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THE TAX COURT COMMITTEE ON OPINIONS

TAX COURT OF NEW JERSEY



Mala Sundar
JUDGE

R.J. Hughes Justice Complex
P.O. Box 975
25 Market Street
Trenton, New Jersey 08625
Telephone (609) 943-4761
TeleFax: (609) 984-0805
taxcourttrenton2@judiciary.state.nj.us

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Paul Tannenbaum, Esq.
Zipp Tannenbaum Caccavelli, L.L.C.
280 Raritan Center Parkway
Edison, New Jersey 08837

Martin Allen, Esq.
DiFrancesco Bateman et al.
15 Mountain Boulevard
Warren, New Jersey 07059

Re: Surfrider Beach Club, L.L.C. v. Borough of Sea Bright
Block 23, Lot 12
Docket No. 001296-2016

Dear Counsel:

This matter addresses the hearing held in regard to plaintiff's contention that it never received the defendant's ("Borough") assessor's Chapter 91 request, therefore, it could not have provided a response, consequently, its complaint should not be dismissed.¹

The following facts are undisputed. On June 1, 2015, the Borough's assessor sent, by certified mail, return receipt requested, a Chapter 91 request to plaintiff. Included in the request

¹ In an earlier proceeding in connection with defendant's motion to dismiss the complaint for failure to respond to the assessor's Chapter 91 request, plaintiff had argued that the property was not income-producing, but reserved its right to continue its opposition on grounds it did not receive the Chapter 91 request. On November 4, 2016, the court agreed with defendant that the property was income-producing, however, did not dismiss the complaint since the issue of receipt of the Chapter 91 was unresolved.

was his cover letter, a copy of the statute, and the income and expense (“I&E”) form. The envelope was addressed to plaintiff thus:

Block: 23 Lot: 12 4A
Property Location: 931 Ocean Avenue
 Sea Bright, NJ
Surfrider Beach Club LLC
931 Ocean Avenue

On June 24, 2015, the mail was returned to the assessor’s office by the United States Postal Service (“USPS”). There was a line across the address. Below this was a stamp dated 6/22/15 “Return to Sender Insufficient Address Unable to Forward.” To the left of the crossed-out address was a hand-written notation “LN” below which were three hand-written dates “6/3, 6/10, 6/18.” Also on the envelope was handwritten “UNC.”

The electronic delivery tracking information on the USPS’ website shows the following entries: that on June 2, 2015, the mail arrived at the USPS’ Kearny facility, was sent to the Trenton facility, and left that facility. The mail arrived at the Rumson facility on June 3, 2015. On the same day, the next entry was “Notice Left (No Authorized Recipient Available.” The next entry is dated June 19, 2015, “Unclaimed/Max Hold Time Expired.” The mail then arrived at the Teterboro facility on June 22, 2015, from where it went to the Trenton facility on June 23, 2015, and thereafter to the Rumson facility on June 24, 2015.

Plaintiff refuted receipt of the envelope by asserting no delivery was attempted, let alone made. In this regard, its employee, Ms. Lobiondo, (a family member) testified as to the routine procedure of receiving mail at the business address. She is employed as a manager, and her responsibilities include front-desk operations, such as addressing any issues or concerns members may have, opening and sorting mail, including certified mail. She is assisted by four employees on a rotational basis who work at the front-desk (reception). The witness testified that these

employees have been staff for the last five years, and she and/or these rotational employees are continually present at the front desk seven days a week from the opening to closing hours of the property (a beach club), throughout the summer months (which is the only period the beach club is open), and that the front desk is never left unattended.

Incoming mail is generally dropped off by the mail-delivery person between 12 p.m. and 2 p.m., in a drop-box located by a staircase in the lobby. Overnight or priority mail will however be brought to the front desk for signature of the employee. The witness and the rotational receptionists are all authorized to accept and sign for such mail. Such mail will then be sorted out by the witness in the office of the appropriate person, or sometimes, placed on the desk of that person. The witness testified that she has received mail from the assessor's office before, that the plaintiff's address on the returned envelope containing the Chapter 91 request was correct, and that she did not recollect seeing that envelope. She affirmed that neither she nor any of the rotational receptionists would refuse to sign any mail, nor have they let any mail be returned unsigned.

