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THE TAX COURT COMMITTEE ON OPINIONS

TAX COURT OF NEW JERSEY

Mala Sundar
JUDGE

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Re: Rozinante, Inc. v. Borough of Sea Bright
Block 23, Lot 13
Docket No. 001307-2016

Dear Counsel:

This matter comes before the court on defendant's motion to dismiss plaintiff's 2016 local property tax appeal for failure to respond to the tax assessor's request for financial information pursuant to N.J.SA. 54:4-34 (L. 1979, c. 91), commonly known as "Chapter 91," in connection with the above captioned property ("Subject"). Plaintiff does not dispute receipt of, and non-response to, the Chapter 91 request. However, it opposes the motion on grounds the property is a beach club, with its receipts solely from membership fees, and since members cannot stay overnight at the cabanas or lockers, i.e., there is no lodging at the facilities, the Subject is not income-producing and does not require a response to the Chapter 91 request.

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For the reasons stated below, the court finds the Subject as income-producing. It therefore grants defendant's motion subject to plaintiff's right to a reasonableness hearing pursuant to Ocean Pines Ltd. v. Borough of Point Pleasant, 112 N.J. 1 (1988).

FACTS

On June 1, 2015, defendant's ("Borough") assessor sent, by certified mail return receipt requested, a Chapter 91 request to plaintiff. Included in the request was his cover letter, a copy of the statute, and the income and expense ("I&E") form. On the cover letter, the property owner was advised as follows:

> If your property is 100% owner-occupied, (no rental income from any source, including a related entity), please state that on the first page of the enclosed form. You need not fill out the remainder of the form. However, if there is rental income from any source (including cell tower, billboard or parking), please provide that information.

The cover letter also advised the owner that it could "contact" the assessor's office with "any questions concerning" the Chapter 91 request.

It is undisputed that the Chapter 91 request was properly made, mailed, and received, and that plaintiff did not respond to the same.

For tax year 2016, the Subject was assessed at $8,408,300. Plaintiff filed a timely direct appeal. The Borough filed a counterclaim, then the instant timely motion.

Plaintiff's interrogatory responses, certification by plaintiff's president, and membership application show the following: The Subject is operated as Sands Beach Club ("Beach Club") and measures about 6.4 acres. After having been destroyed by the hurricane in 2012, it was rebuilt and operational in 2014. It is improved by a part one-story, part two-story building. The building is 5,352 square feet (SF) and is used for office space, reception, lavatories, game room, snack bar, and ice cream parlor. An additional 17,417 SF is used for 318 lockers and 28 cabanas. Thirty-one

beach cabanas are "[n]on-permanent" structures. There are two in-ground pools. Surface parking is also available.

The Beach Club is open daily and only during the summer (approximately Memorial Day to Labor Day). Members have access to the beach, ocean, and facilities such as a locker or cabana, depending on the type of membership. The Beach Club also provides recurring swim meets, arts and crafts programs, and holiday events.

A person becomes a Beach Club member by submitting an application form "for a facility," and paying the requisite fee for the type and location of the selected facility. Facilities include lockers and cabanas. Access to a facility is limited to the named members on the application and any guests declared to the Beach Club and paid for by a member each day. Each fall, members receive letters from the owner inviting them to renew their memberships and facilities, but if the rental fee is not fully paid by April 15, the Beach club will not honor the reservation. After the second payment due date of February 15, "no refunds of any rental fees will be made."

The minimum lockers and cabana "rental rates" are priced for a husband and wife, with two children younger than 21 years of age. Adding a child, grandparent, babysitter, or adult child as a member costs $400, $500, $500, and $800 respectively. Adult guests pay $22 for a weekday and $25 for a weekend, a child guest costs $16 for a weekday, and $20 for a weekend.

The family price varies based upon facility location and type. Family lockers are rented at $3,850 without night access, and $4,000 with night access. A standard pool locker has electric, a refrigerator, no night access, and costs $4,500. A large locker with electric, fridge, and night access is rented at $4,800. Individual rates apply for shared lockers ($1,600 for an adult and $1,075 for an individual younger than 20 years of age).

A cabana offers more amenities, costs more, and can be shared with another family. For one family, the rental rates for a cabana on the deck or beach with shower, sink, fridge, ceiling fan, and night access costs $10,700 and $12,800 if shared by two families. A large beach cabana with the same amenities, but on the south beach, costs $12,700 for one family and $14,800 if shared by two families. Night access extends until 10:00 p.m. Cabana occupancy is limited to two families.

