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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-2784-04T52784-04T5

A-4544-04T5

CITY OF ATLANTIC CITY,

Plaintiff-Appellant,

v.

LOIS FINIFTER, ATLANTIC COUNTY

BOARD OF TAXATION, and ACE

GAMING, LLC (successor in

interest to GREATER BAY HOTEL and

CASINO a/k/a THE SANDS HOTEL

AND CASINO),

Defendants-Respondents.

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Submitted May 10, 2006 - Decided June 9, 2006

Before Judges Stern, Grall and King.

On appeal from the Tax Court of New

Jersey, Docket No. 000010-2005.

DeCotiis, Fitzpatrick, Cole & Wisler,

attorneys for appellant; Michael J. Caccavli,

of counsel; James L. Esposito, on the brief).

Zulima V. Farber, Attorney General, attorney

for respondents Lois Finiffer and Atlantic

County Board of Taxation (Patrick DeAlmeida,

Assistant Attorney General, of counsel;

Julian F. Gorelli, Deputy Attorney General,

on the brief).

Wolf, Block, Schorr & Solis-Cohen, attorneys

for respondent ACE Gaming, LLC (Nathan P. Wolf,

on the brief).

PER CURIAM

In A-2784-04T5 the City of Atlantic City appeals from an order of the Tax Court, entered on January 12, 2005, dismissing its complaint "with prejudice" and denying its request to enjoin the Atlantic County Board of Taxation ("the County Board") from reviewing defendant ACE Gaming

LLC's 2005 real property tax assessment, at ACE's request, prior to certification of the tax lists. In A-4544-04T5 the City of Atlantic City appeals from an order of March 9, 2005, which converted its second complaint, filed in the Tax Court, "to a 2005 tax appeal by the plaintiff" with the matter to be tried "with the pending appeals" for the years 2000 through 2004. The March 9, 2005 order expressly "consolidated" the second complaint, which challenged the County Board's \$100,000,000 reduction of ACE's 2005 assessment, with the pending tax appeal. Among other things, the City had argued that the reduction was invalid because it was adopted after consideration of confidential material submitted by the City in furtherance of settlement discussions in connection with prior tax year appeals pending in the Tax Court which was forwarded to the County Board by Ace. The City also asserts the assessment was adopted in violation of the statutory procedure for challenging assessments, improperly adopted in the absence of a valid compliance plan, and was "arbitrary and capricious." On the City's first verified complaint and Order to Show Cause, the Tax Court concluded that there was no "irreparable harm" and it did not have equitable power to grant Atlantic City the relief requested, and refused to enjoin the County Board considering the submission or from holding a meeting at which the correspondence was considered. Accordingly, it dismissed the City's first complaint for injunctive relief. Thereafter, on January 17, 2005, the Board declined to consider the matter until after the tax assessor submitted the 2005 assessment list. After the assessment list was provided, however, on February 25, 2005, the Board reduced ACE's assessment by \$100,000,000, to \$175,000,000.

The City's second complaint, filed on March 7, 2005 in the form of a second verified complaint and Order to Show Cause, sought to vacate the reduced assessment by the County Board. The March 9, 2005 order of the Tax Court denied injunctive relief to prevent enforcement of the reduced assessment, and dismissed the County Tax Administrator and County Board as defendants, but "converted" the verified complaint into a tax appeal. After a motion for reconsideration was denied on April 15, 2005, the City appealed to us and challenges the March 9, 2005 order.

Atlantic City argues that "the Tax Court erred when it determined that Atlantic City's verified complaint and Order to Show Cause were not ripe for the judicial determination," that "by permitting the County Board to proceed with the hearing on the subject property's 2005 assessment, the County Board and Tax Court aided ACE Gaming's efforts to circumvent the long established procedure for challenging property tax appeals in New Jersey" and that "by permitting the County Board to proceed with a hearing on the subject property's 2005 assessment, the Tax Court permitted the County Board to effect an illegal spot assessment on the subject property." It asks us to reinstate the original 2005 assessment of the Atlantic City tax assessor. In essence, Atlantic City contends that "ACE Gaming's disclosure of Atlantic City's privileged and confidential settlement correspondence is indefensible and cannot be permitted to go [without] penalty." The City further contends that "the County Board lacks statutory authority to review, revise or otherwise modify the subject property's assessment at ACE Gaming's behest" prior to certification of the tax lists, and that the County Board did so upon the "disclosure of Atlantic City's privileged and confidential settlement correspondence" in violation of law.

