TAX COURT OF NEW JERSEY

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NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE TAX COURT

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Re: RT. 17 Parkway Assoc. C/O Muscarelle v. Borough of Paramus

Docket No. 003410-2012

Dear Counsel:

This matter was opened to the court on motion by defendant Borough of Paramus (hereinafter "Borough" or "defendant") to dismiss the complaint of plaintiff Route 17 Parkway Associates, LLC (hereinafter "taxpayer" or "plaintiff") for failure to respond to the tax assessor's request for financial information, commonly known as "Chapter 91 request," pursuant to N.J.S.A. 54:4-34.

*

The Chapter 91 request was sent by the assessor to the taxpayer in this matter at the address on file in the assessor's office, simultaneously via certified mail and regular mail. The certified mail was returned to the assessor marked "RETURN TO SENDER[,] UNCLAIMED" on t envelope. The request mailed via regular mail was never returned to the assessor's office as undelivered. The court finds that the taxpayer received adequate notice of the assessor's request since the request was sent by both certified and regular mail to the same address and the regular mail was not returned as undelivered. Therefore, defendant's motion is granted.

FINDINGS OF FACT AND PROCEDURAL HISTORY

On March 19, 2012, Plaintiff filed a complaint appealing the assessment for the 2012 tax year for the property located at Route 17, Paramus, New Jersey, designated on the Borough's tax map as Block 3601, Lot 7 (hereinafter "subject property"). When the taxpayer failed to respond to the assessor's Chapter 91 request for financial information, defendant filed the within motion to dismiss the appeal together with the supporting certification of James Anzevino, the Paramus assessor.

By letter dated October 1, 2011, the assessor sent a request for income and expense information to the owner of the subject property by certified mail and included a copy of N.J.S.A. 54:4-34. Appended to the certification is a copy of a certified mail receipt, as well as an Income and Expense Statement for the subject property. The top portion of the statement regarding the block, lot, property location, and owner of record, was properly completed. The request was sent to P.O. Box 915, Maywood, N.J., 07607, the address on record in the assessor's office as of October 1, 2011. That address had been utilized by the assessor in past years. Specifically, the year prior, on October 1, 2010, the assessor sent a Chapter 91 request letter to the plaintiff at the same post office box and received a response to the request.

The certification of Mr. Anzevino set forth the procedures that he follows when sending out Chapter 91 requests. He states that:

> [T]he mailing address that is used for mailing the Chapter 91 request letters is generated from a list that produces the tax bills and appears in the annual tax book. The addresses on that list are the addresses that are recorded and on file with Bergen County Registrar's office. Unless my office receives notice that there has been a change as to the property owner's address, the letter containing the Chapter 91 request (the "letter"), is prepared and is sent to the address that my office gets from that list.

The letter mailed via certified mail was returned to the assessor's office as undelivered, and contained the notation "RETURN TO SENDER[,] UNCLAIMED" with the handwritten notation "ATTEMPTED 10-1, 10/10, 10/20". The envelope also contained the following handwritten words "Tax Collector has same mailing address & tax bill got delivered & paid." The letter mailed contemporaneously via regular mail was never returned to the assessor as not being delivered. After receipt of the returned certified mail letter the assessor took the following action:

> I had one of my employees check with the Tax [O]ffice to inquire into the address that they had on record for mailing the tax bills and to see if it was the same. The Tax Office confirmed they had the same address I had in our records and that I had on the envelopes in which I mailed the Chapter 91 request by both Certified and regular mail. The tax collector further confirmed the owner with an address of P.O. Box 915 Maywood, N.J., 07607 is current with their taxes.

Defendant disputes plaintiff's claim that the request was not delivered, and asserts that the post office attempted delivery on three occasions but plaintiff elected not to accept delivery, which resulted in an "unclaimed" chapter 91 request.

In opposition to the motion to dismiss, plaintiff submitted the certification of Anne Herrera, the asset manager for the subject property. Ms.

