NOT FOR PUBLICATION WITHOUT APPROVAL OF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

TAX COURT OF NEW JERSEY

Kathi F. Fiamingo
Judge

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January 29, 2015

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RE: Paterson City v. Paterson Coalition for Housing, Inc.
Docket No. 011021-2008

Dear Counsel:

This letter is issued pursuant to Rule 2:5-1(b) to amplify the court's December 5, 2014 oral opinion granting Paterson City's ("plaintiff") motion for voluntary dismissal of its complaint and denying Paterson Coalition for Housing, Inc.'s ("defendant") cross motions.

*

After oral argument, the court found that the following facts had been established: In or about October, 2007, defendant made application to the Paterson City Tax Assessor for a property tax exemption for the subject property known as Lot 20 in Block 4802 on the Paterson City Official Tax Map on the basis that it was a charitable organization and entitled to exemption under N.J.S.A. 54:4-3.6. The Assessor denied defendant's application, whereupon defendant filed a timely appeal with the Passaic County Board of Taxation. The Passaic County Board of Taxation issued a Memorandum of Judgment granting the exemption with a notation that the exemption was "for one year only".

Defendant paid the 2008 first and second quarter taxes assessed on the subject property, but did not pay the second half taxes for the year. Plaintiff filed a timely appeal of the County Board's judgment with the Tax Court. Defendant filed no answer (which is not required[1]). Defendant filed no counterclaim or other pleading contesting the County Board's limitation of the exemption to "one year only" or any other issue, nor did defendant make application to the court permitting it to file any other pleading.[2]

For year 2009 and thereafter, Paterson City continued to assess the property as non-exempt. Defendant did not pay any of the taxes assessed in the following years nor did it file any further appeals with either the County Board or the Tax Court. On June 25, 2009, Paterson City sold to Royal Tax Lien Services, LLC ("Royal") a Tax Sale Certificate on the subject property which included taxes assessed for the second half of 2008 – even though the property had been granted an exemption by the Passaic County Board of Taxation for 2008 - and the first half of 2009. Royal subsequently filed a complaint in the Superior Court of New Jersey, Chancery Division, Passaic County to foreclose its lien. Defendant filed an answer to the complaint contesting the foreclosure.

[1] R. 8:3-2(b) provides that "[i]n local property tax cases, every defendant may but need not file an answer."
[2] R. 8:3-2(b) permits the filing of only an answer, counterclaim and answer to counterclaim, unless a court order provides otherwise.

The Tax Court previously entered a Consent Order permitting Royal to intervene as a third party defendant in the Tax Court matter, but no pleadings were filed by either plaintiff or defendant with respect to any claims alleged against Royal, nor has any pleading been filed by Royal in this matter. Other than the referenced consent order no party in this action has applied to the court for leave to file any other pleadings in this matter. Accordingly, the only pleading filed in the matter before this court was the complaint filed by plaintiff contesting the grant of the exemption to the defendant for 2008.

Plaintiff brought its motion pursuant to R. 4:37-1(b) requesting leave to voluntarily dismiss the complaint in this matter[3]. Defendant opposed the motion and filed a "cross-motion" requesting an order: voiding and canceling the tax sale certificate issued by plaintiff to Royal[4]; applying the Freeze Act (N.J.S.A. 54:51A-8) to the County Board's Judgment granting the exemption; voiding the portion of the Passaic County Board of Taxation's Memorandum of Judgment limiting the exemption to "one year only"; and permitting the defendant to contest the assessments imposed for years 2009 through 2012.

Dismissal of Complaint

The court granted plaintiff's motion and denied defendant's cross-motion. In granting plaintiff's motion, the court noted that R. 4:37-1(b) permits dismissal of the complaint only by leave of court and upon such terms and conditions as the court deems appropriate in its sound discretion. The broad objective of the rule is "to expedite justice, to avoid duplicitous litigation and to decide each case on its merits" Burke v. Central R. Co., 42 N.J. Super 387, 396 (App. Div. 1956).

[3] Plaintiff did not argue that it was entitled to withdraw its complaint pursuant to R. 8:3-9 which permits withdrawal of a complaint filed in Tax Court "at any time prior to the close of the proofs before the Tax Court . . ."

[4] Apparently counsel for plaintiff and defendant "decided" in the foreclosure action that the issue of whether the Tax Sale certificate was valid was an issue that would be determined in the Tax Court action. Despite this decision, neither party filed any pleading placing the issue before the Court.