Members are bound by the rules included in the application packet mailed out by plaintiff in the preceding fall. Members must have tags for their cars to park at the Beach Club on holidays and weekends. Single adults can store only one chair in a shared locker, grills cannot be stored in lockers overnight. Chairs and umbrellas are removed from the beach each night. The Beach Club disclaims responsibility for items left in a facility at the end of the season. Failure to declare and pay for guests results in membership revocation.

Plaintiff opposed the Borough's motion claiming that the Subject is not income-producing. It alternatively posited that it has doubts whether the Borough's assessor actually uses the Chapter 91 information to help set the assessment, and requested that the motion be kept pending until it has completed discovery in this regard. The assessor responded with a supplemental certification explicating that he did use the Chapter 91 information to set assessments, and although the 2016 assessment was a result of revaluation conducted by an outside firm, that firm also used Chapter 91 responses to set assessments for an income-producing, similar beach club.[1]

ANALYSIS

N.J.S.A. 54:4-34 requires a property owner to "render a full and true account of" the property owner's "name and real property and income therefrom," if the property is "income-

[1] Included in plaintiff's complaint was also Block 24, Lot 15.02 which was assessed at $1,516,800. The Borough conceded that the Chapter 91 request addressed only Lot 12, thus, its dismissal motion was restricted only to the Subject.

producing." Failure or refusal to respond within 45 days of the Chapter 91 request (i) allows the assessor to reasonably determine the property's "full and fair value" based upon any information he or she has; and (ii) bars the property owner from appealing that assessment. Ibid.

(A) Response Requirement for Non-Income-Producing Properties

It is well-established that a complaint should not be summarily dismissed where a property owner failed to respond to a Chapter 91 request because the property is not income-producing, even if the request had sought an affirmative response that the property is owner-occupied. H.J. Bailey Co. v. Neptune Township, 399 N.J. Super. 381, 384 (App. Div. 2008). The court noted that while the statute "clearly requires that property owners respond to Chapter 91 requests, irrespective of whether their property is income-producing or not," its language on "the sanction for not responding to the request for information . . . refers only to owners of income-producing properties." Id. at 386.

The court was cognizant that owners of non-income-producing properties could have their day in court despite ignoring Chapter 91 requests. It noted that the statute's "clear language confers upon owners of non-income-producing properties the unilateral right to ignore Chapter 91 requests with impunity." Id. at 389. While this appeared improper, "it is not the judiciary's role to formulate public policy," but to effectuate the statute's clear intent, which was that the Chapter 91's penalty "does not apply to non-income-producing properties." Ibid.[2]

The court however cautioned that "the Legislature may hereafter amend the statute to provide practical consequences to non-responding owners of non-income-producing properties," and further that the property owner could still be denied its appeal rights if the "property will

[2] The court recommended legislative change so that there is a "clear consequence" for non-responsive owners of non-income producing properties. 399 N.J. Super. at 389. The statute remains unaltered.

ultimately be found to be income-producing." Ibid. As to the latter, it cited cases where a non-responsive owner was subject to the appeal preclusion if it was found (a) that the property used to be income-producing;[3] (b) that the property owner had a "mistaken belief that his property was non-income-producing;"[4] or, (c) that the "property was, in fact, income-producing."[5] Id. at 389-90. The risk of appeal loss would "be particularly great where . . . the nature of the taxpayer's property is such that" an assessor cannot "readily determine whether the property is income-producing or not." Id. at 390 n.3.

In sum, from the above precedent: (1) a non-responsive owner's appeal is not automatically barred if the property is, or is believed to be, owner-occupied or non-income-producing; (2) non-response does not prevent a taxing district from nonetheless moving for a complaint dismissal; (3) in the context of such motion the court must decide whether the property was indeed income-producing; and, (4) if the court so finds, then the penalties of non-response to a proper Chapter 91 request will apply.

Here, plaintiff's basis for opposing the Chapter 91 motion is that the Subject is not income-producing. Therefore, and pursuant to precedent above, its undisputed non-response is not a per se a reason to grant the Borough's motion.

(B) Is the Subject Income-Producing?