Herrera certified that she did not receive the Chapter 91 request certified mailing. She stated as well that "there was a point in time when the taxpayer used the post office box address, as set forth on the label, but the taxpayer discontinued the use of that post office box for business purposes well before October 1, 2011." She described two letters that had been sent by the taxpayer to the Borough Tax Collector in 2007 and in 2009. Copies of the letters are annexed to the Herrera certification. The first letter dated August 21, 2007 requested that the address to be used for the purpose of sending tax bills should be: Route 17 Parkway Associates, C/O Jos. L. Muscarelle, Inc., 99 Essex Street, Maywood, N. 07607. The second letter dated October 7, 2009 requested changes as to the issuance of tax bills to the effect that original tax bills should be sent to G.S. Wilcox & Co., the mortgagee or service company, at 365 South Street, Morristown, NJ07960, with a copy to the plaintiff, Route 17 Parkway Associates, LLC, c/o Jos. L. Muscarelle, Inc., 99 Essex Street @ Route 17, Maywood, NJ 07607.[2] The 2009 letter also contained the bank's code which collectors use for purposes of submitting original tax bills to the mortgagee or servicing company. Plaintiff alluded to these letters as proof of submitting a proper request for a change of address. The Borough disputed this claim by submitting to the court that the assessor's office was not in receipt of these or any other correspondence evidencing a proper change of address request.[3] Further, the letters did not provide a different taxpayer address. As such, the Borough asserts that its assessor properly sent the Chapter 91 request to the same P.O. Box to which he has mailed the request in prior years, and to which plaintiff has received and provided a response to.

Immediately before this matter came before the court for argument, plaintiff submitted a deed, dated July 9, 1998, with an address for the grantor, Joseph L. Muscarelle, Jr. and Sharon Muscarelle at 99 W. Essex Street & Route 17, P.O. Box 915, Maywood, New Jersey, 07607, and an address for the grantee with a shared street address at Route 17 Parkway Associates, LLC, 99 W. Essex Street & Route 17, Maywood, New Jersey 07607. Plaintiff relied on the deed as proof that the Borough sent the Chapter 91 request to the wrong address [grantor's address instead of the grantee's address].

CONCLUSIONS OF LAW

The purpose of the Chapter 91 request is to assist the assessor's collection of information for use in establishing value for an income producing property, which value is generally determined by the capitalization approach. Delran Holding Corp. v. Delran Township, 8 N.J. Tax 80, 83 (Tax 1985). The governing statute, N.J.S.A. 54:4-34, reads as follows:

> Every owner of real property of the taxing district shall, on written request of the assessor, made by certified mail, render a full and true account of his name and real property and the income therefrom, in the case of income-producing property,…and if he shall fail or refuse to respond to the written request of the assessor within 45 days of such request,…the assessor shall value his property at such amount as he may, from any information in his possession or available to him, reasonably determine to be the full and fair value thereof. No appeal shall be heard from the assessor's valuation and assessment with respect to income-producing property where the owner has failed or refused to respond to such written request for information within 45 days of such request.

The financial information which the assessor seeks by way of a Chapter 91 request is designed "to assist the assessor in the first instance, to make the assessment and thereby . . . to avoid unnecessary expense, time and effort in litigation." Ocean Pines, 112 N.J. 1 (1988) (quoting Terrace View Gardens v. Township of Dover, 5 N.J. Tax 469, 474-75 (Tax 1982), aff'd, 5 N.J. Tax 475 (App. Div.), certif. denied, 94 N.J. 559 (1983)).

As established by statute, no tax appeal shall be heard in the case of a taxpayer who fails to respond to a Chapter 91 request. Given the severity of the sanction, the courts require that the municipality strictly adhere to the statutory requirements. The property owner must be adequately notified of its statutory obligations. In Great Adventure, Inc. v. Township of Jackson, 10 N.J. Tax 230, 233 (App. Div. 1988), the court stated that "the severity of the penalty for noncompliance provided by N.J.S.A. 54:4-34, namely, the taxpayer's loss of his right to appeal the assessment, requires a strict construction of the statute."

The only issue in this case is whether the assessor complied with the statute's mailing requirement, specifically, whether the Borough of Paramus properly mailed its Chapter 91 request to the taxpayer in a manner sufficient to provide adequate notice of the taxpayer's obligation to respond.