> R.R. 4:42-1(b)[5] is identical to Rule 41 (a)(2) of the Federal Rules of Civil Procedure. It has been adopted to protect a defendant from the duplication of the normal costs of litigation. The evil aimed at by the rule "is present in any instance in which a defendant is damaged by being dragged into court and put to expense with no chance whatever (if there is a dismissal without prejudice) of having the suit determined in his favor." McCann v. Bentley Stores Corporation, 34 F. Supp. 234 (W.D. Mo. 1940). The obvious purport of our rule is to protect a litigant where a termination of the proceedings without prejudice will place him in the probable position of having to defend, at additional expense, another action based upon similar charges at another time.
>
> [Union Carbide Corp. v. Litton Precision Products, Inc., 94 N.J. Super. 315, 317 (Ch. Div. 1967)]

Plaintiff's motion was to dismiss the complaint with prejudice and therefore the perils of duplicative litigation were not present. Dismissal of the complaint would make final the judgment relative to the charitable exemption for the subject property for 2008, the only issue properly before the court.

Furthermore, R. 8:3-9 provides: "Whether or not a responsive pleading has been filed, a complaint or a counterclaim may be withdrawn at any time prior to the close of proofs before the Tax Court and thereafter with leave of Court." Thus it appears that plaintiff was entitled to withdraw the complaint despite any objection of the defendant as no proofs had yet to be placed before the court. As stated by Judge Conley in Cherry Hill v. United States Life Ins. Co., 1 N.J. Tax 236 (Tax 1980):

> [T]here is no authority to prevent plaintiff from withdrawing its appeal as requested in this case. Indeed, R. 8:3-9 permits such a withdrawal. The practice in the Tax Court in this respect is different from practice in the Superior Court. Dismissal of an action resulting from a plaintiff's timely withdrawal of its complaint is not upon terms and conditions set by the court. In the case of such a withdrawal, entry of the judgment of dismissal is a ministerial act carried out by the Clerk of the Tax Court. Any party seeking affirmative relief in this court must protect his rights by the filing of an appropriate pleading. He cannot rely upon the filing of a pleading by his adversary. Defendant's motion for an order preventing plaintiff's withdrawal of its appeal is denied.

[5] R.R. 4:42-1(b) is the source rule of current R. 4:37-1(b). Pressler & Verniero, Current N.J. Court Rules, Note: R. 4:37-1, (Gann).

[Id. at 243.]

As noted above, defendant filed no pleadings in the within matter. It was incumbent upon it to do so in order to protect its rights to relief. Thus under R. 8:3-9, defendant's opposition to plaintiff's withdrawal of its complaint should have been denied. As plaintiff filed its motion under R. 4:37-1(b), the application of R.8:3-9 was not addressed in the proceedings. Had it been, the complaint would have been dismissed under that Rule.

Defendant's Cross-Motions for Relief

As to the defendant's "cross-motion", it is questionable whether any of the defendant's requests for affirmative relief were properly the subject of "cross-motions" as the defendant had filed no pleadings in this matter.

I found that the only issue properly before the court was the claim brought in the only pleading filed in this court - the complaint appealing the County Board of Taxation's judgment granting the charitable exemption to the property for the year 2008. No other issue was pleaded. Defendant filed no counterclaim contesting the County Board's limitation of the exemption "for one year only"; the defendant did not file a counterclaim or third party complaint or any other pleading in this court contesting the issuance of the tax lien or its validity; nor did the defendant file any appeal of any assessment/denial of exemption for 2009 or thereafter. Bringing such claims for affirmative relief as part of a cross-motion without having first addressed them in some filed pleading was improper and such claims were denied.[6]

The court also denied the defendant's cross-motion to apply the Freeze Act to 2009 and 2010 based on the Supreme Court's decision in Boys' Club of Clifton v. Jefferson Township, 72

[6] It should also be noted that with the exception of the filing of a Consent Order granting Royal the right to intervene as a Third Party Defendant, defendant did not at any time in the six years that this matter has been pending move to for permission to file a cross appeal or a third party complaint, or any other affirmative pleading in this court.

N.J. 389 (1977). In that case, the Supreme Court held that while the Freeze Act makes binding a final judgment with respect to valuation, there was no similar provision in the statutes involving tax exempt status. Thus, the taxpayer which received an exemption for 1971 and 1972 should have separately appealed in 1973 and 1974 to obtain exemption for those years. Id. at 405. See also Cnty of Essex v. E. Orange, 214 N.J. Super 568, 576-577 (App. Div. 1987) certif. denied 107 N.J. 120 (1987).

In the case currently before the court, the defendant did not appeal the denial of the exemption in 2009 or any subsequent year; even though it had been put on notice that the exemption was limited by the Board in 2008 to "one year only", a limitation it did not appeal to this court, and even though its property continued to be assessed as non-exempt.

The court is not persuaded by the defendant's reliance on the Appellate Division's opinion in Hackensack City v. Bergen County, 24 N.J. Tax 390 (App. Div. 2009). In Hackensack, the City of Hackensack, in 1994, removed from the exempt rolls certain previously exempt property owned by the County of Bergen. The County appealed the decision to the County Board of Taxation, which concluded the property was exempt from tax. The City timely appealed that decision to the Tax Court and continued to assess the property as if non-exempt for 1995 and thereafter. The County belatedly filed appeals to the County Tax Board for years 1995 and 1996 in May of 1996, which were dismissed by the Board as being untimely. The County then appealed the dismissals to the Tax Court. The County further filed timely appeals of the assessments made by the City for 1997 and 1998.

