

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

TUTU PARK, LTD,

Plaintiff,

vs.

GOVERNMENT OF THE VIRGIN ISLANDS,
and **IRA MILLS**, in his official capacity as
Tax Assessor,

Defendants.

Case No. ST-15-CV-570

Action For
Declaratory Judgment

Cite as 2019 V.I. Super 30U

MEMORANDUM OPINION

¶1 **THIS MATTER** is before the Court on Defendant Government of the Virgin Islands' Amended Motion to Dismiss for Lack of Jurisdiction and for Failure to Join an Indispensable Party, filed June 30, 2016 (the "Motion to Dismiss").¹ Plaintiff's Complaint challenges certain real property tax bills and the interpretation of an EDC certificate. But Defendants argue that Plaintiffs failed to exhaust their administrative remedies before the V.I. Board of Tax Review. The Court disagrees. For the reasons set forth herein, Defendants' Motion to Dismiss will be denied.

RELEVANT BACKGROUND

¶2 Plaintiff Tutu Park, LTD ("TUTU") has a ground lease for Parcel #26 Estate Charlotte Amalie, No. 3, New Quarter, St. Thomas, Virgin Islands (the "Property").

¹ The motion is fully briefed. The title of the Motion suggests the only moving party is Defendant Government of the Virgin Islands. However, the body of the Motion makes clear that both defendants are moving for dismissal.

On November 30, 1993, the Virgin Islands Economic Development Authority (the “EDA”) issued TUTU an Economic Development Certificate (an “EDC Certificate”), which, *inter alia*, exempted TUTU from certain real property taxes.

¶3 On October 23, 2015, TUTU initiated this matter, naming the Government of the Virgin Islands and Ira Mills, in his official capacity as Tax Assessor (the “Tax Assessor” and collectively (the “Government”) as Defendants (the “Complaint”). TUTU makes various claims against the Tax Assessor, questioning the methodology used for assessing properties, challenging the valuations the Tax Assessor has assigned to the Property since 2012 and suggesting that the Tax Assessor has incorrectly collected taxes on portions of the Property that were exempted by the EDC Certificate. Prior to filing the Complaint, in or about February 2015, TUTU filed an appeal for a review of the 2014 tax assessments before the Board of Tax Review (“BOTR”). Concurrently with the Complaint, TUTU filed a Motion to Stay Proceedings Before the Board of Tax Review, to allow this matter to proceed pursuant to V.I. CODE ANN. tit. 5 § 80.²

¶4 In the instant Motion to Dismiss, the Government argues that, as TUTU has failed to exhaust its administrative remedies, this Court does not possess subject matter jurisdiction and the case should be dismissed pursuant to Virgin Islands Rules

² Per a letter dated August 8, 2016 (and attached as Exhibit 2 to TUTU’s Informational Notice Related to Pl.’s Emergency Mot. to Stay Proceedings Before the Bd. of Tax Review, filed Aug. 9, 2016), the BOTR granted the request and stayed its review, pending a decision from this Court.

of Civil Procedure 12(b)(1).³ Further, the Government claims that the matter should be dismissed pursuant to V.I. R. Civ. P. 12(b)(7), asserting that by not including the EDA as a Defendant, TUTU has failed to join an indispensable party, as required by V.I. R. Civ. P. 19.

ANALYSIS

¶5 There are two issues before the Court in this matter: (A) whether the Court has subject matter jurisdiction over this case, and (B) whether the EDA is an indispensable party to this action.

A. This Court has Subject Matter Jurisdiction to Hear this Case.

¶6 Motions to dismiss for lack of subject matter jurisdiction are governed by V.I. R. Civ. P. 12(b)(1). “The applicable standard of review under Rule 12(b)(1) differs depending on whether the moving party has made a facial attack or a factual attack on the court's power to hear the case.” *James-St. Jules v. Thompson*, Super. Ct. Civ. No. SX-09-CV-136, 2015 V.I. LEXIS 74, *6 (V.I. Super. Ct., June 25, 2015) (unpublished) (citing *Mortensen v. First Fed. Sav. and Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977)). “A facial attack . . . is an argument that considers a claim on its face and asserts that it is insufficient to invoke the subject matter jurisdiction of the court’