Property is deemed income-producing if the income is related to, or connected with the real estate. ML Plainsboro Ltd. P'p v. Township of Plainsboro, 16 N.J. Tax 250 (App. Div.), certif. denied, 149 N.J. 408 (1997). In that case, the court ruled that the term "income producing

[3] Citing Alfred Conhagen, Inc. v. Borough of South Plainfield, 16 N.J. Tax 470 (App. Div.), certif. denied, 151 N.J. 74 (1997).
[4] Citing SKG Realty Corp. v. Township of Wall, 8 N.J. Tax 209, 211 (App. Div.1985).
[5] Citing Southland Corp. v. Township of Dover, 21 N.J. Tax 573, 585 (Tax 2004).

property" as used in the statute is "a term of art" that should be "construed . . . in accordance with the understanding commonly ascribed to it by the business, investment, and real estate community." Id. at 259 (citations and quotations omitted). Since that term "is generally limited to property producing rental income" in the "real estate appraisal field," it has a "restrictive meaning." Ibid. Thus, the term is "commonly understood to refer solely to property which generates rental income." Ibid. It is the anticipated stream of revenue generated from the rental, lease, custody, or occupancy of the property which renders a property income-producing. Great Adventure, Inc. v. Township of Jackson, 10 N.J. Tax 230, 232-33 (App. Div. 1988).

In Great Adventure, supra, the court rejected as "specious" the argument that a portion of an amusement park's admission fee was "rental payment for the use of the premises." Id. at 233-34. The court concluded that fee is "not paid by the patron for the use of the property in any tenancy sense but rather for the entertainment package offered." Ibid.

In Rolling Hills of Hunterdon L.P. v. Township of Clinton, 15 N.J. Tax 364, 369 (Tax 1995), the court concluded that a portion of payments by patients to a nursing home is for "use of real estate." Therefore, the payment is akin to rent, making the nursing home an "income-producing" property for purposes of Chapter 91. Ibid.

In Southland, supra, the court noted that when the issue is whether a property is income-producing, the inquiry is "whether the fee paid to the owner of land by tenants or patrons is for the continuous and exclusive use of a specific portion of the land and buildings, in the traditional sense of a tenancy, or for the brief right to enter the land and buildings with others on a non-exclusive basis, more akin to a license." 21 N.J. Tax at 589 (citing Great Adventure, supra, and Rolling Hills, supra). It concluded that a portion of the royalty paid by the franchisee to plaintiff was "for the continuous and exclusive use of its real estate," as further evidenced by the franchise

agreement, therefore, the property was "income producing for purposes of Chapter 91." Ibid. The "fact that [the rent] . . . is aggregated with other obligations of the tenant to the landlord" was of no moment. Id. at 590.

Plaintiff claims that the Subject is not income-producing because the Beach Club members must vacate the premises every night, thus, there is no lodging. Per plaintiff, the members have, at most, a license to use the Subject.

The Borough maintains that (1) the members have an exclusive possessory right to use of real property (the cabanas and/or lockers plus parking), which they specifically reserve in advance, at fixed rates, for a fixed, albeit, short term (summer months); (2) the occupation and use is no different than at a hotel or motel, which are undisputedly income-producing properties; and, (3) commercial buildings such as offices also do not permit lodging for its tenants, yet are unquestionably considered income-producing for valuation, thus, for Chapter 91 purposes.

The court finds the Borough's arguments more persuasive. While both the license and lease of real property include use, the former does not include exclusive use or possession. See Van Horn v. Harmony Sand & Gravel, Inc., 442 N.J. Super. 333, 341-42 (App. Div. 2015) (in a lease, the property owner provides "exclusive possession of a property" to the lease "for some period of time," during which the "the lessee's rights of possession and use are greater than the landowner's," whereas in a license, the property owner only grants a "permission to use the land at the owner's discretion," so that the user is "not provide[d] protection . . . against interference by the" property owner) (citations omitted)); see also Sandyston v. Angerman, 134 N.J. Super. 448, 451 (App. Div. 1975) ("[a] license is simply a personal privilege to use the land of another in some specific way or for some particular purpose or act," whereas "a lease is a grant of exclusive possession to use the land for any lawful purpose, subject to reservation of a right of possession in

the landlord for any purpose or purposes 'not inconsistent with the privileges granted the tenant.'") (citations and quotations omitted); Thiokol Chem. Corp. v. Morris Cty. Bd. of Taxation, 41 N.J. 405, 417 (1964) (although difficult to distinguish at times, . . . a lease gives exclusive possession of the premises against all the world, including the owner, while a license confers a privilege to occupy under the owner"). If there is no "rent . . . or other consideration . . . for the transfer of possession," nor a fixed term, but there are "limitations on exclusive possession and control of the premises," plus the owner's ability to "revoke the permit to use at any time," then there is likely no lease-type agreement. Ibid.

