NOT FOR PUBLICATION WITHOUT APPROVAL OF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

TAX COURT OF NEW JERSEY

Mala Sundar
JUDGE

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BY ELECTRONIC MAIL
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Re: Steven D. Stankovits v. City of South Amboy
Block 30, Lot 8
Docket No. 014825-2012

Dear Counsel:

This is the court's opinion addressing a contested motion to dismiss the above captioned complaint. Defendant ("City") moved to dismiss plaintiff's complaint on grounds this court lacks jurisdiction because the Middlesex County Board of Taxation ("County Board") had dismissed plaintiff's petition for failure to appear, thus, for lack of prosecution. Alternatively, the City contends that since plaintiff was not the taxpayer when the County Board petition was filed, it was not an aggrieved taxpayer, therefore the court lacks jurisdiction.

*

For the following reasons, the court finds that neither plaintiff nor his counsel received notice of the County Board hearing. Further, the court also finds that plaintiff was a contract purchaser and thus had standing to appeal the assessment before the County Board. Therefore, the court denies the City's motion to dismiss the complaint.

FACTS AND PROCEDURAL HISTORY

On December 28, 2011, CIT Small Business Lending Corporation ("CIT") obtained title to the property located at 241 Bordentown Avenue, designated as Block 30, Lot 8 ("Subject") in the City. The transfer was obtained pursuant to a Sheriff's sale deed, and because the property owner, Frederick R. Whiteley, III, had defaulted on the mortgage encumbering the Subject. The transfer deed was recorded January 20, 2012.

By an Agreement for Sale and Purchase dated February 27, 2012 ("Agreement"), plaintiff, Steven D. Stankovits ("Stankovits"), contracted to buy the Subject from CIT for $315,000. The Agreement noted that the Subject was being occupied by Frederick R. Whiteley, III, and/or his family members, "who lost title" due to CIT's foreclosure proceedings, but who continued to operate a funeral home business on the Subject, and as to whom Stankovits requested CIT not to institute eviction proceedings. The Agreement further noted that "time was of the essence" therefore a closing had to occur no later than March 31, 2012, and if this did not occur, then the buyer would lose his deposit; the Agreement would be terminated; and CIT could re-sell the Subject to any other buyer, with Stankovits remaining liable for any deficiency of the new price. There was no provision addressing real property tax assessments or appeals therefrom.

The Agreement was signed by Stankovits on March 20, 2012 and by CIT on March 29, 2012. Although the contract for the purchase was executed in March, it appears that the closing

did not occur by the required date. Rather, the closing occurred between CIT and a newly incorporated entity "Ash N' Em, L.L.C." ("A&E"), a New Jersey corporation. A&E was created (sometime after the filing deadline of April 2, 2012) to purchase the Subject. Stankovits is the owner and sole shareholder of A&E. By deed recorded November 7, 2012, CIT transferred ownership of the Subject to A&E. The deed reflects A&E's address to be the same as Stankovits' address on the March 2012 Agreement. The purchase consideration was $260,000, thus, lesser than the amount stated on the Agreement. Aside from the March 2012 Agreement to Sell, there were no transfers of the Subject between March 2012 and the date when the Subject was sold to A&E.

On April 2, 2012, Stankovits filed a property tax appeal for the Subject with the County Board. The petition appealed the 2012 local property tax assessment. The petition indicated the petitioner as "Stankovits, S. as contract purchaser fr Whiteley, F." The mailing address was that of Stankovits' counsel ("c/o Kiczek & Rachinsky, L.L.C."). The petition also contained the correct Block and Lot numbers, and requested a reduction of the assessment from $553,900 to $443,200. The petition was signed by Stankovits' counsel, dated April 2, 2012, with a certification of service that the petition was served upon the Clerk of the City on April 2, 2012.

On May 25, 2012, the County Board issued a judgment dismissing the appeal with prejudice for lack of prosecution due to non-appearance. On June 19, 2012, the County Board judgment was mailed to Stankovits' counsel. The judgment listed the petitioner as "S Stankovits c/o Kiczek." The mailing address on the judgment was that of Stankovits' counsel

On or about August 2, 2012, Stankovits filed a complaint with the Tax Court, appealing the judgment issued by the County Board. The complaint title showed the plaintiff as Steven D. Stankovits. The Case Information Statement accompanying the complaint indicated plaintiff as

being the "contract purchaser." The certification of service attached to the complaint does not include CIT as one of the recipients.