The Tax Court upheld the dismissal of the 1995 and 1996 appeals as untimely and, after trial, found the property to be exempt for the years 1994, 1997 and 1998. The City appealed the Tax Court's decision for years 1994, 1997 and 1998 granting the exemption and the County appealed the Tax Court's dismissal of the 1995 and 1996 appeals.

The Appellate Division affirmed the Tax Court's decision that the property was exempt for 1994, 1997 and 1998. The Appellate Division also upheld the Tax Court's dismissal of the untimely appeals for 1995 and 1996. In doing so, the court found that "[T]he County was remiss in not filing timely appeals for 1995 and 1996, which is considered a fatal defect to the Board's review." Id. at 401.

The court then reviewed the Freeze Act and its application to the facts under review in that case. In doing so, the court noted that the property had been deemed tax exempt from 1974 through 1993 until the City unsuccessfully challenged the designation for 1994. The court did not rule that the Freeze Act was applicable, but instead held open the question as to whether the Act could apply to 1995 and 1996 under the circumstances of that case where "on September 14, 1994, the Board rejected the newly issued assessment and returned the property's assessment to '$0'." Id. At 400.

Specifically the court noted:

> Here the Tax Court examined whether the County's use of the property was sufficient to satisfy N.J.S.A. 54:4-3.3 and warrant a finding that the property was used for public purpose. The assessment was fixed at "$0" based on the determination that no change occurred. That issue was adjudicated on the merits and the facts presented demonstrated that the County utilized the building in the same way in 1994, 1997 and 1998.
>
> [Id. at 405.]

The circumstances of the case before the court are substantially dissimilar to those before the court in Hackensack. In the case before this court the Tax Board affirmed the assessment of the property at $1,583,000 (Land $1,008,000; Improvement $575,000), and entered judgment for an exemption – Judgment Code # 13A. (See attached Memorandum of Judgment). It did not "return" the assessment of the property to "$0". The Board did not set the assessment at "$0". There is no indication that the property was ever assessed at $0. Applying the reasoning of Hackensack application of the Freeze Act in this matter would merely freeze the assessment of $1,583,000 to 2009 and 2010

Even assuming that notwithstanding the decision in Boys' Club the Freeze Act is applicable to the exemption in this matter as positied by defendant, such a finding would have been premature. As noted by the court in Hackensack:

> While it is desirable this litigation be brought to an end with definiteness and not be further prolonged, this issue is not properly before this court. The Tax Court correctly identified the County must receive a final judgment prior to moving for application of the Freeze Act. N.J.S.A. 54:51A-8. Once a final judgment is rendered a taxpayer must file a supplementary motion to the Tax Court in the first instance, pursuant to Rule 8:7(d), to invoke the Freeze Act. That potential relief remains available to the County. We leave for the Tax Court the examination of whether the judgment, once final, has fixed the amount of the assessment such that the Freeze Act applies.
>
> [Id. at 405-06. Internal citations omitted.]

In the case before this court, the judgment was not made final until after the plaintiff's complaint contesting the award was dismissed. As in Hackensack, the issue of the application of the Freeze Act to the assessment of the subject property was not before the court.

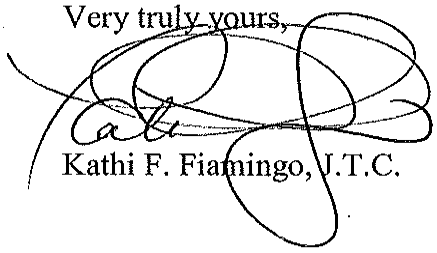
Finally with respect to any year in which defendant failed to file an appeal of the denial of the exemption, such failure removed the issue from being considered by this court. In matters of taxation, strict adherence to statutory deadlines is crucial to the effective administration of government. F.M.C. Stores Co. v. Borough of Morris Plains, 100 N.J. 418, 424 (1985). Thus, "[f]ailure to file a timely appeal is a fatal jurisdictional defect." Id. at 425 (citing Clairol v. Kingsley, 109 N.J. Super. 22, (App. Div.), aff'd, 57 N.J. 199 (1970), appeal dismissed, 402 U.S. 902, 91 S. Ct. 1377, 28 L. Ed. 2d 643 (1971)). Furthermore, filing a complaint "after the statutory deadline has resulted in the dismissal of the taxpayer's appeal." Ibid.

Thus, to the extent defendant's cross-motion for relief applied to any year in which a timely appeal was not filed, the cross-motion was denied.

Conclusion

For the reasons set forth on the record in this matter, and as amplified herein, plaintiff's motion to dismiss the complaint filed in this matter was granted and defendant's cross-motion was denied. Judgment dismissing the complaint was entered accordingly.

Very truly yours,



Kathi F. Fiamingo, J.T.C.