Here, the only document between members and plaintiff is the membership application which also contains the rules of the Beach Club. There are no catch phrases such as lease, rent, tenant, or landlord. However, lack of titles is not controlling. See Sandyston, supra, 134 N.J. Super. at 451 ("determination of whether a given agreement is a lease or a license depends not upon what the parties to it choose to call it nor the language, but [upon] the legal effect of its provisions") (citations and quotations omitted). The application packet, rules, and certification by the plaintiff's president evidence that the member is afforded rights to the Subject that are more in quantity and quality than a mere license. A member is undisputedly entitled to exclusive possession and use of the reserved cabana for the entire summer. No one else is permitted to use and/or occupy that member's cabana. General public have no access, use and occupancy, and a guest is permitted use and occupancy only if a guest of a member.

Further, the cabanas have amenities such as kitchens, bathrooms and utilities, rendering them more than just temporary shelters. Payments must be made in advance for the entire summer, else the cabanas will not be provided. None of the members have any stake in plaintiff's ownership or management (thus, cannot claim to be owner-occupiers). The application form clearly notes

that members are renting a facility for which they must pay rental fees. Based on the above factors, the court finds that some portion of the fee is for the exclusive possession, use, and occupancy of real property. Cf. Van Ness v. Borough of Deal, 139 N.J. Super. 83, 89 (Ch. Div. 1975) (describing the Deal Casino beach club owned by the taxing district and operated by the board of commissioners, which beach club included cabanas, beach houses, and bath houses, as well as restrooms, a restaurant, and swimming pool, and operated very similar to the Beach Club herein in that all facilities were available only to members and their guests, and members had to be prior members, and had to apply in advance. The board was given the power to "lease bathhouses and cabanas" to such members and their guests "at such rates and upon such terms" to be decided by the board, and "rental" of cabana or bathhouse was limited to one per member family), aff'd, 78 N.J. 174 (1978).[6]

Should the fact that overnight stays are barred render the Beach Club a non-income-producing property? In Rolling Hills, supra, the court decided that the nursing home was income-producing because an aspect of the patients' stay was lodging, which averaged thirteen months, although for some it was much shorter. 15 N.J. Tax at 367-68. "For this period of time the home constitutes a patient's residence." Id. at 368. The court noted that although the portion paid for services would be larger, it did not detract from the conclusion that "a portion of a nursing home patient's fee is paid for lodging," and thus is "at least partially attributable to a tenancy in real estate." Ibid. The court noted that the fact that there were differing rates charged for a single versus a double room also showed that a portion of the fee charged a patient was "for the use of real estate." Ibid.

[6] The issue in that case was whether the taxing district could limit the Casino beach club access, and beach access to residents.

This court concludes that the inability to sleep at night at the cabanas is not dispositive of whether the Beach Club is income-producing. For the summer months, members have the full ability to treat the lockers and cabanas as their alternate residence. While there are some restrictions as to what can be stored or used in the facility, those are no different than such restrictions at an apartment or other leased premises. Cf. State v. Stavola, 103 N.J. 425, 429 (1986) (ruling that luxury cabanas could be considered as structures "equivalent" to dwellings for purposes of the permit laws of the Department of Environment Protection ("DEP") requiring permits for construction of certain structures, although "[t]he rules of each [beach] club, as well as municipal ordinances, prohibit overnight occupancy"), rev'g in part, on other grounds, 206 N.J. Super. 213 (App. Div. 1985).[7] Although the Stavola case involved interpretation of a DEP statute, which is not complementary to N.J.S.A. 54:4-34, given that the description, operation, use, and occupancy of the cabanas in that case is almost identical in the instant matter, this court finds that the higher courts' reasoning persuasive, and supports this court's conclusion that the Beach Club