³ Defendant refers to the Federal Rules of Civil Procedure throughout its Mot. to Dismiss. However, effective March 31, 2017 the Supreme Court adopted the Virgin Islands Rules of Civil Procedure, which supersede all previous civil procedure rules applicable to the Superior Court, including the Federal Rules of Civil Procedure. *Mills-Williams v. Mapp*, 67 V.I. 574, 584 (V.I. 2017). Although this action was pending on the effective date of the rules, the Court finds no reason why applying the V.I. R. Civ. P. to this matter would be infeasible or work an injustice to either party and will apply them, per V.I. R. Civ. P. 1-1(c)(2)(B).

based on a jurisdictional defect.” *Id.* at *6-7 (quoting *Constitution Party of Pennsylvania v. Aichele*, 757 F.3d 347, 358 (3d Cir. 2014)). A factual attack occurs “when a defendant disputes the existence of certain jurisdictional facts alleged by plaintiffs” *Id.* at *7. “A factual attack to the Court’s subject matter jurisdiction may only occur after the allegations of the complaint have been controverted.” *Id.* at *7-8 (citing *Mortensen v. First Federal Savings and Loan Assoc.*, 549 F.2d 884, 892 n. 17 (3d Cir. 1977)). In the case of a factual attack, “the burden of proving the existence of subject matter jurisdiction lies with the plaintiff.” *Id.* at *7 (citing *Carpet Group Intern. v. Oriental Rug Importers Ass’n, Inc.*, 227 F.3d 62, 69 (3d Cir. 2000)).

¶7 In the case at hand, the Government filed their Motion to Dismiss after filing their Answer to the Complaint, and that Answer challenged certain allegations in the Complaint. Therefore, the Court will review the 12(b)(1) claim in the Motion to Dismiss as a factual attack.

¶8 The Government claims that the Court lacks jurisdiction to hear this matter because (i) V.I. CODE ANN. tit. 33 §§ 2451 – 2456 provides taxpayers with an exclusive, mandatory remedy for challenging tax assessments, (ii) Plaintiff has failed to exhaust the applicable administrative remedies available, and (iii) there is no irreparable harm.

1. Exhaustion of Administrative Remedies

¶9 The Government argues that the administrative remedies provided in accordance with 33 V.I.C. §§ 2451 – 2456 are mandatory and must be pursued fully

before a taxpayer can bring an action before the court. TUTU counters that the administrative remedies are non-exclusive and that exhaustion of the appeals process with the BOTR is not a condition precedent to filing an action under V.I. CODE ANN. tit. 5 § 80, the Virgin Islands taxpayer statute.

¶10 “Persons who believe that the Tax Assessor has incorrectly assessed the value of their property have the opportunity to seek redress from the Board of Tax Review under V.I. Code Ann. tit. 33, § 2451.” *V.I. Tel. Corp. v. Mills*, Super. Ct. Civ. No. ST-17-CV-279, 2018 V.I. LEXIS 65, *8 (V.I. Super. Ct. June 22, 2018) (unpublished). “Any person aggrieved by the action of the Tax Assessor in relation to the valuation of his property *may* make written complaint thereof to the Board of Tax Review . . .” 33 V.I.C. § 2451(a) (emphasis added). Pursuant to 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, 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 [sic] 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.

Lorraine Associates, L.L.C. v. Gov't of the V.I., Super. Ct. Civ. No. ST-15-CV-438, 2016 V.I. LEXIS 24, *7 (V.I. Super. Ct. Mar. 18, 2016) (unpublished) “. . . 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.” *Id.* at *8 (citing *Haynes v. Ottley*, 61 V.I. 547, 567 (V.I. 2014). Further, under V.I. CODE ANN. tit. 4 § 76: “the Superior Court shall have original jurisdiction in all civil actions regardless of the amount in controversy” This includes claims brought under 5 V.I.C. § 80. “The [Superior] Court has jurisdiction under 4 V.I.C. § 76 for claims arising under 5 V.I.C. § 80 . . .” where the plaintiff has satisfied the conditions for bringing suit under the latter statute. *Lorraine Assocs., L.L.C. v. Gov’t of the V.I.*, Super. Ct. Civ. No. ST-15-CV-438, 2016 V.I. LEXIS 233, *20 (V.I. Super. Ct. Dec. 13, 2016) (unpublished).

