NO. CV 05 4011048	:	SUPERIOR COURT
HEALTHSOUTH CORPORATION	:	JUDICIAL DISTRICT OF
v.	:	NEW BRITAIN
CITY OF WATERBURY	:	MARCH 13, 2008

NO. CV 05 4010916	:	SUPERIOR COURT
HEALTHSOUTH CORPORATION	:	JUDICIAL DISTRICT OF
v.	:	NEW BRITAIN
TOWN OF MADISON	:	MARCH 13, 2008

NO. CV 05 4010807	:	SUPERIOR COURT
HEALTHSOUTH CORPORATION	:	JUDICIAL DISTRICT OF
v.	:	FAIRFIELD AT BRIDGEPORT
TOWN OF FAIRFIELD	:	MARCH 13, 2008

NO. CV 05 4002794	:	SUPERIOR COURT
HEALTHSOUTH CORPORATION	:	JUDICIAL DISTRICT OF
v.	:	WINDHAM AT PUTNAM
TOWN OF WILLIMANTIC	:	MARCH 13, 2008

NO. CV 05 4006234	:	SUPERIOR COURT
HEALTHSOUTH CORPORATION	:	JUDICIAL DISTRICT OF
v.	:	STAMFORD/NORWALK AT STAMFORD
CITY OF NORWALK	:	MARCH 13, 2008

MEMORANDUM OF DECISION

The plaintiff, HealthSouth Corporation (HealthSouth), brought the above captioned municipal tax appeals, challenging the actions of the assessors in five municipalities, Waterbury, Madison, Fairfield, Windham and Norwalk, that listed personal property on the assessment rolls in the name of HealthSouth on the Grand Lists of October 1, 2001, when HealthSouth claims it did not own such property.

The plaintiff seeks a writ of mandamus pursuant to General Statutes § 52-485[1] claiming that the assessors from all five defendant municipalities refused to issue certificates of correction removing personal property from the respective Grand Lists of October 1, 2001, pursuant to General Statutes § 12-57[2] when such property did not exist, and could not be subject to tax on said Grand Lists.

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[1] General Statutes § 52-485 provides, in relevant part, as follows: "**Writ of mandamus**. (a) The Superior Court may issue a writ of mandamus in any case in which a writ of mandamus may by law be granted, and may proceed therein and render judgment according to rules made by the judges of the Superior Court or, in default thereof, according to the course of the common law."

[2] General Statutes § 12-57 provides, in relevant part, as follows: "**Certificates of correction.** (a) When it has been determined by the assessors of a municipality that tangible personal property has been assessed when it should not have been, the assessors shall, not later than three years following the tax due date relative to the property, issue a certificate of correction removing such tangible personal property from the list of the person who was assessed in error, whether such error resulted from information furnished by such person or otherwise."

Although each of the plaintiff's one-count complaints seeking mandamus are based upon the alleged failure of the assessors in all five defendant municipalities to correct the assessment rolls on the 2001 Grand List, the defendants raise the following special defenses to the plaintiff's mandamus claim:

1. Under the doctrine of clean hands, the plaintiff is not entitled to relief.

2. The appeal is untimely filed pursuant to General Statutes § 12-119.

3. The appeal is untimely filed pursuant to General Statutes § 12-117a.

In addressing the untimeliness defense under § 12-119, the plaintiff acknowledges in its memorandum of law in support of its motion for summary judgment (hereinafter plaintiff's 12/14/07 MOL), p. 12, that these actions were not filed within the one-year time limitation period contained in § 12-119. Instead, the plaintiff contends that these actions involve claims pursuant to § 12-57 which has a three-year period within which to seek correction of the assessors' actions. The plaintiff does not address the defendants' special defense dealing with relief pursuant to § 12-117a.

Practice Book § 10-51 requires the defendant to plead special defenses that "must refer to the cause of action which it is intended to answer . . . ." The court notes that the defendants' special defenses implicates causes of action under § 12-117a and § 12-119 that the plaintiff did not plead, yet the defendants seek to dismiss these specific

nonpleaded causes of action for the plaintiff's failure to comply with these statutory provisions. Although the plaintiff has not filed a motion to strike claiming that the special defenses are improper, pursuant to Practice Book § 10-39 (a) (5), the court is still faced with a complaint pleading a mandamus action as provided for in § 52-485, not a complaint based upon § 12-117a or §12-119. For this reason, the defendants' motions to dismiss are denied.

