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THE TAX COURT COMMITTEE ON OPINIONS

TAX COURT OF NEW JERSEY

Mala Sundar
JUDGE

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Via Electronic and First-Class Mail

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Re: Lafayette Navesink View Homes, L.L.C. v. Borough of Rumson
Docket Nos. 016024-2012; 010718-2013

Dear Counsel:

This letter opinion constitutes the court's decision with respect to the above-captioned matters in connection with defendant's motion to dismiss the complaints for failure to pay taxes for tax years 2012 and 2013. Plaintiff argues that its tax payment requirement has been met for 2013 because the lien holder paid the same, and that for tax year 2012, the tax payment requirement should be relaxed in the interests of justice because the properties at issue are COAH mandated condominium units, i.e., affordable housing mandated by State law.

*

The court finds that Plaintiff is correct in its contentions as to tax year 2013. However, the relaxation of the statutory requirement to pay taxes prior to litigating the matters for tax year 2012 is unwarranted simply on grounds of the affordable housing status of the units. Further, Plaintiff's allegation that the taxes comprise about 37% of the potential gross rental receipts for the units does not facially establish that the assessments are so grossly excessive so as to warrant a relaxation of the tax payment in the interests of justice.

FACTS

The following findings of fact are based on certifications and exhibits submitted by the parties pursuant to R. 1:6-6.

The subject property is Block 8, Lot 4 (otherwise known as 16A Bellevue Avenue) and is located in defendant ("Borough"). It is improved by a condominium complex with seven units. As part of the development/approval process, two units were required to be designated as low income and moderate income respectively, under New Jersey's Affordable Housing (or COAH) laws. Five units were sold. Plaintiff is owner of the two COAH units, C06A and C06B. If rented, each Unit would likely be leased at $755 and $1,244 respectively due to their Affordable Housing status.[1]

For tax years 2012 and 2013, Unit C06A was assessed at $273,500 and Unit C06B was assessed at $282,700. The total taxes for the Units amounted to $8,568.48 (2012) and $8,899.20 (2013).

[1] It is unclear if the Units are actually rented. Plaintiff provided a "Certificate of Eligible Household" issued by an entity called Affordable Housing Alliance, which certified two applicants as being eligible for "an affordable unit" which "has been restricted for occupancy by low and moderate-income eligible household." The "Address/Project Name" is listed as Lafayette Navesink View. The "Referred Unit Size" is indicated as 3 and 2. The description of "Condo" and "Studio" is listed as "No."

For each tax year, Plaintiff appealed the assessments to the Monmouth County Board of Taxation, which had affirmed the assessments.

Plaintiff filed a timely complaint with this court on October 11, 2012 (tax year 2012) and on June 28, 2013 (tax year 2013) appealing the County Board judgments for each tax year.

As of the date of the filing of the 2012 complaint, there was due and owing $1,850.15 as to Unit C06A (tax $1,609.60; interest $155.25; costs $85.30); and $1,893.11 for Unit C06B (tax $1,644.70; interest $162.27; costs $86.14). The amounts were with respect to the 2011 tax year. However, it is undisputed that all taxes due and owing for both Units were paid in 2013, and as of the date of the filing of the 2013 complaint by a lien holder, Rainbow Associates.

The Borough filed a motion to dismiss the 2012 complaint for failure to pay taxes but only as to Unit C06A (the complaint included both Units). It also filed a similar motion for tax year 2013 but only as to Unit C06B (this complaint also included both Units).[2]

Plaintiff filed a late opposition (on March 27, at 8:53 p.m., the night before the scheduled return date of March 28, 2014) and requested the court nonetheless to consider the same. The court agreed, over objections of the Borough, and permitted the Borough additional time to file a reply.

CONCLUSIONS OF LAW

When, as here, a taxpayer appeals an assessment to the county board of taxation and thereafter to the Tax Court, our Legislature has required that all taxes outstanding for the year under appeal must be paid at the time the complaint is filed, in order to prosecute the appeals.