Plaintiff argues that since the statute requires service by certified mail the appeal preclusion sanction should not apply where the certified mail was not received by the taxpayer. Despite the fact that the request was also sent by regular mail which, as admitted by Plaintiff, was not returned to the sender[4], plaintiff contends that since certified mail is the only method of service authorized by N.J.S.A. 54:4-34 defendant's relief must be denied. To support this proposition, plaintiff urges this court to find Hammond v. City of Paterson, 145 N.J. Super. 452 (App. Div. 1976) controlling on the facts presented.

In Hammond, plaintiff was injured when he tripped over a manhole negligently maintained by defendant and sent a notice of claim to the city pursuant to the Tort Claims Act. Plaintiff sent the notice solely by ordinary mail despite the language of the statute which authorized that notice be sent by certified mail. N.J.S.A. 59:8-10. The lower court granted defendant's motion for summary judgment since plaintiff had failed to give the notice required by certified mail delivery. The court also cited to N.J.S.A. 59:8-11 of the Act which expressly provides that "proof of mailing may be made in the manner prescribed by the Rules of Court," of which R.1:5-4 permits service by ordinary mail only where the addressee "refuses to claim or to accept delivery." Finding that the plaintiff had failed to deliver the notice to defendant, the Appellate Division held that "when a statute . . . or a contract requires notice by certified mail, no presumption of receipt arises from mailing by ordinary mail. The very reason for providing for certified mail or actual receipt is to avoid such a presumption." Hammond v. City of Paterson, supra, 145 N.J. Super at 455. Plaintiff relies on this holding to support the proposition that fair notice of their obligations under N.J.S.A. 54:4-34 was not adequately received.

The same issue raised by plaintiff in the instant case was resolved against plaintiff taxpayer in Towne Oaks v. South Bound Brook, 326 N.J. Super. 99 (App. Div. 1999) certif. denied 164 N.J. 188 (2000). The assessor sent a chapter 91 request by regular and certified mail to the same address. The certified mail was returned as "unclaimed" after the three attempts at delivery by the post office and the regular mail was not returned. As in this case, the taxpayer did not deny the delivery of the request sent by regular mail. The Appellate Division held that the taxpayer received adequate notice of the tax assessor's Chapter 91 request for information, since the request was sent by both certified and regular mail to the same address, even though the certified mail was returned as "unclaimed." Specifically, the Court agreed with defendant's argument that "[e]lsewise, . . . property owners could avoid the requirements of N.J.S.A. 54:4-34 and its consequences by simply refusing the certified mail." Id. at 104. There, it was undisputed that the "mail was properly addressed, contained sufficient postage, showed the proper return address, and was properly deposited with the post office" therefore it was "presumed that the plaintiff received the notice sent by regular mail." Id. at 101, citing to SSI Medical Service v. State Department of Human Services, 146 N.J. 614 (1996) (holding that "a presumption arises that mail properly addressed, stamped, and posted was received by the party to whom it was addressed"). See also Hackensack v. Rubinstein, 37 N.J. 39, 47 (1962) (Supreme Court held that [w]hen interpreting . . . statutes authorizing service of notice by mail, courts have generally held service complete upon mailing if the envelope is properly addressed and contains sufficient postage. This is true whether the question involved service by registered mail or ordinary mail.")

The Court in Towne Oaks also addressed the holding in Hammond.[5] "In Hammond no presumption of receipt arose from mailing by ordinary mail because no effort had been made to comply with the statutory requirement of actual delivery or notice by certified mail. Here, defendant [Towne Oaks] complied with the statutory mandate by sending the request by certified mail." Likewise, this court does not find Hammond persuasive given the facts of this matter.

The court next considers whether there is merit to the argument that the assessor failed to use the proper mailing address which would preclude application of the Towne Oakes holding to these facts. Plaintiff contends that the 2007 and 2009 letters sent to the tax collector support

the argument that the Borough was on notice of a change of taxpayer address. The court finds that nowhere in the correspondence submitted to the Borough did plaintiff provide adequate notice that the Chapter 91 request be sent to a different mailing address other than the one responded to a year earlier by Ms. Herrera. The court also rejected that argument in Rubenstein v. Township of Upper Pittsgrove, 12 N.J. Tax 494 (Tax 1991) (notice to tax collector regarding tax bills did not constitute notice to tax assessor as to notification of assessment).