A year later, on or about July 12, 2013, the City filed the instant motion to dismiss the complaint with prejudice for failure to appear and prosecute the appeal at the County Board. The City also contended that Stankovits lacked standing because he was not the Subject's owner at the time of filing the County Board petition.

Stankovits opposed the motion contending that neither he, nor his counsel, ever received a notice of a hearing date from the County Board, therefore, he was denied due process. He also argued that he had standing to file the petition as a contract purchaser. In this connection, he also filed a cross motion to amend the named plaintiff in the complaint to A&E, since title was transferred from Stankovits to A&E after the Tax Court complaint was filed.

The City replied that regardless of Stankovits' lack of notice, he did not show that a notice of hearing was not sent to "the correct entity," i.e., to CIT. It contended that "the facts available to the County Board" at the time of the hearing was the Stankovits was not the record owner of the Subject on the filing deadline but CIT was, and that no one appeared on the date of hearing. It noted that that the undisputed lack of Stankovits' ownership and the undisputed failure to raise the issue of lack of notice before the County Board renders Stankovits' standing argument as irrelevant.

Upon the court's inquiry for any information whether CIT had filed a petition, thus, had received a notice of hearing, Stankovits responded that a search of his files did not disclose any information or documents showing that CIT had filed a petition with the County Board.

FINDINGS

(A) Failure to Appear

N.J.S.A. 54:51A-1 provides that a Tax Court cannot review a county board petition which, among others, has been dismissed for failure to prosecute. Thus,

> If the Tax Court shall determine that the appeal to the county board of taxation has been (1) . . . ; (2) dismissed because of appellant's failure to prosecute the appeal at a hearing called by the county tax board; . . . , there shall be no review.
>
> [N.J.S.A. 54:51A-1(c)].

The effectuating regulations also provide similarly. Thus N.J.A.C. 18:12A-1.9 provides:

> A petitioner shall be prepared to prove his case by complete and competent evidence. In the absence of some evidence, the board may dismiss the petition. In the case of failure to appear, the board may dismiss the petition for lack of prosecution.
>
> [N.J.A.C. 18:12A-1.9(e)].

Dismissal of an appeal by a county board for failure to prosecute, if sustained by the Tax Court, terminates a taxpayer's right to appeal the tax year in question without a hearing. Pipquarryco, Inc. v. Borough of Hamburg, 15 N.J. Tax 413, 418 (Tax 1996). If a "taxpayer fails to appear at all, he risks a dismissal for lack of prosecution . . . which results in a loss of the right to file a de novo appeal in the Tax Court." VSH Realty, Inc. v. Twp. of Harding, 291 N.J. Super. 295, 298 (App. Div. 1996).

The Tax Court is vested with the power to determine, de novo, whether there has been a failure to prosecute before the county board within the intendment of the statute. Veeder v. Twp. of Berkeley, 109 N.J. Super. 540, 545 (App. Div. 1970). Whether there has been a failure to prosecute involves a question of fact. Id. at 545. "In reviewing the determination of the county board of taxation, the Tax Court must take into account the facts available to the county board at the time of its ruling." Pipquarryco, supra, 15 N.J. Tax 418.

The issue here is whether Stankovits or his counsel received notice of the County Board hearing for the above law to apply. Pursuant to the regulations, once a petition of appeal is filed, the County Board must "give at least 10 days' notice of the time and place of hearing of the appeal to the petitioner, assessor and attorney of the taxing district." N.J.A.C. 18:12A-1.9. The required method for providing such notice is not prescribed. Nonetheless, "transmittal of county board judgments [by mail] are equally applicable to the transmittal of hearing notices." Family Realty Co. v. Secaucus Town, 16 N.J. Tax 185, 190 (Tax 1996).