[2] This is despite the fact that as of the 2012 complaint date, which complaint included both units, there were unpaid taxes outstanding against both units. Plaintiff notes this omission but maintains that its arguments apply to both Units for both years since the Borough could bring another similar dismissal motion for the remaining Units.

See N.J.S.A. 54:51A-1(b).[3] The "pay now litigate later" principle is well-established in local property tax assessments. Woodlake Heights Homeowners Ass'n, Inc. v. Township of Middletown, 7 N.J. Tax 364, 366 (App. Div. 1984) ("[t]he principle that taxes must be paid when due as a condition to litigating liability for the amount alleged due is firmly embedded in our law"). This requirement is "to insure that the flow of municipal revenues will not be interrupted by the filing of tax appeals" and "has [no] bearing on the amount of the assessment." Route 88 Office Assoc. v. Township of Brick, 13 N.J. Tax 14, 21 (Tax 1992).

(A) Tax Year 2013

The Borough argues that the court must dismiss the 2013 complaint because the taxes were not paid by plaintiff but by a lien holder, and further because plaintiff filed an untimely opposition. Neither argument is persuasive.

As to the untimely opposition, the court in no manner condones plaintiff's counsel's late submission, especially when there is no explanation or justification for the delayed pleading. Court rules require compliance. Counsel, as professionals, and members of the Bar, should assiduously ensure they comply with our Supreme Court's procedures set forth in the court rules. See Seacoast Realty Co. v. W. Long Branch Borough, 14 N.J. Tax 197, 202 n.1 (Tax 1994) (disapproving plaintiff's counsel faxing a reply on the day before the motion's return date and "remind[ing]" attorneys of the need to comply with the time frames set forth in R. 1:6-3 or invite an "imposition of sanctions" for failure to do so).

[3] The Borough relied upon N.J.S.A. 54:3-27 as authority for its motion. That statute requires that taxes up to and including the first quarter of the tax year under appeal must be paid on or prior to the return date of the municipality's motion to dismiss the complaint for non-payment of tax, and applies to complaints filed directly with the Tax Court. See Lecross Assocs. v. City Partners, 168 N.J. Super. 96, 99-100 (App. Div.), certif. denied, 81 N.J. 294 (1979); Powder Mill I Assocs. v. Township of Hamilton, 190 N.J. Super. 63, 70 (App. Div. 1983). Here, the 2012 and 2013 complaints were not direct appeals therefore this statute does not apply.

Nevertheless, the higher courts have cautioned that the rules, especially those governing the motion practice, should not be rigidly applied resulting in routine dismissals due to technical violations. See, e.g., Tyler v. New Jersey Auto. Full Ins. Underwriting Ass'n, 228 N.J. Super. 463, 468 (App. Div. 1988) ("[i]t is a mistaken exercise of judgment to close the courtroom doors to a litigant whose opposition papers are late but are in the court's hands before the return day for a motion which determines the meritorious outcome of a consequential lawsuit.").

The Borough's argument that the 2013 complaint requires dismissal because taxes were paid by a lien holder would have some merit if the payment was made after the complaint was filed. See Dover-Chester Assoc. v. Township of Randolph, 419 N.J. Super. 184, 202 (App. Div.) (holding "that the requirement under N.J.S.A. 54:51A-1(b) that taxes be paid '[a]t the time that a complaint has been filed with the Tax Court' may not be satisfied by the subsequent issuance of a tax certificate.") (disapproving of the contrary analysis and holding in U.S. Land Resources v. Borough of Roseland, 24 N.J. Tax 484 (Tax 2009)), certif. denied, 208 N.J. 338 (2011). Here, it is undisputed that there were no outstanding taxes at the time the 2013 complaint was filed. Therefore, the City's motion to dismiss the complaint as to Unit C06B for 2013 lacks merit.

(B) Tax Year 2012

Plaintiff's 2012 appeal is jeopardized because it had 2011 taxes unpaid as of the date of filing that complaint. Plaintiff concedes that 2011 taxes were outstanding at the time the 2012 complaint was filed. As noted above, the delinquency cannot be rectified by a subsequent payment by a lien holder for purposes of N.J.S.A. 54:51A-1(b). See Dover-Chester, supra.