¶11 The Court in *Lorraine*, adjudicating an almost-identical motion to dismiss, undertook an exhaustively thorough analysis of the statutory construction and interplay between 33 V.I.C. §§ 2451 – 2456 and 5 V.I.C. § 80. *Id.* at *8-22. This Court finds the analysis in *Lorraine* highly persuasive, as *Lorraine* is very similar to the instant matter. The complaint in *Lorraine* was filed one month prior to the Complaint in this case, by the same attorney, against the same Defendants. Importantly, several of the filings in the two matters are virtually identical, with only the case-specific details being altered. In point, the Motion to Dismiss, Opposition and Reply filed in the instant matter are – save the aforementioned case-specific details – identical to the briefings filed in *Lorraine*. Therefore, this Court is satisfied that the analysis performed in *Lorraine* is correct and applicable to this matter and consequently, this Court adopts *Lorraine’s* analysis as though it were set forth in this Opinion.

¶12 The Court in *Lorraine* held that “the administrative appeals process under 33 V.I.C. §§ 2451 – 2456 does not function as a jurisdictional prerequisite to judicial review in cases arising under 5 V.I.C. § 80.” *Id.* at *23 (citing *Public Emples. Rel. Bd. v. United Indus. Workers-Seafarers Ina Union*, 56 V.I. 429, 438 (V.I. 2012) (internal citations omitted)).⁴ Finding that the plaintiff had brought a colorable claim under 5 V.I.C. § 80, the *Lorraine* Court thus held that, “Defendants’ contention that the Court lacks subject matter jurisdiction because Plaintiff failed to exhaust its administrative remedies under 33 V.I.C. §§ 2451 – 2456 lacks merit.” *Id.*

¶13 Here, TUTU has properly 1) alleged that it is a Virgin Islands taxpayer, 2) alleged that Ira Mills, in his official capacity as the Tax Assessor for the Territory, has engaged in illegal or unauthorized conduct, and 3) has requested injunctive relief, thereby satisfying the criteria for bringing a claim under 5 V.I.C. § 80.⁵ Therefore, as in *Lorraine*, this Court finds that pursuing the administrative appeals process provided by 33 V.I.C. §§ 2451 – 2456 is not an exclusive, necessary prerequisite to bringing such a claim under 5 V.I.C. § 80. Thus, this Court has subject matter jurisdiction to hear this case.

⁴ See also *First Am. Dev. Group/Carib, LLC v. WestLB AG*, 55 V.I. 594, 611 (V.I. 2011). (“As the United States Supreme Court has recently reiterated, a statute is ‘jurisdictional’ if ‘it governs a court’s adjudicatory capacity, that is, its subject-matter or personal jurisdiction’” (Quoting *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011))).

⁵ In *Lorraine*, the Court noted that not all claims regarding the Tax Assessor’s office would rise to the level of satisfying the pleading requirements of 5 V.I.C. § 80. Specifically, the Court referenced the requirement that the conduct described be “illegal or unauthorized.” *Lorraine* at *20 (citing *McBean v. Gov’t of the V.I.*, 32 V.I. 120, 128 (V.I. Super. Ct. 1995)).

¶14 In its Reply, the Government argues that commencing the appeals process with the BOTR has created “an additional jurisdictional flaw.” Reply 8 (citing *Thomas v. Gov’t*, 26 V.I. 71, 73 (V.I. Super. Ct. 1991)). The Court in *Lorraine* has already analyzed this question, finding that “a ‘jurisdictional flaw’ is not created merely because an appeal was instituted before the Board of Tax Review, since the Court independently has jurisdiction over the action as a taxpayer suit under 5 V.I.C. § 80 and 4 V.I.C. § 76.” *Lorraine* at *24-25. This Court concurs. Having already established that the Court has subject matter jurisdiction under 5 V.I.C. § 80 and 4 V.I.C. § 76, the Court finds no reason to dismiss this action merely because an appeal was filed with the BOTR.⁶

2. Irreparable Harm

¶15 The Government asserts that this matter should be dismissed because TUTU has neglected to make a showing of irreparable harm. TUTU counters that irreparable harm is not a required element for injunctive relief in cases brought under 5 V.I.C. § 80.