Generally, "there is a presumption that mail matter correctly addressed, stamped and mailed was received by the party to whom it was addressed . . . ." Szczesny v. Vasquez, 71 N.J. Super. 347, 354 (App. Div. 1962); State v. Borough of Eatontown, 366 N.J. Super. 626, 639 (App. Div. 2004); Lamantia v. Twp. of Howell, 12 N.J. Tax 347, 352-53 (Tax 1992). If a party asserts lack of notice, the fact of mailing "may be accomplished by evidence of a custom with respect to the mailing of letters, coupled with the testimony of the person whose duty it is to perform or carry out the custom." Borgia v. Bd. of Review, 21 N.J. Super., 462, 467 (App. Div. 1952). Although corroboration of the custom may be proffered to indicate that the habit or custom was followed in a particular instance, see Davis & Associates, L.L.C. v. Twp. of Stafford, 18 N.J. Tax 621, 627 (Tax 2000), it is not mandatory. Tolentino v. Twp. of Oxford, 4 N.J. Tax 173, 180 (Tax 1982).

Here, it is undisputed that Stankovits filed a petition with the County Board. The April 2, 2012 petition was timely because April 1, 2012 was a Sunday. Stankovits provided his certification, as well as that of his counsel in support of his contentions that neither he nor his counsel received a notice of the County Board hearing date or time. The City, however, did not provide any evidence, circumstantial and/or corroborating, to show that the County Board notice

of hearing was in fact mailed to plaintiff. There is no record of notices mailed by the County Board or a certification indicating the procedures were in fact followed in the mailing of plaintiff's hearing notice. See e.g. Family Realty, supra, 16 N.J. Tax at 188-91 (proof included the county board's mailing log, and corroboration of the mailing by the county tax administrator's certification, which court found established proper mailing of the county board hearing notice) .

Moreover, the facts do not suggest that the County Board lacked the correct mailing address for Stankovits. Indeed, the judgment indicates the same address as contained on the petition, namely, Stankovits' counsel's address, which judgment was received by Stankovits' counsel.

The City's argument that Stankovits had no proof that CIT had received a notice of the County Board hearing, and since it did not appear, the complaint was dismissed, is not credible. When the court asked Stankovits to locate any petition that may have been filed by CIT, the same request was also directed at the City. While Stankovits responded in the negative, the City provided no response, and failed to produce any such petition either.

Moreover, if, as the City argues, the facts before the County Board was only that CIT was the owner of record, and CIT may have received the notice, then the County Board's judgment for failure to appear against Stankovits makes no sense. The more appropriate dismissal code would be 5F, indicating "Other" where the County Board could have indicated lack of standing or improper petitioner because (i) Stankovits' petition to the County Board indicated that he was a "contract purchaser," and, (ii) according to the City, the facts "known to" the County Board was only that CIT was the owner of record.

Additionally, the City did not provide any information whether the County Board issued a judgment to CIT for the Subject for 2012. If CIT had filed a petition, the County Board would have issued a judgment because N.J.S.A. 54:3-26 requires a county board to "keep a record of its judgments thereon" (i.e., from all appeals) "in a permanent form, and shall transmit a written memorandum of judgments to the assessor . . . and to the taxpayer, setting forth the reasons on which such judgment was based . . . ."

Similarly, the City's argument that Stankovits is foreclosed from raising the issue of lack of notice because it was not initially raised before the County Board is meritless because it renders N.J.S.A. 54:51A-1(c)(2) meaningless.

For all of the foregoing reasons, the court denies the City's motion to dismiss the complaint for failure to appear before the County Board.

(B) Lack of Standing

The City raised the alternative argument that Stankovits lacked standing to file a petition before the County Board. Stankovits relies upon the unpublished opinion of the Appellate Division in Omega Self Storage of NJ, LLC v. Twp. of Lawrence, No. A-1755-12T4 (App. Div. July 3, 2013) that a contract purchaser of a property has standing to challenge the property's tax assessment.

N.J.S.A. 54:3-21 provides "a taxpayer" who or which is "feeling aggrieved by the assessed valuation of the taxpayer's property" to file a petition before the County Board or the Tax Court. The plain language makes it clear that the assessed property must be that of the taxpayer's for the appeal to lie. However, the courts have provided a liberal construction to the definition of "taxpayer" to "include parties other than the owner of the property." Lato v. Twp. of Rockaway, 16 N.J. Tax 355, 358-359 (Tax 1997). This is because the inferred legislative

"purpose [is] to afford the right to appeal essentially to any person whose tax payments are adversely affected by an improper assessment and not only an owner in fee of the assessed property appealed." Twp. of Ewing v. Mercer Paper Tube Corp., 8 N.J. Tax 84, 91 (Tax 1985).