However, N.J.S.A. 54:51A-1(b) permits this court to "relax the tax payment requirement and fix such terms of payments as the interests of justice may require."[4] Since the primary goal of the tax payment requirement is to protect municipal revenues, and legislative history of the statute intended "preservation of the tax payment requirement," courts have held that "the relaxation of the requirement be granted sparingly, and in limited circumstances." Dover-Chester Assocs., supra, 419 N.J. Super. at 202 (citation omitted). Thus, although the statute permits relaxation, the court's discretion to exercise the same is "limited." Id. at 190.

The application of the "interest of justice" exception is "fact sensitive," and must be made on a "case-by-case basis" after "weigh[ing] all evidence relating to the totality of the circumstances resulting in non-payment of taxes." Id. at 202. Some of the "circumstances" which may permit such relaxation are those which are "(1) beyond the control of the property owner, not self-imposed, (2) unattributed to poor judgment, a bad investment or a failed business venture, and (3) reasonably unforeseeable." Wellington Belleville, L.L.C. v. Township of Belleville, 20 N.J. Tax 331, 336 (Tax 2002). See also Huwang v. Township of Hillside, 21 N.J. Tax 496, 506-10 (Tax 2004), where this court refused to dismiss a complaint for failure to pay taxes because taxpayers were making periodic payments of back property taxes through their consumer bankruptcy plan, which plan was confirmed without objection from the township.

Plaintiff argues that the court need not indulge in any weighing exercise or consider whether Plaintiff falls within the Wellington Belleville examples because the COAH status of the two Units "in and of itself" requires relaxation of the tax payment requirement. This is because, per Plaintiff, the Affordable Housing laws advance crucial public interests and implicate issues of constitutional proportions, thus, COAH units which are "dedicated" for the public's benefit,

[4] The language was added to the statute in 1999. L. 1999, c. 208.

are "a unique and special classification of properties" warranting an automatic relaxation of the statutorily required tax payments prior to the complaint filing. Plaintiff claims that it is "always" in the interests of justice to hear an appeal against a COAH unit without the need to comply with the tax payment procedure, because excessive taxation will destroy the feasibility of COAH housing and undermine the State's laws and Constitution. Plaintiff notes that since it has benefitted the Borough by allowing the latter to meet the COAH requirements, it should be provided the benefit of a relief from N.J.S.A. 54:51A-1(b).

The court is not convinced. Plaintiff's argument effectively nullifies the limited discretion of the Tax Court which is specifically provided for in N.J.S.A. 54:51A-1(b), and renders the "fact sensitive," "case-by-case" and "totality of the circumstances" standards redundant. Simply because the Units are COAH set-asides does not mean that they are entitled to an automatic exemption. If this were so, the statute would have so stated. Indeed, the Legislature has seen fit to exempt certain classes of property from this requirement. See N.J.S.A. 54:51A-3 (exempting "farm qualified" and "exempt property" from the tax payment requirement of N.J.S.A. 54:51A-1(b)). Units set aside under the Affordable Housing laws are not included. The Affordable Housing laws were promulgated in 1985,[5] and thus were in existence when the relaxation of tax payment language was added to N.J.S.A. 54:51A-1(b) in 1999. Yet, the Legislature did not include these units to merit special treatment.

Plaintiff next argues in the alternative that the court must afford Plaintiff a limited hearing akin to the Chapter 91 reasonableness hearing so it can establish the excessive nature of the assessments. See Ocean Pines, Ltd. v. Point Pleasant, 112 N.J. 1, 12 (1988). The basis for

[5] See Prowitz v. Village of Ridgefield Park, 237 N.J. Super. 435, 438 (App. Div. 1989).

this proposition is that (i) COAH units provide a significant public benefit; (ii) courts have recognized that assessments of COAH units must account for the negative impact to their fair market value due to the COAH restrictions; (iii) the total taxes for both Units is $740 per month, which is about 37% of the total $2,000 gross rent that can be charged for both units, thus establishing that the taxes are "onerous, burdensome, unfair and illogical;" and (iv) to obtain the equalized value of both Units of about $640,000,[6] the gross rent of $24,000 should be capitalized at 3.75%, which less the effective tax rate of 1.32% provides "an actual capitalization rate of 2.43%." Plaintiff notes that failure to allow it to establish this patent excessiveness of the assessments will result in the court permitting over-assessments of the COAH units, which in turn, will deter developers from building COAH Units, and thus, will thwart crucial public interests protected by the Affordable Housing laws.

