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TAX COURT OF NEW JERSEY

**Mala Sundar**
**JUDGE**

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**E-FILED**
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Re: Monmouth Middlesex Realty L.L.C. v. Borough of Freehold
Block 86, Lot 2.09 C326
Docket Nos. 003260-2014; 002126-2015

Dear Counsel:

This is the court's opinion deciding defendant's motion to dismiss plaintiff's 2014 and 2015 local property tax appeals for providing false or fraudulent information in response to the tax assessor's request for financial information pursuant to N.J.SA. 54:4-34 (commonly known as "Chapter 91 request") for each tax year.

The facts are undisputed. Plaintiff ("MMR") owns the above-captioned property ("Subject)" located in defendant ("Borough"). The Subject is a 4,600 square-feet medical condominium. MMR is owned by two doctors. The doctors also own a medical practice called Regional Cancer Care Associates ("RCCA"). They fully occupy the Subject and operate their

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medical practice therein. Because of the common ownership, the doctors decide how much rent RCCA should pay MMR. They are also fully responsible for all the expenses associated with ownership of the Subject. Neither counsel knew or was aware of whether there was any lease or tenancy-type document between MMR and RCCA.

By letter dated April 10, 2013, the Borough's tax assessor sent, by certified mail, a Chapter 91 request seeking completion of the attached Statement titled "Annual Statement of Income and Expenses ["I&E"] for Income Producing Properties," for "the year December 2012." (emphasis in original). The letter asked this Statement be completed and returned to the assessor on or before May 27, 2013. In bold text, the letter stated: "Please note that if your property is owner occupied or you did not own the property for all of 2011, you must indicate that on the form, sign, and return the form by the return date." The letter added that the property owner could contact the assessor with any questions. Reproduced on the cover letter was the full text of N.J.S.A. 54:4-34.

The I&E Statement correctly identified the Subject, its ownership, and location, and sought information for January 1, 2012 to December 31, 2012. It delineated items of income and expenses with accompanying instructions. Attached was also a Schedule with 12 columns titled "Type of Rental Space," "Location of Rental Space," "Status of Occupancy," "Unit of Rental," "Classification of Lease," "Square Feet of Rental Space," "Base Annual rent per Square Feet," "Overage Rent," "Escalation Income," "Year Lease Entered Into," "Years remaining on the Lease," and "Year of Last Rental Revision." Detailed instructions accompanied the Schedule.

The process was repeated for 2015, except that the request was dated May 16, 2014, and the I&E information was sought for the period January 1, 2013 to December 31, 2013. The request included the identical instruction for response if the property was owner occupied.

In response to both requests, one of MMR's owners wrote "Owner Occupied" on the I&E Statement, signed and returned it to the assessor (on the 2013 I&E Statement, MMR's owner wrote but scratched out "operated" and added "occupied"). All of the delineated items of income and expense were left blank. MMR's owner certified that the two doctors believed the responses were truthful because they both owned MMR and RCCA, and because the rent payable to MMR "is set by [them] at [their] discretion."

MMR filed timely appeals challenging the 2014 and 2015 local property tax assessments on the Subject ($1,296,900 each year) on March 24, 2014 and March 11, 2015 respectively. In response to the Borough's discovery demands, MMR stated that it was receiving rental income of $245,583.20. Per the assessor, this response made it "apparent that the [S]ubject . . . is income producing and not owner-occupied." The Township then filed these motions on July 8, 2015.

**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-producing." If the owner fails or refuses to respond, or "render[s] a false or fraudulent account," then it loses the right to challenge the valuation and assessment imposed by the assessor on the "income-producing property." Ibid.

A Chapter 91 motion should be filed no later than 180 days after a complaint is filed or 30 days before the trial date, whichever is earlier. R. 8:7(e). However, if the motion is based upon a "false or fraudulent" allegation, then these time limits do not apply. Ibid. See also Lucent Technologies, Inc. v. Township of Berkeley Heights, 405 N.J. Super. 257, 265 (App. Div. 2009) (court rule does not "place a time limit upon municipalities in seeking dismissal of tax appeals based upon false or fraudulent Chapter 91 responses"), rev'd in part on other grounds, 201 N.J.

237, 250 (2010) ("time limit set forth in Rule 8:7(e) does not apply to" motions to dismiss on false or fraudulent grounds).