In Omega, the plaintiff entered into an agreement to buy the subject property December 2011 which was post-assessment but pre-appeal deadline. The proposed closing of February 2012 was delayed until May 2012. To comply with the April 1 filing deadline, the buyer filed a direct appeal with the Tax Court on March 29, 2012. The complaint alleged that the buyer was the "taxpayer." Neither the complaint nor the Case Information Statement mentioned the name of the record owner. The record owner did not file a complaint either in its own name or in the buyer's name. The Tax Court granted the Township's motion to dismiss the complaint on grounds the buyer was not an "aggrieved taxpayer" under N.J.S.A. 54:3-21.

The Appellate Division reversed. Noting that "the threshold for" examining a person's standing was "fairly low," the court stated that ownership of property is not a pre-requisite to challenge its assessment. Sufficient stake such as exposure to tax liability or financial interest, will provide adequate standing.

The court found that the issue of "standing is a mixed question of law and fact." The factual inquiry involves examination of the "substantiality or sufficiency" of the filer's "financial interest in the assessed property." This included, among others, an "analysis of" the contractual terms, the "timing of the acquisition in relation to the filing deadline, and the proportionality of the tax burden."

The facts in Omega namely, that the December 2011 Agreement to Purchase existed before the April 1 filing deadline; that the proposed closing date was also prior to the April 1 filing deadline (which was why the Agreement likely did not specifically provide for

"protection" of the buyer's "interest in the 2012 tax appeal"); and that the buyer would have to bear the "lion's share of the" assessed taxes for the tax year and thus would be disproportionately assessed unless it was able to file an appeal, allowed for a conclusion that the buyer had "substantial interest in the property" when it filed a complaint. Therefore, the buyer was an aggrieved taxpayer with standing to challenge the property's assessment.

Here, the facts are similar except that the venue is the County Board. Here also the Agreement was entered post-assessment, pre-filing deadline; the closing was scheduled but did not occur prior to the filing deadline; the Agreement was silent as to the tax appeal provisions; and the County Board petition was filed one day before the filing deadline. Given that the Agreement required Stankovits to assume the Subject "as is" without any substantive obligations on the seller CIT, and that the sale involved a foreclosed property, it would appear that CIT did not have a substantial stake or financial interest in the property, other than to maximize recovery of its loan which was defaulted upon by the prior owner. Thus, CIT was not likely sufficiently invested or motivated to challenge the local property tax assessment on the Subject. Whereas, Stankovits, as the contract purchaser, with only 2 days to left to the filing deadline, had much more of a stake in challenging the assessment.

Under the above circumstances, the court finds that Stankovits had standing to file a petition to the County Board. Therefore, the City's motion in this aspect is also denied.

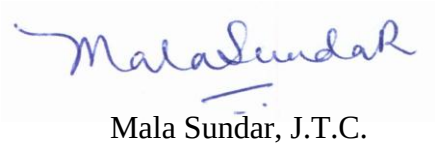
Although the Agreement was between CIT and Stankovits, the Subject was finally transferred on the September closing date to A&E (and for lesser consideration than in the Agreement). However, since A&E was created after the Agreement was entered into, and the only shareholder of A&E is Stankovits, it is reasonable to conclude that Stankovits continued to have sufficient and substantial financial stake in the Subject, to continue prosecution of the

matter by appealing the County Board judgment to the Tax Court (especially because Stankovits never had the opportunity to be heard at the County Board). Therefore, the court will permit the substitution of plaintiff's name in the complaint as A&E.

CONCLUSION

For the aforementioned reasons, the court denies the City's motion to dismiss the complaint and grants Stankovits' motion to amend the complaint to reflect the plaintiff as A&E. An Order reflecting this memorandum opinion will be entered by the court and accompany this opinion.

Very truly yours,



Mala Sundar, J.T.C.