Just like in Rubenstein, 12 N.J. Tax 494, the notices sent by plaintiff to the tax collector regarding tax bills do not constitute notice to the tax assessor of a change of address. The court finds that the result is particularly warranted here given the facts presented, where, in October 2010, after the notices were sent to the tax collector, plaintiff received the Chapter 91 request sent by the assessor to the post office box address and provided a response. In addition, the change requested by the taxpayer related to payment of the tax bill in this case, to be sent to the bank at a separate location. The taxpayer address did not change from the address set forth on the deed.

Plaintiff's reliance in Brick Tp. v. Block 48-7, Lots 34, 35, 36, 202 N.J. Super. 246, 247-48 (App. Div. 1985) is also misplaced. In Brick Township, defendant property owners contended that service at an incorrect address which was listed on the property rolls was ineffective. The appellate court found that plaintiff's [the township] service of process on the property owners complied with the statute and stated that:

> Due process does not require tax collectors, municipalities and their staff to examine the tax rolls to search for outdated or incorrect addresses supplied by property owners, or to communicate with property owners to ascertain whether their addresses remain correct. A local professional or business person cannot expect more. . . The New Jersey Supreme Court has clearly ruled that municipalities are not constitutionally required to search out taxpayers in foreclosure suits to see if they have furnished up-to-date addresses.

(Id. at 252)

The appellate court remanded the case to conduct a plenary hearing on whether there was actual knowledge of facts making receipt of mailed notice unlikely. The court reasoned that the situation would be "something else altogether if someone involved ignored conscious awareness that the address was outdated." Id. at 254.

In the case at hand, plaintiff attempts to use this reasoning to support the proposition that the Borough ignored conscious awareness that the address on their records was outdated. The record in this case is devoid of any indication that would support such a proposition. This court finds that at the time the Chapter 91 request was sent, the address at issue was current as evidenced by Ms. Herrera's receipt of the Chapter 91 request a year earlier.

The parameters of a valid Chapter 91 request are set forth in the statute, N.J.S.A. 54:4-34. The assessor complied with the statute including the requirement of certified mail. The assessor also used the address on file, which he confirmed with the tax collector and plaintiff responded to years prior. The court finds that the assessor reasonably relied on the fact that the address was valid since the taxpayer did not advise otherwise. Plaintiff certified that the post office box address, while previously a valid address, is no longer used by the taxpayer for business purposes but only in opposition to the within motion. As well, plaintiff does not deny that the regular mail was not returned to the assessor as undelivered, and certified only to the fact that the certified mail was not received.

For the foregoing reasons, the motion should be granted, subject to plaintiff's right to a reasonableness hearing, as required by Ocean Pines.

Very truly yours,

1 In the United States postal Service Manual updated November 5,2012, of which the court takes judicial notice, the non-delivery designation of "Unclaimed" is defined as "Addressee abandoned or failed to call for mail."

2 Taxpayer referred to the tax bill copy as an "Advice Copy."

3 In fact, the Borough contends that the first time they received notice that the P.O. Box address is no longer in use was after receiving Ms. Herrera's certification in opposition to the within motion.

4 Ms. Herrera's certification does not dispute its receipt. Similarly, during oral argument, there was no issue of fact as to receipt of regular mail.

5 During oral argument, plaintiff attempted to persuade this Court not to follow the Town Oaks decision. According to plaintiff, Towne Oaks was decided by two appellate judges and not three, the required amount of judges to publish an opinion. Consequently, plaintiff argues that this court owes no deference to our appellate court. Contrary to plaintiff's assertions, "published Appellate Division opinions are clearly binding on all lower courts in the State. . ." Pressler, Current N.J. CourtRules, comment 3.3 on R. 1:36-2 (2013). See also David v. Government Employees Ins., 360 N.J. Super. 127, 142 (App. Div. 2003), certif. den. 178 N.J. 251 (2003).