Apart from the defendants' motions to dismiss, the parties filed cross motions for summary judgment in each of the five appeals. In their motions for summary judgment, all of the parties argue there are no material facts in issue and that based upon the parties' stipulation of facts, each is entitled to judgment as a matter of law.

In its appeal, HealthSouth recites the following uncontested facts in its 12/14/07 MOL, pp. 2-4:

> "The parties have submitted a Stipulation of Facts for the purposes of filing cross motions for summary judgment . . . HealthSouth is a foreign corporation and the owner of certain personal property located in various towns and cities in the State of Connecticut including the defendant [municipalities]. HealthSouth made a timely filing of a declaration of tangible personal property for the 2001 Grand List. It was discovered that a portion of the personal property listed on the foregoing declaration[s] did not exist, but had been included in the declaration[s] as a result of the overstatement of assets owned by HealthSouth nationwide made in an effort to meet or exceed earnings expectations established by Wall Street analysts.
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> "HealthSouth is one of the nation's largest healthcare providers, providing such services as outpatient surgery, diagnostic and rehabilitative services.

When HealthSouth determined that its declaration of tangible personal property for the 2001 Grand List included entries representing property that did not exist, it authorized a representative to seek a correction of that erroneous overstatement of personal property. Correspondence dated May 4, 2004 was sent from Brian T. Scully to the municipal assessor[s], with attachments, explaining the circumstances leading to the error in including these fictitious assets in the declaration for the 2001 Grand Lists. That correspondence is referenced in the Stipulation of Facts, and a copy of the correspondence and attachments is provided as Exhibit 1 attached to this memorandum.

"As explained in the SEC Complaint, the Scully Correspondence, and illustrated by the attachment to that correspondence entitled 'Assessed Value Detail – Personal Property' for each of the respective grand lists, each of the fictitious assets at each HealthSouth facility, and the facility in Waterbury in particular, were described in the facility asset books as 'AP Summary.' This contrasts sharply with the description of the actual assets such as 'MEDIX SYSTEM,' 'AEROBIC ERGOMETER' or 'DUMBELL WAGON,'[3] using examples for the 2001 Grand List shown on the Assessed Value Detail.

"Mr. Scully made a second request seeking corrections in the assessments on the 2001 and 2002 Grand Lists [by the Scully 2005 Correspondence, Exhibit 2]. In this correspondence [it was] again requested that the assessments be corrected to remove the items listed as 'AP Summary' from HealthSouth's list for the 2001 Grand List, as that property were not tangible assets and should not have been included. Mr. Scully also invited the [municipalities] to perform an audit of HealthSouth pursuant to C.G.S. § 12-53 (c) (1) in this correspondence.

"The Assessor for the [municipality] has not issued a certificate of correction in response to the plaintiff's request to do so, nor has the Assessor otherwise amended the 2001 Grand List in response to the plaintiff's request."

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[3] The court notes that various assets are listed for each municipality in the plaintiff's 12/14/07 MOL.

Central to the plaintiff's claim for mandamus is the language in § 12-57 that provides, in relevant part, as follows:

> "When it has been determined by the assessors of a municipality that tangible personal property has been assessed when it should not have been, the assessors shall, not later that three years following the tax due date relative to the property, *issue a certificate of correction* removing such tangible personal property from the list of the person who was *assessed in error, whether such error* resulted from information furnished by such person or otherwise."

(Emphasis added.)

The plaintiff's argument, that the assessors were required to issue certificates of correction once informed that the lists of tangible personal property for assessment purposes were made in error, presupposes that the subsequent information given to the assessors was correct and would compel the assessors to issue certificates of correction once this information was received.

The requirements for the issuance of a writ of mandamus are well settled. "A writ of mandamus is an extraordinary remedy, available in limited circumstances for limited purposes. . . . It is fundamental that the issuance of the writ rests in the discretion of the court, not an arbitrary discretion exercised as a result of caprice but a sound discretion exercised in accordance with recognized principles of law. . . . That discretion will be exercised in favor of issuing the writ only where the plaintiff has a clear legal right to have done that which he seeks. . . . The writ is proper only when (1) the law imposes on

the party against whom the writ would run a duty the performance of which is mandatory and not discretionary; (2) the party applying for the writ has a clear legal right to have the duty performed; and (3) there is no other specific adequate remedy." (Internal quotation marks omitted.) Morris v. Congdon, 277 Conn. 565, 569, 893 A.2d 413 (2006). "Even satisfaction of this demanding [three-pronged] test does not, however, automatically compel issuance of the requested writ of mandamus. . . . In deciding the propriety of a writ of mandamus, the trial court exercises discretion rooted in the principles of equity." (Internal quotation marks omitted.) AvalonBay Communities, Inc. v. Sewer Commission, 270 Conn. 409, 417, 853 A.2d 497 (2004).