¶16 This question has been addressed by various Virgin Islands courts. “[P]laintiffs are not required to show irreparable harm under 5 V.I.C. § 80” *Berne Corp. v. Virgin Islands*, 120 F. Supp. 2d 528, 536, (D.V.I. 2000). “The Legislature of the Virgin Islands enacted standing upon taxpayers, without the demonstration of a particularized injury, pursuant to 5 V.I.C. § 80.” *Donastorg v. Virgin Islands*, 45 V.I.

⁶ The Court notes that TUTU’s appeal before the BOTR has been stayed pending the outcome of this case.

259, 270 (V.I. Super. Ct. 2003). “Standing under section 80 is . . . premised on two elements: an act by ‘a territorial officer or employee,’ and the allegation that such an act was either ‘illegal’ or ‘unauthorized,’ or that it constituted a wrongful disbursement of territorial funds.” *Virgin Islands Taxi Association v. W. Indian Co.*, 66 V.I. 473, 484 (V.I. 2017). “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.” *Olive v. deJongh*, 57 V.I. 24, 39 (V.I. Super. Ct. 2012) (citations omitted). “. . . I reaffirm my earlier holding that plaintiff need not show irreparable harm, because the very remedy provided by 5 V.I.C. § 80 is equitable in nature. Section 80 itself authorizes injunctive relief to restrain or enjoin violations of law.” *Equivest St. Thomas, Inc. v. Gov't of the V.I.*, 208 F. Supp. 2d 545, 551 (D.V.I. 2002) (citing *Berne*, 120 F. Supp. 2d at 536). This Court concludes TUTU need not show irreparable harm in order to bring suit under 5 V.I.C. § 80, and thus failure to show such harm is not a reason to dismiss this matter.

B. The EDA is Not an Indispensable Party to this Action.

¶17 The Government argues that the EDA is an indispensable party to this action, as failure to enjoin the agency would “impair or impede the [EDA]’s ability to grant modifications, extensions, or renewals to existing certificates . . .” Mot. to Dismiss

12. TUTU counters that not only is the EDA not an indispensable party, it is not even a necessary party and is in fact “of marginal relevance to the case.” Opp. 18.

¶18 V.I.R. Civ. P 12(b)(7) permits a party to move for dismissal for “failure to join a party under Rule 19.” Rule 19(a) governs whether or not a party is required and must be joined, if feasible, and provides as follows:

(a) Persons Required to Be Joined if Feasible.

- (1) A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
 - (A) in that person's absence, the court cannot accord complete relief among existing parties; or
 - (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
 - (i) as a practical matter impair or impede the person's ability to protect the interest; or
 - (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Rule 19(a) V.I. R. Civ. P.

An indispensable party is one who not only has an interest but an interest of such a nature that a formal decree cannot be made without either affecting that interest or leaving the controversy in such a condition that a final determination may be wholly inconsistent with equity and good conscience.

Richards v. Election, 13 V.I. 531, 537 (V.I Super. Ct. 1977) (citing *Gaw v. Higham*, 267 F.2d 355, 357 (6th Cir. 1959), cert. denied, 360 U.S. 933 (1959)). “The party that must be joined under Rule 19(a)(1)(A) is referred to as an ‘indispensable party.’”

