.* v. *Skurat*, 253 Conn. 531, 537, 754 A.2d 153 (2000).

Pursuant to § 12-111, "[a]n appellant whose appeal will not be heard by the board may appeal directly to the Superior Court pursuant to § 12-117a." Section 12-117a[2] "allows taxpayers to appeal the decisions of municipal boards of [assessment appeals] to the Superior

[2]Section 12-117a states in relevant part: "Any person . . . claiming to be aggrieved by the action of . . . the board of assessment appeals . . . in any . . . 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 . . . city is situated . . ."

Court." *Konover* v. *West Hartford*, 727, 734, 699 A.2d 158 (1997). In the present case, the defendant provided evidence that the plaintiff filed a petition with to the Town of Montville's BAA claiming that the town's evaluation of the property was excessive and that the plaintiff received notice of his hearing with the BAA. Moreover, the plaintiff was afforded two opportunities to attend a BAA hearing, one on March 16, 2022, and the other on March 21, 2022. The plaintiff never attended either hearing. Therefore, the defendant has provided sufficient evidence to show that the plaintiff filed this action to the Superior Court without exhausting the administrative remedies available to him.

"Section 12-119 addresses two different types of cases: (1) When it is claimed that a tax has been laid on property not taxable in the town or city in whose tax list such property was set; and (2) a tax laid on property was computed on an assessment which, under all the circumstances, was manifestly excessive and [must] have been arrived at . . . by disregarding the [proper] . . . valuation of such property . . . ." (Internal quotation marks omitted.) *Interlude, Inc.* v. *Skurat*, supra, 253 Conn. 538. The plaintiff's claim does not fall within the scope of the first category as the plaintiff is not claiming that the tax assessment was "laid on property not taxable in the town or city in whose tax list such property was set." Section 12-119. Moreover, the second category is not applicable because the plaintiff does not claim that the tax is "manifestly excessive" in that it is "disregarding the [proper] . . . valuation of [the] property." Section 12-119. Although the plaintiff claims that the assessment was not warranted in comparison to other properties, the plaintiff must prove that the assessment was the result of

illegal conduct. See *Second Stone Ridge Cooperative Corp.* v. *Bridgeport*, 220 Conn. 335, 341, 597 A.2d 326 (1991). Therefore, § 12-119 does not apply.

Thus, because the plaintiff failed to exhaust available administrative remedies, an appeal pursuant to § 12-117a could not be maintained by the plaintiff. Additionally, the plaintiff's claims do not satisfy the requirements of § 12-119. Accordingly, this court lacks subject matter jurisdiction over counts one, two, three, and four.

General Statutes § 29-266(b) governs appeals from decisions of building officials regarding the state building code. It provides in relevant part: "When the building official rejects or refuses to approve the mode or manner of construction proposed to be followed or the materials to be used in the erection or alteration of a building or structure, or when it is claimed that the provisions of the code do not apply or that an equally good or more desirable form of construction can be employed in a specific case, or when it is claimed that the true intent and meaning of the code and regulations have been misconstrued or wrongly interpreted, or when the building official issues a written order under subsection (c) of section 29-261, the owner of such building or structure, whether already erected or to be erected, or his authorized agent may appeal in writing or by electronic mail, in a manner prescribed by the board of appeals, from the decision of the building official to the board of appeals." General Statutes §29-266(b). "No right to a direct appeal to the Superior Court is available because § 29-266(b) and (d) requires that an aggrieved person exhaust his administrative remedies by appealing to the board of appeals and then to the codes and standards committee before appealing to the Superior Court."

Preferred Electric, LLC v. *Suffield*, Superior Court, judicial district of Hartford, Docket No. CV09-6005497-S (January 19, 2011, *Wagner, J.T.R.*).

In the present case, the plaintiff alleged that the Town of Montville building official, Dave Jensen, failed to issue a decision on his denied permit within thirty days, and made false requirements beyond the law. The defendant argues that the plaintiff filed his appeal directly to the Superior Court, rather than the board of appeals and, therefore, failed to exhaust his administrative remedies as required by § 29-266(b). As the plaintiff has not provided any evidence showing that he did appeal to the board of appeals, exhausting his administrative remedies, this court lacks subject matter jurisdiction over counts seven and nine of the complaint.

"[J]usticiability comprises several related doctrines, namely, standing, ripeness, mootness and the political question doctrine, that implicate a court's subject matter jurisdiction and its competency to adjudicate a particular matter. . . . A case that is nonjusticiable must be dismissed for lack of subject matter jurisdiction." (Internal quotation marks omitted.) *Janulawicz* v. *Commissioner of Correction*, 310 Conn. 265, 270, 77 A.3d 113 (2013).

"Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [the] court's subject matter jurisdiction . . . ." (Internal quotation marks omitted.) *Valvo* v. *Freedom of Information Commission*, 294 Conn. 534, 540, 985 A.2d 1052 (2010). "Mootness . . . implicates subject matter jurisdiction, which imposes a duty on the court to dismiss a case if the court can no longer grant practical relief to the parties." (Internal

quotation marks omitted.) *Batchelder* v. *Planning & Zoning Commission*, 133 Conn. App. 173, 180, 34 A.3d 465, cert. denied, 304 Conn. 913, 40 A.3d 319 (2012). "Since mootness implicates subject matter jurisdiction . . . it can be raised at any stage of the proceedings." (Citation omitted; internal quotation marks omitted.) *Domestic Violence Services of Greater New Haven, Inc.* v. *Freedom of Information Commission*, 240 Conn. 1, 6, 688 A.2d 314 (1997).

In its motion for summary judgment, the defendant provides sufficient evidence to show that the plaintiff amended his application for a single-family residence, which was accepted on July 1, 2022, and that the plaintiff was refunded the $2000 bond on September 30, 2022. Moreover, it is undisputed that the plaintiff received the requested video on October 31, 2022. As there is no active controversy before us, we cannot provide any form of practical, meaningful relief to the plaintiff. Thus, this court lacks subject matter jurisdiction over counts five, six, and eight of the plaintiff's complaint.

In summary, this court lacks subject matter jurisdiction because the plaintiff failed to exhaust his administrative remedies, and his remaining claims are moot.

II. Due Process

Although this court has determined that it does not have jurisdiction over the plaintiff's claims, this court will nevertheless analyze the plaintiff's due process claim.

Courts have long recognized a common law right of fundamental fairness in administrative proceedings. *Grimes* v. *Conservation Commission*, 243 Conn. 266, 273-74, 703

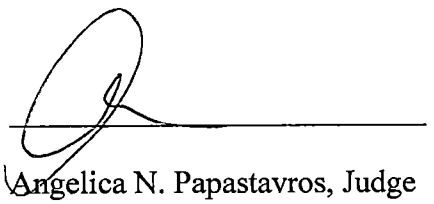
A.2d 101 (1997). While hearings before municipal land use boards are conducted without regard to strict rules of evidence, and are informal, the conduct of a hearing must be fundamentally fair, and cannot violate rules of natural justice. *Pizzola* v. *Planning & Zoning Com.*, 187 Conn. 202, 207, 355 A.2d 21 (1974); *Miklus* v. *Zoning Board of Appeals*, 154 Conn. 399, 406, 225 A.2d 637 (1967). During a public hearing, no one may be deprived of the right to present relevant evidence, or to cross examine witnesses produced by an adversary. In order to meet the fundamental fairness standard, all parties must have an opportunity to know the facts on which the agency is forced to act, and to offer rebuttal evidence. *R & R Pool & Patio, Inc.* v. *Zoning Board of Appeals*, 257 Conn. 456, 480, 778 A.2d 61 (2001); *Megin* v. *Zoning Board of Appeals*, 106 Conn. App. 602, 608-609, 942 A.2d 511 (2008).

In its motion for summary judgment, the defendant provided sufficient evidence that the plaintiff was informed that BAA meetings were held in person, that the plaintiff could have a proxy attend the meeting on his behalf, and that the plaintiff did not attend the two meetings where his appeal was brought in front of the BAA. Executive Order 7B, issued on March 14, 2020, suspended the need for in person meetings, and *permitted* meetings and public hearings to be held remotely, by conference call, video conferencing, or other available technology. Executive Order 7B allowed meetings to be held remotely "to the extent necessary to permit any public agency to meet and take such actions authorized by the law." The fact that the meeting was held in person, and not remotely, is not sufficient to render the proceedings fundamentally unfair. Remote meetings were permitted by Executive Order 7B, not required. The plaintiff had two opportunities to attend the meetings, either in person or by proxy. Thus,

the record does not demonstrate any violation of the common law guarantees of fundamental fairness. Accordingly, the defendant has met its burden in showing that there is no genuine issue of material fact as to whether the plaintiff's due process rights were violated by in-person BAA meetings. The court concludes that the evidence submitted in support of the defendant's motions for summary judgment provides uncontroverted support for the defendant's assertion that the court does not have subject matter jurisdiction over the plaintiff's claims because the plaintiff failed to exhaust his administrative remedies and his claims are moot. Additionally, there is no genuine issue of material fact as to whether the defendant violated the plaintiff's due process rights. Once the defendant presented evidence and met its burden, it was incumbent on the plaintiff to refute that evidence. The plaintiff makes several assertions in his objection, however, he provides no evidentiary support or case law to counter the defendant's arguments. The plaintiff's assertions are conclusory and speculative and are not sufficient to create a genuine issue of material fact to defeat summary judgment.

CONCLUSION

For the foregoing reasons, the motion for summary judgment is granted.



Angelica N. Papastavros, Judge