Dicta has suggested that where a taxpayer proves "that a property is so substantially overassessed so as to be virtually confiscatory, . . . [then] due process may require a hearing on the validity of the assessment provided that tax is paid based on an assessed value deemed reasonable . . . ." J.L. Muscarelle, Inc. v. Township of Saddle Brook, 14 N.J. Tax 453, 477 (Tax 1995) (Lasser, J.T.C., concurring). Judge Lasser observed that this "hearing" should be conditioned upon a "tax [being] paid based on an assessed value deemed reasonable by the hearer of the motion." Ibid. There is no explanation or example of an over-assessment which is "virtually confiscatory." Nor is there any information on the types of proof required to establish the same. Thus, subsequent rulings have not endorsed this dicta. See Christian Asset Mgmt. Corp. v. City of East Orange, 19 N.J. Tax 469, 475 n.2 (Tax 2001) ("evidence of an

[6] The Chapter 123 ratio was 85.9% for 2012 and 87.36% for 2013. Applying the ratio to the combined assessments for the two Units ($556,200) for each tax year would provide equalized values of $647,497 and $636,530.

overassessment . . . without more, is insufficient to meet the 'interests of justice' standard" and noting that the ruling in Muscarelle as to confiscatory over-assessment was dicta); Wellington Belleville, supra, 20 N.J. Tax at 336 n.7.

Plaintiff's "proof" that the assessments are excessive, namely, its mathematical computation of the ratio of potential gross rents to the taxes and the capitalization rate, is unpersuasive. First, it is not even clear whether the Units are actually rented. However, this issue appears moot since the Borough's papers state that the "two units are COAH rental units and have been used as such since they were constructed."

Second, it is not clear that the actual gross rents are about $2,000 for both Units. The letter certifying certain applicant's eligibility for low or moderate income house notes that the projected unit rental does not include "other costs" in the calculations, which costs would be the "responsibility of the prospective renter." This brings into question the purportedly excessive ratio of taxes paid to rents allegedly received. For the same reason, Plaintiff's capitalization rate is not credible.

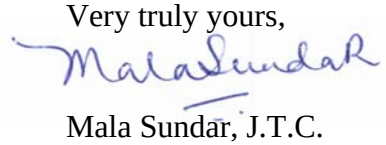
Third, and in any event, the court is not persuaded that comparing the ratio of taxes to the gross rent facially establishes an assessment that is so excessive as to border on being confiscatory. The tax rate is not a function of the assessment of the two Units. Moreover, because laws require a lower than market rental income for COAH, the ratio of rents to taxes would naturally appear higher but this cannot be a standard or an acceptable methodology for evaluating an alleged excessiveness of an assessment. Plaintiff was well aware that the two Units would be subject to lower-than-market rentals (or if sold, and Plaintiff has not explained whether it was barred from or failed in its attempt to sell the Units, at a lower price due to COAH restrictions). Its contention that it did not expect nor foresaw "a tax bill equating to 37% of the

rents charged" is insufficient to prove that the facts of this case merit a relaxation of the tax payment in the interests of justice. Cf. Christian Asset Mgmt. Corp., supra, 19 N.J. Tax at 476 (finding the taxpayer's officer's certification that the expenses exceeded the rental income, as insufficient basis to relax the tax payment requirement).

CONCLUSION

For the aforementioned reasons, the Borough's motion to dismiss the 2012 complaint as to Unit C06A is granted. Its motion to dismiss the 2013 complaint as to Unit C06B is denied. A final Order in this regard will accompany this memorandum opinion.

Very truly yours,



Mala Sundar, J.T.C.