It is undisputed that MMR timely responded to both Chapter 91 requests by complying with the direction that if the Subject was owner occupied, the response should state so, and be returned within the 45-day time frame. The Borough asserts that the report which left all items of income blank is "false" i.e., inaccurate and not borne by the facts, therefore, its motion is timely as to both years in addition to being on all fours with the holding in SKG Realty Corp. v. Township of Wall, 8 N.J. Tax 209 (App. Div. 1985).

In SKG Realty, the real property was owned by a corporation, which was 100% occupied by a related corporate member. Id. at 211. The rents set amongst the members were not the market rates. Ibid. Rather, "[t]he rental payments and responsibilities for payment of expenses [were] established in such a way as to accommodate the inter-subsidiary accounting needs of the various corporations in the structure." Ibid. The court ruled:

> The purpose of the requirement that owners "render a full and true account of . . . the income . . . of income-producing property," N.J.S.A. 54:4-34, is to afford the assessor access to fiscal information that can aid in valuing the property. The purpose of the provision outlawing appeals by non-responding owners is to encourage compliance with the accounting requirement. Where real property is owned by one entity and occupied by a related entity, the manner in which they order their fiscal relationship may reduce the usefulness of the income accounting required by the statute. But, some or all of it may have utility, and it is up to the assessor and not the taxpayer to decide whether to consider the information furnished. Transactions among related corporations are not privileged. There is nothing about them or the language or purpose of N.J.S.A. 54:4-34 that exempts a real estate taxpayer who owns property rented and occupied by a sister corporation.
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> [SKG Realty, supra, 8 N.J. Tax at 211 (emphasis added)]

The obvious distinction between the instant cases and SKG Realty, supra, is that there, unlike here, the property owner never responded to the Chapter 91 request although it held a belief

similar to MMR's that the rental income was non-economic. Further, in SKG Realty, there was no evident commonality of ownership between the landlord entity and the tenant entity. Rather, the property owner was a subsidiary, and the tenant was a division of another subsidiary, both subsidiaries being owned by the same parent corporation. Here, the two individual doctors who are the only owners of MMR are also the only owners of RCCA. Finally, unlike in SKG Realty, MMR undoubtedly complied with the plain language of the assessor's instructions that if the property was owner-occupied, the I&E statement need not be completed.

The issue thus, is whether MMR's belief and consequent response that the Subject was "owner occupied," made its response either false or fraudulent as the Township argues, or whether the failure to provide income information was proper because an average property owner, not in the business of trading or dealing with real property, would reasonably understand the term "owner occupied" as MMR did under the facts herein.

The latter situation was present in ML Plainsboro Ltd. Partnership v. Township of Plainsboro, 16 N.J. Tax 250 (App. Div.) certif. denied, 149 N.J. 408 (1997). In that case, which was decided almost 10 years after SKG Realty, the property owner responded to a Chapter 91 request with a letter stating that the properties were "not income producing" since one of the partners of the owner occupied 100% of one property for its own business (brokerage) with "no lease arrangement with outside parties." 16 N.J. Tax at 254. At the time of responding to the Chapter 91 request, the owner had not "confer[ed] with an attorney." Id. at 255.

After discovery, the municipality filed a motion for the property owner's failure/refusal to respond to the Chapter 91 request. Id. at 254. The Tax Court dismissed the complaint noting that "the . . . request and accompanying forms would not cause a reasonably prudent business person to conclude that" Chapter 91 was inapplicable, and that the "mention of leases and rental income

in the assessor's request does not reasonably lead to the conclusion that only leased rental property is income producing within the meaning of c. 91." Id. at 255. Rather, "a close examination" of the I&E forms showed that "they could easily have been completed." Ibid.