[7] The Appellate Division had ruled that that the luxury cabanas were "reasonably susceptible of being considered in the same category as motel or hotel units or their equivalent," and that the lack of "overnight use" was not "determinative" for purposes of applying the DEP laws. 206 N.J. Super. at 223. Rather, "[t]o the extent desired by the occupant, and perhaps limited by the regulations of the respective defendants, they can be essentially lived in during all the daylight hours and the time periods the facilities are open." Ibid. Therefore, the "deluxe cabana facilities are sufficiently equivalent to dwellings, whether or not the cabanas are intended to be used for sleeping, to be considered the type of shelter which can be included within the provisions of the regulation which includes motel and hotel rooms." Ibid

The dissent noted that "a cabana club" could not be considered a dwelling because "[p]eople do not live there, either permanently or for short periods," and in the summer only, spend "daylight hours" at the club just as people do in "offices, stores, stadiums, assembly plants or restaurants," which are also equipped with utilities, "[b]ut, no one calls them housing developments." Stavola, supra, 206 N.J. Super. at 226 (Cohen, J.A.D., dissenting). Since the cabanas had "no heat, air conditioning or insulation;" were not built to construction code; "and overnight occupancy is prohibited;" the dissent opined that the structures could not be considered as dwelling units simply on the notion that the members were provided the exclusive use of an enclosed space. Id. at 226-27.

The Supreme Court reversed that portion of the Appellate Division's holding that the DEP could bar completion of the cabanas' construction without the need for regulations. The Court noted that "[l]uxury cabanas, even conceding that they differ greatly from traditional cabanas, are more akin to recreational structures such as bath houses than to residential structures such as housing developments or dwelling units," however, this did not mean "that recreational uses and residential uses are mutually exclusive." 103 N.J. at 434. It concluded that while the DEP could include beach club cabanas as a dwelling, it must do so by properly promulgated regulations. Id. at 439.

members' rights to the exclusive use, possession, and occupancy of the cabanas exceed those granted by a license. See also Southland, supra, 21 N.J. Tax at 589 (when the property owner "just as the "property owner in Rolling Hills receives money from its franchisees for the continuous and exclusive use of its real estate . . . [then a] tenancy was created and the money received is, at least in part, rental income and therefore, the subject property is income producing for purposes of Chapter 91").

The remaining issue is whether plaintiff should be allowed establish through discovery that the assessor's request for information is mechanical and not with any intent to assist him in setting the 2016 assessment. The request is denied.[8]

It is true that the implied purpose of a Chapter 91 request is that the income/expense information is to assist an assessor in determining the assessment of the property. See N.J.S.A. 54:4-34 (in the absence of a response, or if a false one is provided, then the assessor must "value [the] 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"). See also John Hancock Mut. Life Ins. Co. v. Township of Wayne, 13 N.J. Tax 417, 422 (Tax 1993) ("purpose of N.J.S.A. 54:4-34 is to assist the assessor in making the assessment and to diminish the likelihood of litigation," therefore, "the assessor's request must be timely, so that [when received], the assessor can utilize the information by January 10," consequently, a "taxpayer must show that the information could not have been used by the assessor in completing the assessment by January 10 to defeat a [Chapter 91] motion").

[8] As noted above, the assessor provided a reply certification explaining the use of Chapter 91 information in the setting on the assessments. Plaintiff provided absolutely nothing to refute the certification.

However, this court does not extend the holding in John Hancock, supra, such that property owners are excused from their statutory obligation to respond to a Chapter 91 request on grounds that they are entitled to know whether or not the information that could have been provided, would have been used by the assessor in setting the assessment. Such a reading turns the statute on its head. N.J.S.A. 54:4-34 places two express burdens: one upon the property owner to respond in a timely manner; and one upon the assessor to send a written request by certified mail with a copy of the statute. There is nothing limiting, prescribing, or determining the method or means by which the assessor can or must use such information. See SKG, supra, 8 N.J. Tax at 211 ("it is up to the assessor and not the taxpayer to decide whether to consider the information furnished"). Indeed, requesting the information itself is discretionary.

This court therefore rejects plaintiff's argument that it must conduct discovery on whether the assessor would have used the Chapter 91 information in the assessing process, had the same been provided by plaintiff. Plaintiff is not prejudiced because it would be entitled to a reasonableness hearing should its complaint be dismissed, and in that context, is permitted discovery on the methods employed by the assessor in setting the Subject's assessment.

CONCLUSION

The court finds the Subject is income-producing. The Borough's motion to dismiss the complaint is granted in part since plaintiff is entitled to a reasonableness hearing.

Very Truly Yours,

Mala Sundar, J.T.C.