NOT FOR PUBLICATION WITHOUT APPROVAL OF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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Re: The Top Condominium v. South Orange
Docket Nos. 014840-2011; 016249-2012; 009306-2013

Dear Counsel:

This letter constitutes the court's opinion with respect to the plaintiff's motion for summary judgment. For the reasons expressed herein, plaintiff's motion is granted.

Facts and Procedural History

The facts, as submitted, are as follows: Plaintiff, The Top Condominium Association, is the owner of real property located at 1616 South Orange Avenue, West, Township of South Orange, Essex County NJ, also known as Block 2605, Lot 1. Defendant is the Township of South Orange Village.

The property in question consists of approximately 1.46 acres and is improved with a driveway, shrubbery and plantings all of which service the condominium development known as The Top Condominiums located on a contiguous lot within the Township of Maplewood. There is a separate assessment for the value of each individual condominium unit located in the Township of Maplewood.[1]

For the tax year 2011, an assessment for the subject property in the amount of $318,000.00 was issued. For each of the tax years 2012 and 2013, the assessment was $239,700.00. The assessments in each tax year were issued to plaintiff, the condominium association.

For each of the tax years in question, taxpayer filed timely appeals before the Essex County Board of Taxation, which upheld the assessments. Timely complaints to the Tax Court were thereafter filed claiming, "Plaintiff's ownership and its use of the subject property entitle it to local property tax exemption because it is not separately assessable and falls within the exclusion of common elements."

Plaintiff previously filed a motion for summary judgment before Judge Mala Sundar, J.T.C. Judge Sundar denied the motion finding that the matter was not ripe for summary judgment. The Judge found that there was not enough evidence to conclude that the common elements were included in the assessed value of the condominium units (in Maplewood) and that as a matter of law that the common elements were being "separately assessed" by South Orange.

Plaintiff has renewed its Motion for Summary Judgment, arguing as before that defendant cannot impose a separate property tax assessment on the subject property because it constitutes a

[1] The property in the Township of Maplewood upon which the improvements constituting the condominium units are located is not a part of this action.

common element of the condominium falling squarely within the provisions of N.J.S.A. 46:8B-19.

Plaintiff addresses the issue raised in the denial of the initial Summary Judgment motion by submitting the opinion of its expert, Jon P. Brody, MAI, CRE, who concludes, "that the assessment of the subject property in South Orange is incorrect and this parcel of land should not have been independently assessed in South Orange. . . . The entire property, both the South Orange land and the Maplewood property should and is in actually (sic) assessed in Maplewood. This conclusion is based on accepted appraisal practice and our understanding, from an appraisal standpoint, of the New Jersey Condominium Act."

In addition to the opinion letter, Plaintiff provides a certification from Mr. Brody who states in part that he spoke with Edward Galante, the assessor in the Township of Maplewood, and that it is the opinion of both Mr. Brody and Mr. Galante, that the subject "property is part and parcel of the ownership of the individual condominium owners and that the price paid for the individual condominium unit includes the contributory value of all common elements of this property."

Mr. Brody goes on to opine that "the value of the entire assessment of the subject property in South Orange is included in the assessment of the individual condominium units of 'The Top' in Maplewood Township" and that the subject property should not have been separately assessed in South Orange.

Defendant opposes the motion indicating that even if the hearsay provided by Plaintiff's expert regarding his conversation with the Maplewood tax assessor is admissible, it does nothing to prove that the property in question is in fact taxed by both South Orange and Maplewood or provide any statutory basis under which the taxation of property located within the confines of

the Township of South Orange Village could be validly assessed by the Township of Maplewood.

Findings

Summary Judgment will be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c), Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). Denial is appropriate only where the evidence is such that reasonable minds could return a finding favorable to the party opposing the motion. Id. At 534, 540.

If the opposing party makes a prima facie showing of a genuine dispute, summary judgment may not be appropriate. See also Allstate Ins. Co. v. Fisher, 408 N.J. Super. 289, 302 (App. Div. 2009) ("even in an uncontested motion, the judge must consider whether undisputed facts are sufficient to entitle a party to relief. It is not enough to suggest that there is no opposition, especially if the facts do not warrant the granting of relief in the first instance.")

As noted these issues were previously the subject of a Summary Judgment motion which was denied. The prior denial of summary judgment does not bar the Court's reconsideration of the issues. Denial merely reserves issues for future disposition. Gonzalez v. Ideal Tile Importing Co., Inc., 371 N.J. Super 349, 356 (App. Div. 2004), aff'd, 184 N.J. 415 (2005), cert. denied, 546 U.S. 1092, 126 S.Ct. 1042, 163 L. Ed.2nd 857 (2006); A&P Sheet Metal co., Inc. v. Edward Hansen, Inc., 140 N.J. Super 566, 573 (Law Div. 1976).

Plaintiff claims it is entitled to judgment as a matter of law because the South Orange portion of the property consists only of common elements which by law are inseparable from the unit ownership and not subject to a separate assessment. N.J.S.A. 46:8B-19. Defendant states

that Plaintiff has not demonstrated how it is entitled to a zero assessment on property located in South Orange, and that it is a constitutional requirement that each non-exempt property bear its fair ad valorem share of each community's tax burden. See, N.J. Const. art. VIII, § 1 and N.J.S.A. 54:4-1. Defendant further contends that plaintiff has failed to present any evidence of the resolution of plaintiff's tax appeal in Maplewood and whether a reduction based on the location of the common elements in South Orange was obtained.