The Appellate Division reversed. Noting that the purpose of Chapter 91 requests is to provide an assessor with "fiscal information that can aid in valuing the property," the court ruled:

> However, the statute is solely permissive. The tax assessor may seek information from a taxpayer regarding an income producing property . . . or may refrain from exercising the authority provided thereunder. An assessor also may confine an information request only to certain information subject to disclosure . . . rather than exercising his full statutory authority. Thus, an assessor could decide that the only kind of information relating to income producing properties which is sufficiently useful to aid in the valuation process is information relating to rents produced by properties leased to third parties. Therefore, in determining whether a taxpayer is barred from appealing an assessment because it failed to respond adequately to a tax assessor's request for information pursuant to N.J.S.A. 54:4-34, the . . . Tax Court must decide not simply whether the taxpayer's property is "income producing" but also whether the assessor's request would be understood by the average owner of an income producing property to require disclosure of the information which the taxpayer has allegedly withheld.
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> [Id. at 256-57]

Due to the harsh consequences of Chapter 91, i.e., denial of a hearing on the merits, the court held that Chapter 91 requests must provide clear and unequivocal language as to the type of information being specifically sought by the assessor. Id. at 257. This is because while assessors "are experts in the field of real estate valuation . . . small business persons who may have difficulty reading complex and confusing forms and may lack ready access to legal advice" are not necessarily so. Ibid.

The higher court rejected the Tax Court's "view" that inclusion of a copy of the statute suffices to clearly and unequivocally notify the property owner that "the assessor's information request related to any property which is 'income producing,' regardless of whether the property is

leased to a third party." Id. at 259. The term "income producing 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." Ibid. Since that term "is generally limited to property producing rental income" in the "real estate appraisal field," it has a "restrictive meaning." Ibid. (citing and quoting Great Adventure, Inc. v. Township of Jackson, 10 N.J. Tax 230, 232-233 (App. Div. 1988)). A property owner would "reasonably assume" that the inclusion or incorporation of the statute in a Chapter 91 request was "simply to set forth the authority for the information request." Id. at 259-60.

Assuming that the properties in question were "income producing within the intent of" Chapter 91, the court held that the Chapter 91 request as well as the accompanying I&E forms did not clearly and unequivocally require the property owner to provide information "other than the rents derived from leased properties" so as to "justify the harsh sanction of an order barring appeals from the assessments." Id. at 257. The request did "not indicate that a taxpayer is required to report not only rental income from leased properties but also other income derived in whole or in part from business operations conducted on the property. Nor [did it] indicate that a taxpayer must report charges for expenses between affiliated companies." Id. at 258. The I&E Statement and accompanying schedule also evidenced that the information sought was as to "properties which are actually leased or available to be leased to third parties rather than properties which are exclusively used by the taxpayer and its affiliated companies for their own business operations or which generate business income other than rental income." Id. at 258-59. Given the understanding of an "average owner of an income producing property," the court concluded that the plaintiff's response could not be construed as a refusal or failure to respond to the Chapter 91 request. Id. at 260.

The ruling and analysis on ML Plainsboro applies here.[1] The statute does not even use the phrase "owner occupied." That term developed from precedent interpreting the statutory term "income producing," and equated owner occupied to non-income producing properties, thus, not subject to complaint dismissals for failure to respond to Chapter 91 requests. See Monsanto Co. v. Town of Kearny, 8 N.J. Tax 109, 111-112 (Tax 1986) (facts showed property was "owner-occupied manufacturing plant" thus concluding that it was "not income producing property"); Great Adventure, supra, 10 N.J. Tax at 232-233; H.J. Bailey v. Township of Neptune, 399 N.J. Super. 381, 388-90 (App. Div.2008). When the term "income producing" is itself deemed a "term of art" to be construed restrictively, a small business property owner such as MMR, would not understand that "owner occupied" has been construed in the legal and real estate appraisal world as generally excluding properties which receive some form of rental income from a related entity, whose common owners structure the entities separately and discretionarily set a rental/income amount for non-Chapter 91 purposes.

As in ML Plainsboro, the Chapter 91 requests here were bereft of any notice or direction (even by way of an example) that "owner occupied" does not include properties for which rents are being received from any source including from related entities, whether or not the rents are subjectively deemed to be economic. Nor did the I&E Statement or instructions to the same elucidate that income includes any payments received from related entities, or entities with common ownership, for use of the property, whether or not the rents are deemed economic by those parties. Rather, the requests stated, in clear and unequivocal terms, that if property is owner occupied, the signed response should only indicate that much and be returned to the assessor.

[1] The court's description of the I&E Statement and accompanying schedule closely mirror the I&E Statement and accompanying schedule attached to the Chapter 91 requests at issue here.