ACE disputes the City's contention that the County Board based the reduction of the 2005 assessment on ACE's submission of the City's settlement correspondence. Moreover, ACE notes that after the March 9 order was entered, Atlantic City endeavored to amend the complaint under [N.J.S.A. 54:3-21](#) to challenge the assessment, and then unsuccessfully tried to have the order certified as final. When the appeal to us was thereafter challenged as interlocutory, Atlantic City withdrew its 2005 tax appeal complaint to achieve finality for purposes of appeal. As a result, ACE now argues that "[a]s a result of withdrawal, the filing of the second complaint is a nullity, no action below exists for which there could be a remand and the matter is moot."

The appeal from the second order is clearly interlocutory. The March 9, 2005 order consolidated the complaint with the pending tax appeals. Hence, even though the City withdrew its 2005 tax appeal, the matter remains interlocutory. Moreover, the City is essentially trying to challenge the assessment based on the use by the taxpayer and County Board of material confidentially supplied to the Tax Court as part of settlement discussions, and we agree with the Tax Court that the 2005 assessment can be best challenged in the pending tax appeal. Irrespective of Atlantic City's withdrawal of its appeal, the taxpayer's 2005 appeal is pending, and Atlantic City can advance its arguments in that case. [N.J.S.A. 54:3-21](#) ("An appeal to the Tax Court by one party in a case in which the Tax Court has jurisdiction shall establish jurisdiction over the entire matter in the Tax Court."). We recognize that there may well be a question as to whether the withdrawal of a municipality's complaint or counterclaim (appeal or

cross-appeal) would prevent it from seeking an increased assessment based on the taxpayer's complaint or appeal to the Tax Court. See Pressler, Current N.J. Court Rules, comment R. 8:3-2 (GANN 2006). See also id. Comment R. 8:3-7. However, even if preclusion might otherwise result, we conclude that the City should be able to challenge the assessment as too low. The City has been trying to challenge the assessment from the time it was reduced by the Board. Clearly, neither ACE nor the County Board can claim prejudice or a lack of notice in light of the March 9, 2005 order.

We also recognize that the January 12, 2005 order dismissing the first complaint may technically constitute a final judgment cognizable by an appeal to this court, but as the underlying issue is now before the Tax Court, we decline to exercise jurisdiction and believe that the matter is best reserved for the creation of a record in the pending Tax Court matter. This is particularly true as the Chancery Division transferred the first complaint to the Tax Court for disposition there, and the underlying issue of the property's true assessment value will be decided there incident to the pending 2005 tax appeal. Moreover, while perhaps insignificant, the transcripts relative to both complaints have the same Tax Court docket number and the Tax Court may deem both matters "consolidated," notwithstanding the dismissal of the first complaint. See R. 8:8-3(a). In any event, the first appeal is technically moot because the requested injunctive relief was denied, the County Board proceeded on February 25, 2005 to reduce and certify the assessment, see N.J.S.A. 54:4-46 to -48, and the City's remedy is now by a tax appeal. See N.J.S.A. 54:3-21.

Accordingly, we dismiss both appeals without prejudice, and remand the matter to the Tax Court for further consideration of the second complaint as a regular 2005 tax appeal. We emphasize that, despite our concerns, we do not pass on the use in an administrative proceeding of the settlement documents presented to a court. See N.J.R.E. 408. Nor do we conclude that the County Board used or relied on the documents in this case. We leave the record for development by the Tax Court and believe it can determine the appropriate assessment by the use of appropriate evidence.

Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

The matter was transferred to the Tax Court, resulting in the order entered by a Tax Court judge, but captioned in the Chancery Division. However, the matter was apparently given Tax Court docket number 00010-2005. It bore a different Chancery Division docket number.

The plaintiff's appendix refers to a second complaint as filed January 8, 2005, but it is dated March 7, 2005.

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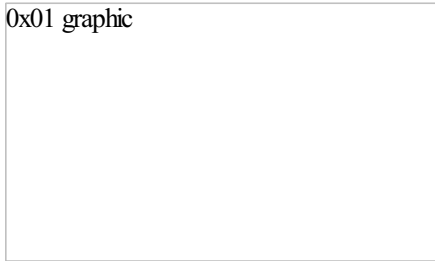
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