The AvalonBay court further noted that "[i]t is axiomatic that [t]he duty [that a writ of mandamus] compels must be a ministerial one; the writ will not lie to compel the performance of a duty which is discretionary. Consequently, a writ of mandamus will lie only to direct performance of a ministerial act which requires no exercise of a public officer's judgment or discretion. . . . Furthermore, where a public officer acts within the scope of delegated authority and honestly exercises her judgment in performing her function, mandamus is not available to review the action or to compel a different course of action. Discretion is determined from the nature of the act or thing to be done rather than from the character of the office of the one against whom the writ is directed." (Citations omitted; internal quotation marks omitted.) Id., 422.

The plaintiff's position is that even if, for purposes of assessment, it intentionally listed property it did not own at the time of the valuation, the non-existent personal property can have no situs, and therefore, cannot be taxed. See plaintiff's 12/14/07 MOL, p. 6, citing Levin-Townsend Computer Corporation v. Hartford, 166 Conn. 405, 407, 349 A.2d 853 (1974).

Although the plaintiff recognizes that the doctrine of clean hands is applicable in an equitable action and that the defendant municipalities can argue that the doctrine of unclean hands bars the plaintiff from recovery, the plaintiff nonetheless argues that the defendants must show that the plaintiff engaged in willful misconduct. See plaintiff's 12/14/07 MOL, pp. 6-7, citing Ridgefield v. Eppoliti Realty Co., 71 Conn. App. 321, 801 A.2d 902, cert. denied, 261 Conn. 933, 806 A.2d 1070 (2002). The plaintiff's main point is that the municipalities will have a windfall they are not entitled to if the assessors consider property it did not own for purposes of taxation.

The plaintiff also relies on the holding in Chatterjee v. Commissioner of Revenue Services, 277 Conn. 681, 894 A.2d 919 (2006), for the proposition that when the legislature enacts language that the commissioner of revenue services *"shall"* do something required by statute, as in General Statutes § 12-425 (1) or in § 12-549, the *"shall"* language in § 12-57 "clearly mandates that [each] assessor of the [various municipalities] issue a certificate of correction removing the entries for personal property

that did not exist and therefore was assessed when it should not have been." (Plaintiff's 12/14/07 MOL, pp. 9-10.)

Fundamental to the plaintiff's argument is that the plaintiff's action in submitting lists of fictitious assets to the various assessors for taxation purposes was an error which could be rectified by § 12-57.

"Error" is defined as "b: an act involving an unintentional deviation from truth or accuracy[;] c: an act that through ignorance, deficiency, or accident departs from or fails to achieve what should be done[.]" Merriam Webster's Collegiate Dictionary (10th Ed.). According to this definition, an error cannot arise from an intentional act, but that is exactly what the plaintiff did when it knowingly and deliberately included non-existent personal property in its declaration of taxable assets to the assessors.

The parties' stipulation of facts includes a letter dated May 4, 2004 from Brian T. Scully (Scully), Manager, National State and Local Tax Practice of KPMG, LLP. Scully issued the letter on behalf of his client, HealthSouth and its subsidiaries, stating in part, that "HealthSouth is being investigated by the Securities and Exchange Commission ('SEC') for a massive accounting fraud . . . . Part of the accounting fraud, as detailed in the SEC complaint, consisted of overstating property, plant and equipment by listing fictitious assets on depreciation schedules using the asset description of 'AP SUMMARY'. *These assets do not exist.* As a result of this, HealthSouth has been

reporting, has been assessed and has paid personal property taxes on these erroneous assets. Consequently, these erroneous assets have been included in the taxing jurisdictions certified tax roll in error." (Emphasis added.) (Exhibit C to 10/22/07 stipulation of parties.)