MMR timely complied with this direction. There is no evidence that MMR consulted with counsel while responding to the Chapter 91 requests so that it was or should have been aware of the legal coinage and interpretation of the term "owner occupied." Therefore, the court finds that MMR's responses to the requests were not unreasonable or improper.

The court is unpersuaded by the Borough's argument that by choosing to have a separate corporate entity own the Subject, MMR cannot disavow that business decision for purposes of Chapter 91. It may be, as the Borough argues, that MMR was incorporated separately for benefitting from income tax deductions,[2] or perhaps even to keep the medical practice separate from holding real estate to limit personal liability. This choice however, does not automatically elevate MMR to being a so sophisticated a business entity that it knows, should know, or should have known, the import of the term "owner occupied" for purposes of Chapter 91, and under the facts herein.

The Borough's primary contention is that by claiming to be owner occupied when MMR was, in fact, receiving income from RCCA, MMR's responses were false or fraudulent under N.J.S.A. 54:34-4 and Lucent, supra. In the latter case, plaintiff ("Lucent") responded to a Chapter 91 request by stating that the property was "owner-occupied" except for a small portion (about 5% of the premises) which was leased to a non-related entity. 405 N.J. Super. at 260. During discovery, Lucent revealed that the property was leased to it by a related entity under a 20-year lease agreement, which specified that it was a "true lease for state law and tax purposes," and that Lucent had subsequently sub-leased portions of the property to three non-related entities under

[2] See General Trading Co. v. Director, Div. of Taxation, 83 N.J. 122, 135 (1980) ("to be sure, tax considerations inform or even motivate business decisions").

sub-lease/license agreements. Id. at 259-60. The municipality then filed motions claiming the responses to be false or fraudulent. Id. at 260.

In a bench opinion, the Tax Court "found that the property was income-producing property within the meaning of Chapter 91 and that" Lucent was a "property owner for purposes of Chapter 91 notices and responses." Id. at 261. It also found Lucent's responses "deficient" since they failed to disclose the "leaseback transaction," or the subleases/license. Ibid. It held that a "taxpayer is obligated to provide the income information . . . [and i]f it believes that the information is of no use in determining value, it could accompany the information with a statement to that effect." Ibid. The court found that it was unnecessary to make "a finding of fraudulent intent" to decide "whether the responses were false or fraudulent." Ibid. While "every omission" does not make a "Chapter 91 response false," Lucent's "omissions [were] significant." Ibid. "[S]atisfied that the property was income-producing property . . . and that the responses to the requests were false or fraudulent, the court granted the Chapter 91 motions for two of the three tax years, but denied it for one tax year as being untimely. Id. at 261-62 and n.2.

On appeal, the sole issue was whether the Tax Court erred in denying the motion on grounds of untimely filing. Lucent did not contest the findings "that the property was income-producing property . . . and that [its] responses . . . were false or fraudulent." Id. at262 n.2. Thus, neither of the higher courts ruled on the issue of the Tax Court's findings on when or why an omission of information, or whether, as here, a response of "owner occupied," is deemed to be false or fraudulent. The Tax Court's findings, which were based upon the facts before it, is not binding on this court.[3] Rather, the Appellate Division's ruling in ML Plainsboro, supra, which this

[3] Nor is this court bound to agree with the Tax Court's conclusion that "intent" is immaterial to a finding of, at least, fraud, for purposes of Chapter 91. "False" as an adjective is defined as "untrue . . . deceitful, lying" and "can be so by intent, by accident or by mistake." Black's Law Dictionary 718 (10th ed. 2014). "In law, [false] means something

court has found applies here, is controlling, due to which any inquiry into whether the responses were false or fraudulent is unnecessary.

Lucent is also distinguishable factually. Here, it is undisputed that there was only one occupant and operator on the Subject, the medical practice. It is undisputed that the two doctors who own and operate the medical practice also own MMR. These doctors, as sole owners of both MMR and the medical practice, are fully responsible for, and pay all the expenses associated with the Subject. There is no proof that MMR owns, occupies, or operates from any other premises from which location it pays its bills (mortgages, taxes, utilities, and the like). Consequently, while MMR omitted to include the rental amount being received from RCCA, the court does not find the omission to be inaccurate in the context of MMR's response, as an average property owner not versatile in legal or real estate appraisal terms of art, that the Subject is owner occupied, or so significant/egregious to be deemed "false" or "fraudulent" for purposes of Chapter 91.[4]

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more than untrue; it means something designedly untrue and deceitful, and implies an intention to perpetrate some treachery or fraud." Black's Online Legal Dictionary (2d ed.) (http://thelawdictionary.org). Cf. A Dictionary of Modern Legal Usage 348 (Garner 2d ed. 1995) (when used "in a phrase such as false statement," the word "false" is "potentially ambiguous since [it] may mean either 'erroneous,' 'incorrect.' or 'purposely deceptive' and resulting damages to the plaintiff").