The only "facts" presented to this Court to support Plaintiff's assertion that the subject property, located in South Orange, has been actually assessed by Maplewood as part of that municipality's assessment of the condominium units is the opinion letter and certification of Mr. Brody. As noted by defendant, neither the opinion letter nor the certification provides indisputable evidence that, in fact, Maplewood has included the value of the lot located in South Orange in its assessment of the units located in Maplewood. Mr. Brody's reference to a conversation he had with the assessor in Maplewood is both inadmissible and insufficient to establish that the Township of Maplewood has included the value of the subject property in its assessment of the condominium units. Mr. Brody's opinion is not evidentiary of the inclusion of the value of the subject property in the assessment of the condominium units in the Township of Maplewood.

Regardless, I do not find that the question of whether the Township of Maplewood has actually included the subject property within its assessment of the condominium units is a genuine issue of material fact which would bar disposition of this matter on Summary Judgment.

N.J.S.A. 54:4-25 states that "When the line between taxing districts divides a tract of land, each part shall be assessed in the taxing district where located, unless the governing body of one of the taxing districts shall by resolution request that the entire tract be assessed by the

adjoining taxing district in which a portion of the tract is located." See also N.J.S.A. 40A:13-19 which permits governing bodies of two municipalities, by resolution, to allocate the sole "supervision" over land and buildings divided by the boundary line between them to one of those municipalities.[2]

Even if Plaintiff were to provide sufficient proof that Maplewood included the value of the South Orange tract in its assessment of the condominium units, it begs the question as to what authority Maplewood may have to assess property not located within its taxing district absent the governing body resolutions permitted by Statute. One municipality has no legal authority to assess taxes against property located in another municipality absent compliance with N.J.S.A. 54:4-25 Harvey v. Orland, 108 N.J. Super 493 (Ch. Div. 1970), aff'd 118 N.J. Super 104 (App. Div. 1972).

However, against the backdrop of the provisions of N.J.S.A. 54:4-25 lies the statutory scheme of condominium ownership. "By statute, ownership of a condominium unit includes a proportionate share of the common elements. N.J.S.A. 46:8B-3(h), (o), -6." Wedgewood Knolls v. West Paterson Bor., 11 N.J. Tax 514, 528 (Tax 1991). "All property taxes are separately assessed against each condominium unit and not on the common elements of the condominium property. N.J.S.A. 46:8B-19" City of Atlantic City v. Warwick Condominium Ass'n, Inc., 334 N.J. Super. 258 (App. Div. 2000); Wedgewood Knolls Condominium Ass'n v. West Paterson Bor., supra 11 N.J. Tax, 528; Glenpointe Ass'n v. Teaneck Tp., 10 N.J. Tax 288, 294 (Tax 1988). "For property tax purposes, the value of a common element is allocated among its owners on percentages set forth in the condominium's master deed." Olde Orchard Village v. Pequannock, 21 N.J. Tax 275, 281 (Tax 2004).

[2] It is apparent that no such resolution exists in this matter.

Neither party disputes that the subject property is a part of the common elements of the Plaintiff condominium association. The question before this Court is how to reconcile South Orange's constitutional and statutory right and obligation to assess and tax property located within its taxing jurisdiction with the prohibition of N.J.S.A. 46:8B-19 against the separate assessment of common elements.

"All real property within New Jersey is subject to taxation", Township of Holmdel v. New Jersey Highway Authority, 190 N.J. 74, 87 (2007) (citing N.J.S.A. 54:4-1; N.J. Const. art. VIII, § 1, P 2). It is unlikely that the legislature in enacting N.J.S.A. 46:8B-19 intended that a municipality like South Orange be denied its fair share of taxes on property located within its boundaries. "Judicial interpretation of statutory tax exemptions is governed by principles of general statutory construction." Id. "The 'Legislature's intent is the paramount goal . . . and, generally, the best indicator of that intent is the statutory language." Id. (quoting DiProspero v Penn, 183 N.J. 477 492, (2005).

Technically, N.J.S.A. 46:8B-19 does not provide an exemption from taxation for common elements like the subject property; instead there is a requirement that all assessments be "separately assessed and collected on each unit as a single parcel, and not on the condominium property as a whole". I have found no case dealing with the situation where the property located within one taxing district is a parcel containing only common elements servicing condominium units located in another taxing district. Where it has been found that the property under review constituted a common element the courts have ruled that it may not be separately assessed. See Warwick, supra 334 N.J. Super. 258 (parking lot constituted a common element and could not be separately assessed); Glenpointe Ass'n. supra 10 N.J. Tax 288 (recreational facilities were common elements not subject to separate assessment).

No case has barred the assessment of the common elements except against the condominium property as a whole. In other words, although the common elements may not be the subject of a separate assessment to the "condominium as a whole", the property constituting the common elements does not escape assessment and taxation altogether. Instead it is to be included within the assessment of each individual condominium unit. See Id at 305; Olde Orchard Village, supra, 21 N.J. Tax at 282. The interpretation that common elements could not be assessed - at all - even if they are located in a separate taxing district is not supported by the language of the statute or the cases reviewing it.

Accordingly, while I find that N.J.S.A. 46:8B-19 does not bar South Orange's right to assess taxes on property located within its taxing district which constitute common elements of a condominium, I also find that it does prohibit the assessment of the common elements against the "condominium property as a whole". Instead such taxes are to be allocated among the condominium unit owners on the percentages set forth in the condominium's master deed.

As a result, I find the assessment for the years in question is improper. The facts and legal issues before the court support only this conclusion, however impractical it may be to the parties. Nothing in this opinion prohibits the parties from seeking other remedies or corrections that may be available to them.

Conclusion

Summary Judgment in favor of Plaintiff is granted. Judgment voiding the assessments will be entered.

Very truly yours,

Kathi F. Fiamingo, J.T.C.