Hendricks v. Clyne, Super. Ct. Civ. No. ST-16-CV-147, 2016 V.I. LEXIS 177, at *3-5 (V.I. Super. Ct. Oct. 27, 2016) (unpublished) (internal citations omitted). “A necessary party, however, only becomes indispensable when it cannot be joined. Fed. R. Civ. P. 19(b).” *Epstein v. Fancelli Paneling, Inc.*, 55 V.I. 150, 165 (V.I. Super. Ct. 2011). “Ultimately, the burden is on the moving party to show that a party is both necessary **and** indispensable.” *Titan Medical Group, LLC v. Governor Juan F. Luis Hospital and Medical Center*, Super. Ct. Civ. No. SX-13-CV-497, SX-2013-CTO-00004, 2015 V.I. LEXIS 79, at *2 (V.I. Super. Ct. July 14, 2015) (unpublished), *vacated in part on other grounds, remanded by sub nom. Juan F. Luis Hosp. & Med. Ctr., & Gov’t of the V.I. ex rel. Governor Juan F. Luis Hosp. & Med. Ctr. V. Titan Med. Group, LLC*, S. Ct. Civ. No. 2015-0074, ___ V.I. ___, 2018 V.I. Supreme LEXIS 33 (V.I. Oct. 25, 2018), (emphasis added).

¶19 Here, not only has the Government failed to prove that the EDA is a necessary party, they have also given no reason why the EDA could not be joined, if needed. First, the EDA’s absence from this suit would not impede the Court’s ability to grant complete relief among the parties. Whether the Tax Assessor is violating the law by failing to disclose data and assessment methodologies, produce evidence that it is following IAAO standards, or failing to comply with the terms of TUTU’s EDC Certificate are all questions that do not require the EDA’s joinder as a party. As has been noted by this Court in another, similar matter, the EDA “is not responsible for the assessment of property taxes, the collection of property taxes, or the refunding of

overpaid property taxes.” *V.I. Tel. Corp. v. Mills*, 2018 V.I. LEXIS 65, *11, Super. Ct. Civ. No. ST-17-CV-279, (V.I. Super. Ct. June 22, 2018) (unpublished). Although the Government asserts that failure to join the EDA would in some way “impair or impede” the agency’s ability to “protect [its] interest” in the matter, they have not shown any evidence of how, exactly, the EDA would be impacted since the Certificate has expired. Finally, there is no reason to conclude that, should they not be joined, the EDA would be at any risk of being “subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.” Therefore, the EDA does not meet the threshold for a required party, as per Rule 19(a).⁷ As the EDA is not a required party, there is no reason for a Rule 19(b) analysis and no reason to dismiss this matter for failure to join an indispensable party.⁸

CONCLUSION

¶20 The administrative remedies for challenging tax assessments as provided in 33 V.I.C. §§ 2451 – 2456 are not mandatory and TUTU was not required to exhaust them prior to filing suit under 5 V.I.C. § 80. Therefore, this Court has subject matter jurisdiction over TUTU’s claim.

⁷Moreover, the Government have provided no reason why the EDA could not be joined in this matter. As a result, even if the EDA were established to be a required party, no 19(b) determination is necessary.

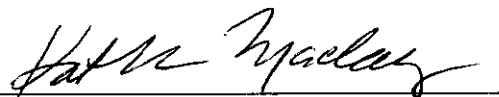
⁸Importantly, a Rule 19(a) defense is one that is waived unless raised in the pleadings, per Rule 12(b). As TUTU notes in the Opposition, Rule 12(h)(2) expressly provides relief to this waiver, but only for Rule 19(b) claims. As the Government did not raise a Rule 19 defense in their Answer, they waived that defense.

¶21 The Government has failed to establish that the EDA is a required party in this matter. As a result, there is no basis for dismissing this action for failure to join EDA as a party under V.I. R. Civ. P. 12(b)(7) and V.I. R. Civ. P. 19.

¶22 For the foregoing reasons, Defendant's Motion to Dismiss for Lack of Jurisdiction and for Failure to Join an Indispensable Party will be denied.

¶23 An Order consistent with this Memorandum Opinion will be entered.

DATED: March 6, 2019



Kathleen Mackay
Judge of the Superior Court
of the Virgin Islands

ATTEST:

ESTRELLA H. GEORGE

Clerk of the Court

BY: 

DONNA DONOVAN

Court Clerk Supervisor

3/6/2019