In contrast, the term "fraudulent" involves intentional misrepresentation. Black's Law Dictionary, supra, at 775, 777 (defining "fraud" as a "knowing misrepresentation or knowing concealment of a material fact to induce another to act to his or her detriment," and "fraudulent act" as "conduct involving bad faith, dishonesty, a lack of integrity, or moral turpitude"). See also Marino v. Marino, 200 N.J. 315, 341 (2009) ("[a] cause of action in fraud requires the satisfaction of five elements: a material misrepresentation by the defendant of a presently existing fact or past fact; knowledge or belief by the defendant of its falsity; an intent that the plaintiff rely on the statement; reasonable reliance by the plaintiff; and resulting damages to the plaintiff").

[4] The court brought to the parties' attention, an unpublished opinion granting a Chapter 91 motion grounds of false or fraudulent responses where the property owner revealed rental income at the discovery stage of litigation. Singh Real Estate Ent. v. Township of Evesham, 2014 N.J. Tax Unpub. LEXIS 75, *5 (Tax 2014). Parties were permitted to provide their arguments as to the application of that holding, recognizing that as an unpublished Tax Court decision, this court need not rely upon the same, or should not cite to the same pursuant to the court rules. Predictably, the Borough stated the matter supported its position while MMR disagreed. The court does not rely on the case but does note that there, unlike here, the property owner did not "dispute that the response provided by plaintiff was false." Rather, its "only defense to the motion is that its false response should be excused because defendant's counsel, and most likely the assessor, were in possession of discovery responses establishing that the subject property is income producing and detailing the income and expenses associated with the rental of the property for three years." This is not so here since MMR vociferously contests the Borough's contention that its timely Chapter 91 responses of being owner occupied were false or fraudulent.

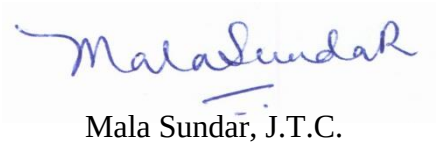
In sum, and under the facts herein, the court finds that MMR's timely responses to the Chapter 91 requests as being owner occupied does not merit dismissal of its complaints. MMR complied with the direction of the assessor that if owner occupied, the response should so state, and the I&E statements be only signed and returned. The term "owner occupied" is not used in the statute let alone defined by it, but evolved as a result of precedent interpreting the term "income producing" which is itself a term of art used in the real estate appraisal field, thus, construed restrictively. Therefore, ML Plainsboro applies. Lucent is thus inapplicable, and in any event, sufficiently distinct factually. As a result, the Borough's Chapter 91 motion for tax year 2014 is untimely. See R. 8:7(e).

As noted above, this ruling only applies to the facts herein. If the Chapter 91 request at issue here had alerted the property owner that "owner occupied" excludes properties which receive any form of rental or lease income for their use (or the instructions accompanying the I&E Statement explained that income includes receipts) from any source including from related corporate or business entities, whether pursuant to a formal or informal rental/lease agreement, whether for a portion of the property or otherwise, and whether or not the income is deemed "at market," then this court's opinion would be different. Then, any contention of the utility of the income information cannot justify failure to provide the information, whether as a non-response, or an "owner occupied" response. See SKG Realty, 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"); Lucent, supra, 405 N.J. Super. at 261 (rejecting plaintiff's contention that the sublease information would be useless to the assessor given the smallness of those portions of the property, and holding that the usefulness or otherwise is "a decision . . . for the tax assessor").

**CONCLUSION**

For the aforementioned reasons, the Township's motions are denied. Orders reflecting this opinion will be simultaneously entered.

Very Truly Yours



Mala Sundar, J.T.C.