The Borough argued that the dates (hand-written and web-based) showed that the Chapter 91 request was attempted to be delivered to plaintiff by leaving a notice on three occasions, June 3, June 10, and June 18, and that since it was unclaimed, it was sent back to the initial post-office unit on June 19, 2015 for eventual return to the Borough. Consequently, its assessor did all what was required of the Chapter 91 statute (including sending it with a return receipt not required by the statute), therefore the complaint should be dismissed. The Borough points out that it could be possible that the mail was not accepted by a rotational employee and since plaintiff did not produce any witnesses in this regard, it is reasonable to conclude that the "unclaimed" notation by the post-office delivery person was legitimate and credible.

Plaintiff points out that the post-office delivery person's hand-written dates are not reliable because (1) there was nothing to refute Ms. Lobiondo's testimony, which therefore established that had mail been delivered it would undoubtedly have been accepted; (2) the handwritten notes indicated a second and third attempted delivery on June 10 and June 18, yet only the first such attempt was noted on the USPS' web-entry; and, (3) while the hand written "UNC" and June 19 web-entry indicated that the mail was unclaimed, the front of the envelope was also stamped as being returned due to insufficient address, therefore, at the very least it is unclear why the mail was returned to the assessor, and this uncertainty should be weighed in favor of the plaintiff due to the harsh consequences of a non-response to the Chapter 91 request.

The Borough argues that the assessor has no statutory obligation to ensure or even prove actual receipt. However, in matters involving the justifications for a non-response to Chapter 91 requests, the courts are generally concerned with whether there was proper delivery of the mail, not actual receipt. See, e.g., Green v. City of East Orange, 21 N.J. Tax 324, 334 (Tax 2004) ("[s]ince N.J.S.A. 54:4-34 does not require certified mail return receipt requested, a defective return receipt alone . . . does not necessarily mean that the delivery is defective," and the USPS' delivery record can establish proper delivery, thus, "actual receipt" provided the USPS "properly followed" its procedures).²

Here, that is the very issue, namely, whether the USPS properly followed its procedures on delivering the assessor's Chapter 91 request. Because the reasons for returning the Chapter 91 request were contradictory, because only one of the alleged three attempted delivery dates was reflected in the USPS' web delivery record, and further because there was no testimonial or other

² That case saw no need to decide whether "there can be a presumption of receipt" in certified mailing cases, akin to regular mailing, *i.e.*, if the envelope has the correct address and postage, and is properly mailed, there is a presumption of receipt and the burden shifts to the addressee to rebut the presumption. Green, supra, 21 N.J. Tax at 331.

evidence from the USPS clarifying these delivery issues, the court agrees with plaintiff that the City cannot prove proper delivery of the Chapter 91 request. The court so concludes after finding credible plaintiff's witness' testimony as a whole, which was largely un-contradicted.

While the assessor is under no statutory obligation to follow-up with a regular mailing when the certified mail was returned (for reasons other than an undisputed decision of the taxpayer to deliberately fail to claim that mail, thus, to deliberately fail to respond, such deliberate decision being reflected by the USPS' un-contradicted delivery record), the benefit of this decision accrues to the taxpayer. As noted in J & J Realty Co. v. Township of Wayne, 22 N.J. Tax 157, 165 (Tax 2005), the "impact on" a taxing district when a Chapter 91 motion is denied "is of a far lesser magnitude than the impact . . . on a taxpayer's appeal rights" if the motion were to be granted. This is because the assessor can impose an assessment in the absence of the Chapter 91 information, whereas the taxpayer is left with a limited right to challenge the reasonableness of that assessment.

For the above explicated reasons, the court finds that in this case, it must deny the City's motion to dismiss the complaint.

Very Truly Yours,



Mala Sundar, J.T.C.