The SEC complaint (see Exhibit B to 10/22/07 stipulation of parties), recites as follows in the introduction section:

> "1. Since 1999, HealthSouth Corp. ('HRC'), one of the nation's largest healthcare providers, has overstated its earnings by at least $1.4 billion. This massive overstatement occurred because HRC' founder, Chief Executive Officer and Chairman of the Board, Richard M. Scrushy ('Scrushy'), insisted that HRC meet or exceed earnings expectations established by Wall Street analysts. When HRC's earnings fell short of such estimates, Scrushy directed HRC's accounting personnel to 'fix it' by artificially inflating the company's earnings to match Wall Street expectations. To balance HRC's books, the false increases in earnings were matched by false increases in HRC's assets. By the third quarter of 2002, HRC's assets were overstated by at least $800 million, or approximately 10 percent of total assets. HRC's most recent reports filed with the Commission continue to reflect the fraudulent numbers.
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> "2. Despite the fact that HRC's financial statements were materially misstated, on August 14, 2002, Scrushy certified under oath that HRC's 2001 Form 10-K contained 'no untrue statement of a material fact.' In truth, the financial statements filed with this report overstated HRC's earnings, identified on HRC's income statement as 'Income Before Income Taxes and Minority Interests,' by at least 4,700%."

Clearly, an intentional act to misstate the plaintiff's taxable personal assets, in the declarations submitted to each of the defendant municipalities, is not the commission of an erroneous act. Of particular interest is the "Declaration of Personal Property Affidavit", signed by the plaintiff's agent and notarized, reciting: "I DO HEREBY declare under penalty of perjury that all [sections] of this declaration have been completed according to the best of my knowledge, remembrance and belief, is a true assessment of all my personal property liable to taxation; and that I have not conveyed or temporarily disposed of any estate for the purpose of evading the laws relating to the assessment and collection of taxes." (Exhibit A, p. 7.) The plaintiff would be hard pressed to claim that the intentional inclusion of non-existing assets in its declarations of personal property for tax purposes was an error under § 12-57. Such a claim would be a perfect example of an "oxymoron".[4]

The granting of a mandamus order here would deprive the assessors of the opportunity to exercise their judgment to make a factual finding as to whether the plaintiff's action amounted to an error or not. Since a mandamus action is based upon the enforcement of a ministerial act on the part of the assessor and not upon an act of the assessor requiring judgment or discretion, the mandamus action cannot lie. As noted

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[4] The word "oxymoron" is defined as "a combination of contradictory or incongruous words[.]" Merriam Webster's Collegiate Dictionary, 10th Ed.

above, "[t]he writ is proper only when (1) the law imposes on the party against whom the writ would run a duty the performance of which is mandatory and not discretionary; (2) the party applying for the writ has a clear legal right to have the duty performed; and (3) there is no other specific adequate remedy." (Internal quotation marks omitted.) Morris v. Congdon, 277 Conn. 569.

Since this action was brought as a mandamus action as the sole remedy, it is necessary to consider whether mandamus is the proper vehicle to use when challenging the action of an assessor. As discussed above, a three-pronged test is applicable. See id. Furthermore, 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 tax review. The taxpayer may then appeal, pursuant to General Statutes [§ 12-117a], an adverse decision of the town's board of tax review to the Superior Court. The second method of challenging an assessment or revaluation is by way of § 12-119. . . . [Section] 12-119 allows a taxpayer one year to bring a claim that the tax was imposed by a town that had no authority to tax the subject property . . . ." Waterbury Hotel Equity, LLC v. Waterbury, 85 Conn. App. 480, 501, 858 A.2d 259, cert. denied, 272 Conn. 901, 863 A.2d 696 (2004).

In the present action, the plaintiff's basis for seeking a writ of mandamus against

the defendant assessors must fail for three reasons. First, each assessor's refusal to revisit the plaintiff's assessment of personal property on the 2001 Grand Lists was a discretionary act. It was not the performance of a mandatory act because the plaintiff's filing of the 2001 declarations were not made in error, they were intentional acts. Second, a writ of mandamus does not lie where the plaintiff has a right to appeal the action of the assessors pursuant to § 12-119. Third, a mandamus "is a remedial process and may be issued to remedy a wrong, not to promote one, to compel the discharge of a duty which ought to be performed, but not to compel the performance of an act which will work a public and private mischief, or to compel a compliance with the strict letter of the law in disregard of its spirit or in aid of a palpable fraud. The [plaintiff] must come into court with clean hands." (Internal quotation marks omitted.) Jalowiec Realty Associates, L.P. v. Planning & Zoning Commission, 278 Conn. 408, 419, 898 A.2d 157 (2006).

For the above stated reasons, the plaintiff is not entitled to a writ of mandamus against the various assessors of the defendant towns. Accordingly, the plaintiff's motions for summary judgment are denied, the defendants' cross motions for summary judgment are granted with judgment to enter in favor of each of the defendant towns, without costs to any parties.

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Arnold W. Aronson

Judge Trial Referee